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DISPUTE SETTLEMENT

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

2.3 Consent to Arbitration

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NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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OVERVIEW

This Module gives an overview of the most important legal questions that arise in connexion with consent to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention).

Arbitration is always based on a consent agreement between the parties. But the fact that ICSID arbitration is, by necessity, between a host State and a foreign investor leads to some peculiarities in the giving of consent. The most conspicuous peculiarity is that consent agreements need not be based on a document that is signed by both parties. Rather, the host State may make a general offer to foreign investors or to certain categories of foreign investors to submit to arbitration. This offer may be contained in legislation or in a treaty to which the host State is party. To perfect a consent agreement, the investor has to accept this offer in writing. This acceptance can be quite informal and may even be expressed through the act of instituting proceedings.

Consent to ICSID arbitration, once it is perfected, carries a number of important consequences. These include the irrevocability of consent, the exclusion of other remedies and the prohibition of diplomatic protection. Therefore, the time of consent must be considered carefully.

Consent agreements may be subject to limitations and conditions. Their interpretation can at times raise considerable difficulties.

In some countries, it is not the federal government but a smaller entity or a public company that deals with foreign investors. Therefore, the Convention opens the possibility for a constituent subdivision or agency of the host State to become a party to ICSID arbitration. But host States retain strict control over consent by such entities: the constituent subdivision or agency must have been designated to the Centre and its consent must have been approved by the State to which it belongs.

OBJECTIVES

Upon completion of this Module the reader should be able to:

- Understand the significance of consent to jurisdiction for ICSID's jurisdiction.
- Identify the different forms in which consent to jurisdiction may be given.
- Appreciate the nature of an offer of consent contained in legislation or a treaty.
- Describe the ways in which such an offer may be accepted.
- Understand the principle of the non-revocability of consent.
- Determine the time at which consent was given.
- Define the limitations and conditions that may be attached to consent.
- Discuss the methods whereby consent is interpreted.

INTRODUCTION

Arbitration agreements

Arbitration is always based on an agreement between the parties. In the case of ICSID, there must be an agreement to arbitrate between the host State and the foreign investor. Art. 25, first sentence, of the ICSID Convention provides to this effect:

> *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.*

The parties giving consent must be a State party to the ICSID Convention (or a designated constituent subdivision or agency) and a national of a State party to the ICSID Convention (see Module 2.6). In addition, there must be a legal dispute arising directly out of an investment (see Module 2.7).

Participation in the Convention alone does not carry any obligation or even expectation that there will be consent to jurisdiction. A Contracting State remains free as to whether or not, and if so to what extent, it wishes to give consent.

Requirements of form

Under the Convention, consent must be in writing. But there is no particular form in which this must be done. Consent in writing will normally be communicated between the parties but there is no need to notify the Centre at the time of consent. In fact, the Centre has no precise knowledge of the number and the contents of various consent clauses covering investments. But proof of consent in writing will be required at the time a request for arbitration is made.

Consent in writing must be explicit and not merely construed.

In *Cable TV* v. *St. Kitts and Nevis*, the Respondent was not a party to the agreement containing the consent clause. The Claimant argued that consent by the Respondent could be construed from the institution of proceedings by the Attorney-General of St. Kitts and Nevis against the Claimants in a domestic court of the Respondent. The purpose of the domestic court proceedings was to obtain an injunction to restrain the Claimant from raising its rates prior to the resolution of the dispute through ICSID arbitration. The Tribunal held that the references in the court documentation to the ICSID clause in the agreement were merely statements of fact and did not amount to consent by any person to ICSID jurisdiction.[1]

[1] Cable TV *v.* St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review–Foreign Investment Law Journal 328, 354-361 (1998).*

Three different ways of giving consent: Direct agreement

In practice, consent is given in one of three ways. The most obvious way is a consent clause in a direct agreement between the parties. Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. ICSID has prepared and published a set of Model Clauses to facilitate the drafting of these contracts.[2]

National legislation

Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings.

Treaties

The third method to give consent to ICSID jurisdiction is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty. The same method is employed by a number of regional multilateral treaties such as the NAFTA and the Energy Charter Treaty. Attempts to create a global Multilateral Agreement on Investment that would include a similar dispute settlement clause have not come to fruition. Offers of consent contained in treaties must also be perfected by an acceptance on the part of the investor.

Summary:

- **ICSID arbitration is always based on an agreement between the parties to the arbitration, i.e. the host State and the foreign investor.**
- **No particular formalities are required for the parties' consent to arbitration, except that it must be in writing and that it must be explicit.**
- **In practice, consent to ICSID arbitration is given in one of three ways:**
    1. **A clause in a direct agreement between the host State and the foreign investor.**
    2. **A provision in the host State's national legislation offering ICSID arbitration to foreign investors. Such an offer must be accepted by the foreign investor.**
    3. **A provision in a treaty between the host State and the investor's State of nationality offering ICSID arbitration to the nationals of the other side. Such an offer must be accepted by the foreign investor.**

[2] *ICSID Model Clauses, Doc. ICSID/5/Rev. 2 of 1993. Reproduced in 4 ICSID Reports 357.*

1. CONSENT THROUGH DIRECT AGREEMENT BETWEEN THE PARTIES

Consent for future or existing disputes

An agreement between the parties recording consent to ICSID arbitration may be achieved through a compromissory clause in an investment agreement between the host State and the investor submitting future disputes arising from the investment operation to ICSID jurisdiction. It is equally possible to submit a dispute that has already arisen between the parties through consent expressed in a *compromis*. Therefore, consent may be given with respect to existing or future disputes.

The majority of cases brought to ICSID arbitration are based on agreements between the parties containing a consent clause for future disputes.[3] Agreements to submit to the Centre disputes that have arisen already are rare.[4] It is obvious that consent by both parties is much easier to obtain before the outbreak of a disagreement.

Model clauses

It is important to give careful attention to the drafting of consent clauses when negotiating investment agreements. The Centre has developed a set of Model Clauses for the convenience of the parties to facilitate the drafting of consent clauses between them.[5] The Model Clauses, as published, are merely offered as examples and the parties are entirely free to adapt them to the specific circumstances of their relationship. They are useful not only as blueprints for actual contracts but also as a checklist for the various questions to be considered when submitting to ICSID. The Model Clauses have undergone two revisions.[6]

The 1993 Model Clauses suggest the following basic submission clause in respect of future disputes for insertion in investment agreements between host States and foreign investors:

> ***Clause 1***
>
> *The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre")*

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[3] Holiday Inns *v*. Morocco, Lalive, *The First 'World Bank' Arbitration, 51 British Year Book of International Law 128 (1980)*, Adriano Gardella *v*. Ivory Coast, *1 ICSID Reports 287;* Kaiser Bauxite *v*. Jamaica, *1 ICSID Reports 301, 303/4;* AGIP *v*. Congo, *1 ICSID Reports 313;* Benvenuti & Bonfant *v*. Congo, *1 ICSID Reports 340/1;* Amco *v*. Indonesia, *1 ICSID Reports 392;* Klöckner *v.* Cameroon, *2 ICSID Reports 10, 13;* SOABI *v*. Senegal, *2 ICSID Reports 179, 204, 272;* LETCO *v*. Liberia, *2 ICSID Reports 347, 350/1;* Atlantic Triton *v*. Guinea, *3 ICSID Reports 17;* Vaccum Salt *v*. Ghana, *4 ICSID Reports 329;* Mobil Oil *v*. New Zealand, *4 ICSID Reports 147, 158.*

[4] *See* MINE *v*. Guinea, *4 ICSID Reports 67, 80;* Swiss Aluminium Ltd. and Icelandic Aluminium Co. Ltd. *v.* Iceland, *Case No. ARB/83/1;* Compania del Desarrollo de Santa Elena S.A. *v*. Costa Rica, *Case No. ARB/96/1.*

[5] *Doc. ICSID/5/Rev.2.*

[6] *The earlier versions have been published in 7 ILM 1159 (1968) and 1 ICSID Reports 197. The 1993 version is published in 4 ICSID Reports 357.*

any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").[7]

Square brackets indicate alternatives from which the parties may choose. Underlined text indicates information to be supplied by the drafters.

If the parties have not given their consent in respect of future disputes, the 1993 Model Clauses offer the following formula for the submission of an existing dispute:

Clause 2

The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and nationals of Other States, the following dispute arising out of the investment described below:...[8]

Consent through separate instruments

The agreement on consent between the parties need not be recorded in a single instrument:

In *Amco v. Indonesia*, the investor had submitted an application to the Indonesian Foreign Investment Board to establish a locally incorporated company for the purpose of carrying out the investment operation. The application provided that any disagreements would be put before ICSID. The application was approved. Before the Tribunal, the government accepted the validity of the consent clause in principle while disputing its applicability to the parties to the dispute and to the subject-matter.[9] The Tribunal said: ...

while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them.[10]

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[7] *4 ICSID Reports 359/60.*
[8] *4 ICSID Reports 360.*
[9] *Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 392.*
[10] *At p.400.*

Consent through reference to another instrument

An agreement between the parties may record their consent to ICSID jurisdiction by reference to another legal instrument:

In *CSOB* v. *Slovakia*, an agreement entered into between the parties to the dispute contained the clause “this agreement shall be governed by the laws of the Czech Republic and the [BIT between the Czech and Slovak Republics]”. The Claimant contended that this constituted an incorporation by reference of consent to ICSID arbitration as provided for in the BIT. The Respondent argued that the clause was merely a choice-of-law provision. Moreover, the BIT had never entered into force. The Tribunal carefully examined the drafting history of the agreement between the parties. It noted that the clause in question had replaced a clause in an earlier draft providing for domestic arbitration. In addition, the reference to the BIT had included the words “after it is ratified” in a later draft but these words were deleted in the final agreement. The Tribunal concluded that under these circumstances the parties by referring to the BIT had intended to incorporate the ICSID clause in the BIT into their agreement.[11]

Summary:

- **Consent to ICSID arbitration may be contained in a direct agreement between the parties.**
- **Consent may be given with respect to future disputes or with respect to existing disputes.**
- **The Centre has put a set of Model Clauses at the disposal of parties that may facilitate the drafting of consent agreements.**

[11] CSOB *v.* Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 268-271 (1999).*

2. CONSENT THROUGH HOST STATE LEGISLATION

The host State may offer consent to ICSID arbitration in general terms to foreign investors or to certain categories of foreign investors in its legislation. Such an offer, in order to become operative, must be accepted by the foreign investor.

a) Offer by the Host State

Offers of consent in national laws

Some national investment laws provide unequivocally for dispute settlement by ICSID. For instance, Art. 8(2) of the Albanian Law on Foreign Investment of 1993 states in part:

> *...the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes.*[12]

A more common method to provide for settlement by the Centre is to include a reference to the Convention as one of several possible means of dispute settlement. The alternatives offered may include procedures expressly agreed to by the parties, procedures provided by bilateral investment treaties, the International Chamber of Commerce and *ad hoc* arbitration. Some laws specifically state that the consent of the State to ICSID's jurisdiction is constituted by the Articles referring to the Convention. Provisions to this effect may be found in the legislation of the Central African Republic,[13] of Cote d'Ivoire[14] and of Mauritania.[15]

Other provisions are not so clear, but it may still be inferred from them that they express the State's consent to ICSID's jurisdiction. Thus, national laws state that the foreign investor "shall be entitled to request" that the dispute be conclusively settled by one of several methods including the ICSID Convention,[16] that any of the parties to the dispute "may transfer the dispute" to one of several institutions, including ICSID,[17] or that the dispute "shall be settled" by one of these methods.[18]

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[12] *See* Tradex *v.* Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review-Foreign Investment Law Journal 161, 174 (1999). Similar provisions may be found in the legislation of Guinea, Ordinance No. 001/PRG/87 of January 3, 1987, which sets forth the Investment Code; Botswana Sec. 11 of The Settlement of Investment Disputes (Convention) Act, 1970*; *Sri Lanka, Sec. 26 (1) of the Greater Colombo Economic Commission Law, 1978; Togo, Art. 4 of Law No. 85-3 of January 29, 1985, which provides for readjustment of the Investment Code.*

[13] *Art. 30 of the Investment Code, 1988.*

[14] *Art. 10 of the Investment Code, 1984.*

[15] *Art. 7(2)(d) of the Investment Code, 1989.*

[16] *Art. 45 (1) of the Cameroon Investment Code, 1990.*

[17] *Art. 27 (2) of the Kazakhstan Law on Foreign Investments, 1995.*

[18] *Art. 19 of the Somalia Foreign Investment Law, 1987; Sec. 40(6) of the Zambian Investment Act, 1991.*

In *SPP* v. *Egypt*. The Request for Arbitration was based on Art. 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone.[19] Art. 8 provided in relevant part:

> *Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.*[20]

Egypt claimed that the clause referring to ICSID was not self-executing and required a separate implementing agreement with the investor. In Egypt's view, Law No. 43 was too ambiguous and equivocal to establish consent to ICSID arbitration.[21] Rather, it was intended only to inform potential investors that ICSID arbitration was one of a variety of dispute settlement methods that investors may seek to negotiate with Egyptian authorities in appropriate circumstances.[22]

The Tribunal rejected the idea that Art. 8 had the consequence only of informing potential investors of Egypt's willingness, in principle, to negotiate a consent agreement. There was nothing in the legislation requiring a further *ad hoc* manifestation of consent to the Centre's jurisdiction.[23]

The Tribunal's conclusion was as follows:

> *116. On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law No. 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express "consent in writing" to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty.*[24]

Since the parties had not agreed on another method of dispute resolution and since there was no applicable bilateral treaty in force, the Tribunal found "that Article 8 of Law No. 43 operates to confer jurisdiction upon the Centre with respect to the Parties' dispute."[25]

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[19] *Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, 114/5. 16 ILM 1476, 1479 (1977). Law No. 43 of 1974 has since been replaced by the Investment Law of 1989.*
[20] *At. p.126. The provision continues by providing that disputes may also be settled by* ad hoc *arbitration under Egyptian law.*
[21] *At pp. 126/7.*
[22] *Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 140, 147.*
[23] *At pp. 152-156.*
[24] *At p. 161.*
[25] *At p. 161.*

Provisions in national laws foreseeing future agreement on consent

Not all references in national legislation amount to consent to jurisdiction or an offer to the investor to accept ICSID's jurisdiction. Therefore, the respective provisions in national laws must be studied carefully. Some legislative provisions referring to the settlement of disputes by ICSID make it clear that further action on the part of the host State is necessary to establish consent. For instance, the new Egyptian Investment Law of 1989 provides in Art. 55, after a reference to the role of domestic courts in the settlement of disputes under that law:

> *The parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country or within the framework of the [ICSID] Convention ...subject to the terms and conditions, and in the instances where such agreements do apply.*

Similar clauses, providing for further agreement between the host State and the foreign investor, may be found in the investment legislation of El Salvador,[26] Madagascar,[27] Malawi,[28] Mozambique[29] and Yugoslavia.[30]

Yet another type of legislative provision referring to ICSID dispute settlement foresees investment licences to be issued to foreign investors. Such a license may specify the modalities of dispute settlement, including ICSID arbitration. Clauses of this kind may be found in the investment legislation of Uganda,[31] of Benin,[32] Niger,[33] and Tanzania.[34]

In the case of the last two types of clauses referring to ICSID, the legislative provisions as such do not amount to consent to ICSID's jurisdiction. They do not constitute an offer by the host State that may be accepted by the investor through a unilateral act. Rather, they require a specific agreement between the host State and the investor contained in an investment agreement, an investment licence or another document. Such an agreement may be withheld at the host State's discretion.

b) Acceptance by the Investor

While a host State may express its consent to ICSID's jurisdiction through legislation, the investor must perform some reciprocal act to perfect consent. Even where consent is based on the host State's legislation, it can only come into existence through an agreement between the parties. The provision in the host State's legislation can amount to no more than an offer that may be accepted by the investor. The Convention requires consent in writing. This would indicate a minimum of formality in accepting the host State's offer.

[26] *Art. 21 of the Foreign Investment Promotion and Guarantee Law, 1988.*
[27] *Art. 33 of the Investment Code, 1989.*
[28] *Sec.18 of the Investment Promotion Act, 1991.*
[29] *Art. 25 of the Law of Investment, 1993.*
[30] *Art. 27 of the Foreign Investments Law, 1988.*
[31] *Art. 30 of the Investment Code, 1991.*
[32] *Art. 57 of the Investment Code, 1982.*
[33] *Art. 6 of the Investment Code, 1989.*
[34] *Art. 29 of the National Investment (Promotion and Protection) Act, 1990.*

Acceptance of offer through instituting proceedings

The investor may accept the host State's offer by bringing a request for arbitration to the Centre:

> In *Tradex* v. *Albania*, the Albanian law of 1993 contained an offer of consent by the host State (see above). The Tribunal said:
>
> > *...it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law.*[35]

While it is possible to perfect consent through the institution of proceedings, it is questionable whether it is wise for the investor to rely on the host State's offer contained in its legislation without accepting it at an earlier stage. Consent will be perfected only upon the acceptance of the offer and the time of consent triggers a number of legal consequences under the Convention. The most important of these is that consent becomes irrevocable. Therefore, once the investor has accepted consent based on legislation, the agreement on consent will stay in effect even if the legislation is repealed.

Acceptance of offer prior to instituting proceedings

The investor may express its acceptance in a variety of ways other than instituting proceedings. These include an investment agreement with the host State, a simple communication to the host State that consent to ICSID's jurisdiction in accordance with the legislation is accepted, a statement contained in an application for an investment licence or a mere application if under the law in question the successful applicant automatically gets specified benefits including access to ICSID.

The investor's acceptance of consent can be given only to the extent of the offer made in the legislation. But it is entirely possible for the investor's acceptance to be narrower than the offer and to extend only to certain matters or only to a particular investment operation.

> In *SPP* v. *Egypt*, the Claimants had sent a letter to Egypt's Minister of Tourism on August 15, 1983, about one year before the institution of the arbitration, which said in relevant part:
>
> > *...we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Centre for the Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law No. 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration.*[36]

[35] Tradex *v.* Albania, *Decision on Jurisdiction, 24 December 1996, 14 ICSID Review–Foreign Investment Law Journal 161, 187 (1999).*

[36] *Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 119.*

Before the Tribunal, the Claimants contended successfully that their own consent was expressed in the letter and again by the act of filing their request for arbitration with the Centre.[37]

Conditions, time limits and formalities

The host State's legislation containing the offer of consent may prescribe certain conditions, time limits or formalities for the acceptance by the investor. In a number of investment laws, the investor's consent is linked to the process of obtaining an investment authorization. The choice of one of several methods for dispute settlement offered by the legislation must be stated expressly in the application for the investment authorization. Other investment laws require that the investor must accept the offer of consent to ICSID arbitration within certain time limits.In the absence of formal requirements in the host State's legislation for the investor's consent, a maximum of flexibility should be allowed. Any indication of acceptance on the part of the investor should be permissible. This may be effected by any written instrument by which the investor signifies its submission to the legal framework provided in the host State's legislation, including settlement under the ICSID Convention. Nevertheless, it is advisable to make an acceptance as clear as possible. Implicit acceptance, while not impossible, is liable to lead to jurisdictional disputes, to uncertainties concerning the exact date of consent and to difficulties once the host State changes its legislation.

Summary:

- **Some States offer ICSID arbitration to foreign investors by way of national legislation.**
- **Legislative provisions of this kind must be interpreted carefully: not all references to ICSID arbitration in national legislation amount to an offer of consent.**
- **Some provisions in national legislation merely hold out the prospect of future consent.**
- **In order to amount to a consent agreement, the offer contained in national legislation must be accepted by the investor.**
- **The investor may accept the offer simply by instituting proceedings. But it may be advisable to do so at an earlier stage.**
- **Offers of consent contained in national legislation may prescribe certain conditions, time limits or formalities for their acceptance.**

[37] *At p. 120.*

3. CONSENT THROUGH BILATERAL INVESTMENT TREATIES (BITS)

The technique employed in national legislation may also be employed with the help of treaties to which the host State is a party. The treaty on its own cannot amount to consent to ICSID' s jurisdiction by the parties to the dispute, since ICSID arbitration is always between a host State and a foreign investor. But the treaty may contain the host State's offer. This offer may then be taken up by a national of the other State party to the treaty.

Consent through BITs has become accepted practice. Some capital exporting States have developed their own national practice in this regard, usually through the use of model BITs.[38] Over the years, ICSID clauses have been incorporated into hundreds of BITs. Today, they can be found in the overwhelming majority of new BITs.

a) Offer by the Host State

Offers of consent in BITs

The majority of ICSID clauses in modern BITs express consent on the part of the two Contracting States to submit to ICSID's jurisdiction, for the benefit of nationals of the other State party to the treaty. The treaty between the United Kingdom and Sri Lanka of 1980 offers an example of a simple ICSID clause in Art. 8:

> *(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (herein refferred to as "the Centre") for settlement by conciliation or arbitration under the Convention ... any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.*[39]

Many BITs contain similar clauses. Clauses of this kind have been the basis of jurisdiction in several ICSID cases.[40]

Some BITs do not specifically mention consent. But formulations to the effect that a dispute "shall be submitted" to the Centre or that the parties have the right to initiate proceedings leave no doubt as to the binding character of these clauses. For instance, the German Model Agreement in its Art. 11 (Model I) provides:

> *(2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the national or company of the other Contracting Party, be submitted for*

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[38] *The most comprehensive study is* Dolzer/Stevens, *Bilateral Investment Treaties (1995).*
[39] *19 ILM 886, 888 (1980).*
[40] AAPL *v.* Sri Lanka, *Award, 27 June 1990, 4 ICSID Reports 246, 250/1;* AMT *v.* Zaire, *Award, 21 February 1997, 36 ILM 1531, 1545 (1997);* Fedax *v.* Venezuela, *Decision on Jurisdiction, 11 June 1997, 37 ILM 1378, 1384 (1998).*

> *arbitration. Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.*[41]

ICSID as one of several alternatives

The dispute settlement clauses in many BITs refer to ICSID as one of several possibilities. The alternatives contemplated may include the domestic courts of the host State, procedures agreed to by the parties to the dispute, ICC arbitration, arbitration under the UNCITRAL rules, and *ad hoc* arbitration. Some of these composite settlement clauses require a subsequent agreement of the parties to select one of these procedures. Others contain the State's advance consent to all of them, thereby giving the parties a choice. A relatively simple example for this technique may be found in some Swiss BITs. For instance, the Switzerland-Ghana BIT of 1991 provides in its Art. 12:

> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) of this article within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall be submitted to international arbitration or conciliation.*
>
> *(3) Where the dispute is referred to international arbitration or conciliation, the aggrieved party may refer the dispute either to:*
>
> > *(a) the International Centre for the Settlement of Investment Disputes ...; or*
> >
> > *(b) an international arbitrator or an ad hoc arbitration tribunal to be appointed by a special agreement or established under the arbitration rules of the United Nations Commission on International Trade Law.*
>
> *(4) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration or conciliation.*

Some BITs offering several methods of settlement specify that the choice among them is with the investor.[42]

BITs referring to future consent

Not all references to the ICSID Convention in BITs constitute binding offers of consent by the host State. Some clauses contain promises of future consent or hold out a general prospect of sympathetic consideration. Still others simply state that consent may be given by way of agreements with the investor.

Some clauses in BITs referring to ICSID's jurisdiction amount to an undertaking by the host State to give consent in the future. This may be achieved by providing that a future investment agreement between the host State and the investor shall, upon the investor's request, include a provision for the submission of disputes to ICSID.[43] More simply, the BIT may contain an undertaking to assent to any demand by the investor to submit to dispute settlement by the Centre. For instance, the Netherlands-Pakistan BIT of 1988 provides in its

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[41] Dolzer/Stevens, *Bilateral Investment Treaties, p. 194.*

[42] *See Switzerland-Paraguay BIT (1993) Art. 9; Lithuania-Poland BIT (1992) Art. 7.*

[43] *See France-Malaysia BIT (1975) Art. 5.*

Art. 10:

> *The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for arbitration or conciliation, to the Centre ..., any dispute that may arise in connection with the investment.*[44]

Clauses of this kind do not give the investor an immediate right of access to the Centre. If the host State refuses to give its consent, it would be in breach of its obligation under the BIT. But the Secretary-General of ICSID would presumably reject a request for arbitration under these circumstances. It is unlikely that a promise to give consent would be accepted as amounting to consent. Therefore, any remedy must, in the first place, lie with the treaty partner to the BIT. The investor's home State can demand that the host State give its consent and, if necessary, resort to such procedures as are available between the States parties to the BIT.

An even weaker reference to ICSID is contained in some BITs that provide for the host State's sympathetic consideration to a request for ICSID dispute settlement. It is obvious that a clause of this kind does not amount to consent by the host State. The most that can be read into it is that consent may not be withheld arbitrarily and that the States parties to the BIT must consider ICSID in good faith.

Some BITs merely foresee a future agreement between the host State and the investor containing consent to ICSID's jurisdiction. An example is Art. 6 of the Sweden-Yugoslavia BIT of 1978:

> *In the event of a dispute arising between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes...*[45]

In *CSOB* v. *Slovakia*, the Respondent contended that the dispute settlement clause in the BIT, which stated that the investor and the host State had the right to submit disputes to ICSID, meant that any submission had to be made jointly by both parties. The Tribunal rejected this argument. It pointed out that a holding that the parties must submit their dispute jointly would mean that the ICSID clause in the BIT was subject to an agreement by the parties after the dispute had arisen. The fact that some BITs contained provisions for joint submission of disputes to arbitration did not compel the conclusion that provisions whose →

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[44] *See also Japan-Egypt BIT (1977) Art. 11; UK-Philippines BIT (1980) Art. X; Australia-CSFR BIT (1991) Art. 11. For further examples see* Dolzer/Stevens, *Bilateral Investment Treaties, p. 133;* Broches, A., *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes,* in: *The Art of Arbitration, Liber Amicorum Pieter Sanders* (Schultz, J./van den Berg, A. *eds.*) *63, 65/6 (1982).*

[45] *See also Sweden-Malaysia BIT (1979) Art. 6; Sweden-Egypt BIT (1978) Art. 6; Sri Lanka-Switzerland BIT (1981) Art. 9.*

wording is at best ambiguous should be interpreted in this way. Moreover, the Tribunal noted that the BIT offered a choice between ICSID and UNCITRAL arbitration and that any dispute was to be resolved by the method that was chosen first. The Tribunal concluded that this provision made sense only on the assumption that each party to a dispute had the right separately to institute the arbitration proceedings.[46]

b) Acceptance by the Investor

The Convention requires consent in writing by both parties to the dispute. Just as in the case of legislative provisions for the settlement of disputes by ICSID, a provision on consent in a BIT can be no more than an offer that requires acceptance. The treaty provision cannot replace the need for consent by the foreign investor. In addition, the BIT must be between the host State and the State of the investor's nationality.

Acceptance by instituting proceedings

It is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.

In *AMT* v. *Zaire*, the Tribunal said:

> *In the present case, it happens that AMT (...) has opted for a proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates that consent necessary to validate the assumption of jurisdiction by the Centre.*[47]

Acceptance of offer prior to instituting proceedings

Withdrawal of an offer of consent before its acceptance would appear to be less of a problem in the case of ICSID clauses contained in treaties than in the case of national legislation. Withdrawal of the host State's consent contained in a BIT would be a breach of the treaty and would presumably trigger some adverse reaction on the part of the other party to the treaty. Also, an ICSID clause in a treaty remains valid notwithstanding an attempt to terminate it, unless there is a basis for termination under the law of treaties. Nevertheless, in order to avoid complications early acceptance is advisable also in the case of offers of consent contained in treaties.

Some BITs require early acceptance

Some BITs specifically provide for the giving of consent by the investor. Under these clauses, once the investor has accepted the offer contained in the BIT, either party may start proceedings. Consent by the investor must be expressed

[46] CSOB *v.* Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 271/2 (1999).*

[47] AMT *v.* Zaire*, Award, 21 February 1997, 36 ILM 1531, 1545/6 (1997). See also* AAPL *v.* Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 251;* Fedax *v.* Venezuela*, Decision on Jurisdiction, 11 June 1997, 37 ILM 1378, 1384 (1998);* CSOB *v.* Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 264 (1999).*

in some positive way and cannot be substituted by the BIT or simply assumed.

There are ways by which an investor may be induced to give consent. Submission to ICSID or other methods of settlement may be made a condition for admission of investments in the host State and may form part of the licensing process. BITs may provide specifically that their benefits will extend only to investors that have consented to ICSID's jurisdiction.

Summary:

- **Many bilateral investment treaties (BITs) contain offers of consent to the nationals of the respective countries.**
- **Some of the dispute settlement clauses in BITs offer a choice of several methods including ICSID.**
- **Some references to ICSID in BITs do not amount to consent to jurisdiction, but merely hold out the prospect of future consent.**
- **In order to amount to a consent agreement the offer contained in a BIT must be accepted by the investor.**
- **The investor may accept the offer simply by instituting proceedings.**

4. CONSENT THROUGH MULTILATERAL TREATIES

Offers of consent in multilateral treaties

Since the early 1990s, a number of multilateral treaties that provide for ICSID's jurisdiction have come into existence. The underlying mechanism is similar to that in the BITs discussed above. The treaties contain offers by the States parties to them to consent to ICSID's jurisdiction. These offers may be taken up by investors who are nationals of other States parties to the treaties.

NAFTA

The North American Free Trade Agreement (NAFTA) of 1992 between Canada, Mexico and the United States[48] contains a Chapter Eleven on Investments. Art. 1122 bears the title "Consent to Arbitration" and provides in relevant part:

> 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;...*

As long as Canada and Mexico are not parties to the ICSID Convention, the NAFTA will not operate to confer jurisdiction under the Convention. But ICSID Additional Facility arbitration (see Module 2.4) is available between United States investors and Canada or Mexico and between Canadian or Mexican investors and the United States. In disputes between Canadian investors and Mexico or Mexican investors and Canada not even the ICSID Additional Facility may be used. In disputes of the latter kind only arbitration under the UNCITRAL Rules is available.

The NAFTA specifically provides that the investor must consent to arbitration (Art. 1121), thereby emphasizing the reciprocal nature of consent to arbitration. However, under the NAFTA, submission of a claim to arbitration is open only to an investor and not to a host State.

Energy Charter Treaty

The Energy Charter Treaty of 1994 between the European Communities and 49 mostly European States in its Art. 26 also provides consent to ICSID's jurisdiction by the States parties in relation to investors of all other States parties.[49] The Treaty contains an unconditional consent to ICSID and to the Additional Facility, whichever may be available. The Article specifically requires consent in writing also on the part of the investor. The Article only envisages the submission of a claim by the investor but not by the host State.

MERCOSUR

The 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone (MERCOSUR) contain similar provisions. Art. 9 of the Colonia Protocol gives the investor the option to institute one of several procedures including ICSID arbitration.

[48] 32 ILM 605 (1993).
[49] 34 ILM 360, 399 (1995).

Cartagena Free Trade Agreement

The 1994 Free Trade Agreement between Mexico, Colombia and Venezuela offers yet another example of consent to ICSID arbitration by multilateral agreement. Under Art. 17-18, the investor is given the option to institute ICSID arbitration, Additional Facility arbitration or arbitration under the UNCITRAL Rules, depending on the ICSID Convention's state of ratification by the three States.

Summary:

- **Several regional multilateral treaties also offer consent to ICSID jurisdiction to nationals of participating countries investing in other participating countries.**
- **These offers must be accepted by eligible investors in the same way as in the case of BITs.**
- **Regional treaties containing offers of consent to ICSID arbitration include NAFTA, the Energy Charter Treaty, Mercosur and the Cartagena Free Trade Agreement.**

5. THE TIME OF CONSENT

Time of consent given by both parties

The time of consent is determined by the date at which both parties have agreed to ICSID's jurisdiction. If the consent clause is contained in an offer by one party, its acceptance by the other party will determine the time of consent.

If the host State makes a general offer to accept ICSID's jurisdiction in its legislation or in a treaty, the time of consent is determined by the investor's acceptance of the offer. At the latest, this offer may be accepted through bringing a request for conciliation or arbitration to the Centre. The investor is under no time constraints to accept the offer and thus to complete the consent unless the offer, by its own terms, provides for acceptance within a certain period of time. But it should be borne in mind that consent, once completed, has a number of legal consequences. Therefore, care should be taken to perfect consent at the appropriate time and not to rely on a standing offer without actually taking it up.

Additional requirements for consent

It may happen, that the conditions *ratione personae* for the Centre's jurisdiction have not yet been met when a document containing a consent clause is signed. For instance, the host State or the State of the investor's nationality may not yet have ratified the Convention. In such a case, the date of consent will be the date on which all the conditions have been met. If the host State ratifies the Convention after the signature of the consent agreement, the time of consent will be the entry into force of the Convention for the host State. The same applies to a ratification by the State of the investor's nationality subsequent to the signature of the agreement containing the consent clause.

> In *Holiday Inns* v. *Morocco*, no fewer than three conditions for the full validity of consent were lacking at the time the agreement containing the consent clause was signed: (i) the host State had not yet ratified the Convention; (ii) the investor's home State had not yet ratified the Convention; and (iii) one of the corporate parties to the dispute had not yet been created. The Tribunal noted that all these defects had been cured before the institution of proceedings and stated that "... it is the date when the conditions are definitely satisfied ... which constitutes in the sense of the Convention the date of consent..." [50]

Relevance of time of consent

Consent to the jurisdiction of the Centre triggers a number of legal consequences under the Convention. The most important one is that consent, once perfected, becomes irrevocable under the last sentence of Art. 25(1) (see Section 9. below). The nationality of the foreign investor under Art. 25(2) is determined by reference to the date of consent. Both, natural and juridical persons, must be nationals of another Contracting State on the date of consent.

[50] Lalive, *The First 'World Bank' Arbitration, 51 British Yearbook of International Law 123, 146 (1980).*

Consent to the jurisdiction of the Centre will, unless otherwise stated, exclude other remedies pursuant to Art. 26 of the Convention. Therefore, resort to domestic courts or to other forms of arbitration becomes unavailable, in principle, from the date of consent. Similarly, under Art. 27 (1) diplomatic protection by the investor's State of nationality is no longer permitted once the parties have consented to the jurisdiction of the Centre.

Art. 44 of the Convention provides that proceedings will be conducted in accordance with Arbitration Rules in effect on the date on which the parties have given their consent. The parties may agree otherwise. But if they do not, it is not the Rules in their latest version that apply but those in force on the date of consent. The idea is to protect the parties against amendments that might not suit them.

Consent at time of institution of proceedings

Consent by both parties must exist at the time of the institution of the proceedings. If the party wishing to institute proceedings cannot supply documentation of written consent to the jurisdiction of the Centre, the Secretary-General will find that the dispute is manifestly outside the jurisdiction of the Centre and will refuse to register it.

There are good practical reasons for not proceeding with a request that is unsupported by any documentation of consent by the other party. It does not make sense to go through the procedure of constituting a tribunal if it is likely that it will find that there is no jurisdiction. Therefore, manifest absence of consent is an absolute bar against a request ever reaching a tribunal.

The situation is somewhat different if the existence of a valid consent is unclear or if the precise scope of the consent is subject to doubt. These are questions that are to be decided by the tribunal under Art. 41, and it is in these proceedings that the position taken by the respondent may become relevant.

In *Tradex* v. *Albania*, the Claimants relied on the bilateral investment treaty between Albania and Greece as one of two bases for jurisdiction. The Tribunal noted that the Request for Arbitration was dated 17 October 1994 but that the BIT had come into force only on 4 January 1995. It found that jurisdiction must be established on the date of the filing of the claim and rejected the BIT as a basis for jurisdiction.[51]

Once the proceedings are instituted, the parties may confirm or even extend their consent to jurisdiction. A tribunal will examine the validity or scope of consent only if a party raises a jurisdictional objection. A party that has not challenged the existence of consent at an early stage in the proceedings, is precluded from doing so later on.

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[51] Tradex *v.* Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 178-180 (1999).*

A respondent's failure to appear before the tribunal cannot be interpreted as an admission of jurisdiction. Logic militates against interpreting absence from the proceedings as implicit consent to jurisdiction. Moreover, Art. 45 of the ICSID Convention expressly states that failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

Summary:

- **The time of consent is the date by which both parties have submitted to jurisdiction.**
- **If other conditions to ICSID's jurisdiction are not yet fulfilled by the time the parties have expressed their consent agreement, the time of consent will be the date by which these conditions are fulfilled.**
- **The time of consent carries a number of important consequences: these include the irrevocability of consent, the exclusion of other remedies, and the impermissibility of diplomatic protection.**
- **Consent must exist at the time of the institution of proceedings.**

6. LIMITATIONS ON CONSENT

Parties may limit consent

Art. 25 of the ICSID Convention merely defines the outer limits of the consent that the parties may give. There is nothing to stop them from circumscribing it in a narrower way. The parties are free to delimit their consent by defining it in abstract terms, by excluding certain types of disputes or by listing the questions they are submitting to ICSID's jurisdiction. The 1993 Model Clauses offer the following formula for this purpose:

> ***Clause 4***
>
> *The consent to the jurisdiction of the Centre recorded in citation of basic clause above shall [only]/[not] extend to disputes related to the following matters: . . .*[52]

In practice, broad inclusive consent clauses are the norm. They are also generally preferable. Narrow clauses, listing only certain questions or excluding certain questions, are liable to lead to difficulties in determining the tribunal's precise competence. Moreover, narrow clauses may inadvertently exclude essential aspects of the dispute.

Consent clauses contained in investment agreements typically refer to "any dispute" or "all disputes" under the respective agreements.

Limitations in investment legislation

References to ICSID contained in national investment legislation typically relate to the application and interpretation of the piece of legislation in question. Some national laws are more sweeping and simply refer to disputes "concerning foreign investment". Others describe the questions covered by consent clauses in narrower terms. These may include the requirement that "the dispute is fundamental to the investment itself" or that the dispute must be "in respect of any approved enterprise".

Some national laws circumscribe the issues that are subject to ICSID's jurisdiction narrowly.

The Albanian Law on Foreign Investment of 1993 offers consent to ICSID's jurisdiction but limits this consent in the following terms:

> *... if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, ...*[53]

In *Tradex* v. *Albania*, the Tribunal held that it had jurisdiction subject to joining to the merits the issue as to whether or not an expropriation had

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[52] *4 ICSID Reports 361.*

[53] *See* Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 174 (1999). Article 7 deals with the investor's right to transfer funds abroad.*

been shown to exist.[54] In its Award it found, after a detailed examination of the facts, that the Claimant had not been able to prove that an expropriation had occurred.[55]

Limitations in BITs

Clauses in bilateral investment treaties (BITs) are generally quite broad and refer to "any legal dispute . . . concerning an investment".[56]

Limitations in the acceptance by the investor

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.

Summary:

- **Consent to jurisdiction may be limited to certain types of disputes.**
- **A Consent agreement exists only to the extent that the offer of consent and its acceptance coincide.**

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[54] *At pp. 185, 196.*

[55] Tradex v. Albania, *Award, 29 April 1999, 14 ICSID Review—Foreign Investment Law Journal 197, 217, 223, 232-248 (1999).*

[56] *Great Britain Model Agreement, Art. 8,* Dolzer/Stevens, *Bilateral Investment Treaties, p. 234. Most of the other Model Agreements contain similarly sweeping clauses.*

7. CONDITIONS TO CONSENT

Parties may subject consent to conditions

Even if a dispute is clearly covered by the parties' consent to resort to ICSID arbitration, access to the Centre may be subject to conditions. The parties are free in the drafting of such conditions, provided they are not contrary to the Convention's mandatory provisions and are in compliance with the Centre's Rules and Regulations. In practice, such conditions always concern certain procedural steps that must be exhausted before proceedings can be instituted.

Exhaustion of local remedies

Under Art. 26 of the ICSID Convention, a State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention. In the absence of such a provision there is no requirement to exhaust local remedies. Only a few States have conditioned their consent to ICSID jurisdiction on the prior exhaustion of local remedies. A relatively small number of bilateral investment treaties and a few investment agreements with investors contain such a condition.

The condition that local remedies must be exhausted before ICSID arbitration can be instituted, may be expressed by a State party to the Convention only up to the time consent to arbitration is perfected but not later. This is a consequence of the principle that once consent to jurisdiction has been given, it may not be unilaterally withdrawn or restricted.

In the annulment proceedings to *Amco* v. *Indonesia*, Indonesia argued "that the Tribunal manifestly exceeded its powers by holding that Amco could bring its claim for compensation of damages based on the acts of the army and police personnel involved directly to an ICSID Tribunal without previously seeking redress before the Indonesian courts in conformity with the general international law rule on exhaustion of local remedies."[57] The *ad hoc* Committee had little problem to dispose of this argument:...

> *By acceptance of ICSID jurisdiction without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right ...*[58]

It is questionable whether insistence by a host State on the exhaustion of local remedies prior to ICSID arbitration serves any useful purpose. Resort to local remedies before the institution of ICSID arbitration may be seen by the investor as a waste of time and money. The public proceedings in the host State's courts may further exacerbate the dispute between the parties and may affect the host State's investment climate. If the ICSID tribunal overturns a decision

[57] *1 ICSID Reports 526.*
[58] *1 ICSID Reports 526.*

by the host State's highest court, this may be a source of acute embarrassment. Therefore, it seems wisest to leave the Convention's basic rule of non-exhaustion in place and to follow the example of the vast majority of consent agreements in not requiring the exhaustion of local remedies.

Attempt at amicable settlement

A common condition for the institution of proceedings before ICSID is that an amicable settlement has been attempted through consultations or negotiations. Where this is the case, negotiations must be undertaken in good faith. Some national investment laws[59] and numerous BITs contain the condition that a negotiated settlement must be attempted before resort can be had to the Centre. In order to forestall dilatory tactics and in order to make it clear when the condition precedent for settlement under the Convention has been satisfied, the treaties typically lay down time limits for negotiations. If no settlement is reached within a certain period of time, access to ICSID is open.

In *Tradex* v. *Albania*, the consent clause in the Albanian Law was subject to the condition that the dispute "cannot be settled amicably".[60] The Tribunal noted that Tradex had sent five letters over four months to the competent Albanian Ministry but that none of these was answered or resulted in any relevant action. The Tribunal found these letters to be a sufficient good faith effort to reach an amicable settlement.[61]

Prior conciliation

Another procedural condition that may be inserted into a consent clause concerns conciliation. Since conciliation is one of two procedures under the ICSID Convention, provision for it is not, strictly, a condition for the Centre's jurisdiction. But arbitration can be made contingent upon prior unsuccessful conciliation under the Convention. Under the 1993 Model Clauses 1 and 2 (see section1.above), consent can be given for conciliation followed, if the dispute remains unresolved within a certain period of time, by arbitration.

Summary:

- **Consent to ICSID arbitration may be subject to certain procedural conditions.**
- **The parties may agree to require the exhaustion of local remedies, or to attempt a negotiated settlement or to go through conciliation prior to the institution of arbitration proceedings.**

[59] *Albania Law on Foreign Investments, 1993, Art. 8(2); Cameroon Investment Code, 1990, Art. 45; Tanzania National Investment (Promotion and Protection) Act, 1990, sec. 29(1); Togo Investment Code, 1985, Art. 4; Uganda Investment Code, 1991, Art. 30(2).*
[60] Tradex *v.* Albania, *Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 174 (1999).*
[61] *At pp. 182-184.*

8. THE INTERPRETATION OF CONSENT

Restrictive or effective interpretation

A recurrent theme in the pleadings before ICSID tribunals is the argument that consent by the host State to the Centre's jurisdiction should be construed restrictively. Respondent Governments have insisted on the need for a restrictive interpretation of a State's undertaking to arbitrate which had to be seen as a derogation from its sovereignty. The Claimants have at times attempted to invoke an alleged principle of interpretation in the opposite sense: that of effective interpretation epitomized in the Latin phrase of *ut res magis valeat quam pereat*. ICSID tribunals have repeatedly refused to embrace either of the two principles.

In *Amco* v. *Indonesia*, the Tribunal was confronted with the argument that the consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty should be construed restrictively.[62] The Tribunal rejected this contention categorically. It said:

> *. . . like any other conventions, a convention to arbitrate is not to be construed* restrictively, *nor, as a matter of fact,* broadly *or* liberally. *It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle* pacta sunt servanda, *a principle common, indeed, to all systems of internal law and to international law.*
> *Moreover–and this is again a general principle of law–any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.*[63]

In the Tribunal's view, the proper method for the interpretation of the consent agreement was to read it in the spirit of the ICSID Convention and in the light of its objectives. ICSID arbitration was in the interest of both parties, a thought that was expressed in the first paragraph of the Convention's Preamble. The investor's interest in submitting investment disputes to international arbitration was matched by a parallel interest of the host State: to protect investments is to protect the general interest of development and of developing countries.[64]

In *SPP* v. *Egypt*, the argument of the restrictive interpretation of jurisdictional instruments was raised in relation to an ICSID clause in national legislation. The Tribunal found that there was no presumption of jurisdiction, particularly where a sovereign State was involved, and

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[62] *Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 393, 397.*
[63] *At p. 394. Emphases original. See also remarks to the same effect at pp. 398 and 402. See also* Cable TV *v.* St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review—Foreign Investment Law Journal 328, 386 (1998);* CSOB *v.* Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 263 (1999).*
[64] *At p. 400.*

that jurisdiction only existed insofar as consent thereto had been given by the parties. Equally, there was no presumption against the conferment of jurisdiction with respect to a sovereign State. After referring to a number of international judgements and awards, the Tribunal said:

> *Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in favor of it is preponderant.*[65]

Therefore, neither of the two presumptions or alleged principles of interpretation carry much weight when applied to expressions of consent to the jurisdiction of ICSID. Neither a principle of restrictive interpretation nor a doctrine of "*effet utile*" will do justice to a consent clause.

Successive legal instruments

A special problem of interpretation is the applicability of consent clauses to successive legal instruments. Investment operations often involve complex arrangements expressed in a number of successive agreements. Some such related agreements concern peripheral operations such as financing or arrangements with subcontractors. These agreements may be concluded in stages and over a period of time. Though economically interrelated, the agreements are legally distinct and often have different features. At times, ICSID clauses are included in some of these agreements but not in others. If ICSID clauses are neither repeated nor incorporated by reference in related agreements, the question arises whether the parties' consent to ICSID's jurisdiction extends to matters regulated by these related agreements.

ICSID tribunals have dealt with this question in a number of cases.[66] These cases suggest that ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship. Therefore, a series of interrelated contracts may be regarded, in functional terms, as representing the legal framework for one investment operation. ICSID clauses contained in some, though not all, of the different contracts may be interpreted to apply to the entire operation.

The need to settle an investment dispute finally and comprehensively would make any other solution impracticable. A situation in which an ICSID tribunal were to address only some of the issues between the parties but would leave other related ones to be litigated elsewhere would be highly unsatisfactory. Partial settlements are uneconomical and liable to delay resolution even further.

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[65] *Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143/4.*

[66] Holiday Inns *v.* Morocco*, Decision on Jurisdiction, 12 May 1979;* Lalive*, The First 'World Bank' Arbitration, 51 British Yearbook of International Law 123, 156-159 (1980);* Klöckner *v.* Cameroon*, Award, 21 October 1983, Decision on Annullment, 3 May 1985, 2 ICSID Reports 13-18, 65-69, 89-93, 97-117;* SOABI *v.* Senegal*, Decision on Jurisdiction, 1 August 1984, Award, 25 February 1988, 2 ICSID Reports 185-188, 204-208, 293-322.*

Ideally, the parties might eliminate most problems of this nature through consistency in the drafting of their various documents. But experience tells that arbitration clauses often do not get the detailed attention they deserve. Therefore, the approach developed in the practice of ICSID tribunals would appear to be the only reasonable solution. But this approach can be maintained only to the extent that it reflects the parties' presumed intentions.

Summary:

- **Consent agreements are to be interpreted neither restrictively nor extensively but in accordance with good faith and with the object and purpose of the ICSID Convention.**
- **Where an investment operation is regulated in a number of successive legal instruments, consent expressed in one of these instruments may cover the entire investment operation.**

9. THE IRREVOCABILITY OF CONSENT

Article 25 (1), last sentence of the ICSID Convention provides:

> *When the parties have given their consent, no party may withdraw its consent unilaterally.*

Consent agreements may not be revoked by one side

The binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim "*pacta sunt servanda*" and applies to undertakings to arbitrate in general. The applicability of this maxim is obvious where the consent is expressed in a compromissory clause contained in an agreement. It applies equally where an offer of consent is contained in national legislation or in a treaty which has been accepted by the investor. Consent to ICSID's jurisdiction is always by agreement even if the elements of agreement are expressed in separate documents.

Irrevocability only after consent is perfected

The irrevocability of consent operates only after the consent has been perfected. A mere offer of consent to ICSID's jurisdiction may be withdrawn at any time unless, of course, it is irrevocable by its own terms. In the case of national legislation and treaty clauses providing for ICSID jurisdiction, the investor must have accepted the consent in writing to make it irrevocable. Therefore, it is inadvisable for an investor, to rely on an ICSID consent clause contained in the host State's domestic law or in a treaty without making a reciprocal declaration of consent. This may be done by a simple letter addressed to the host State. Alternatively, the investor may accept the offer of consent simply by instituting proceedings before the Centre but in doing so runs the risk that the offer may be withdrawn at any time before then.

The irrevocability of consent only applies to unilateral attempts at withdrawal. It is clear that the parties may terminate consent to jurisdiction by mutual agreement either before or after the institution of proceedings.

Non-frustration of ICSID proceedings

The ICSID Convention not only declares the unilateral withdrawal of consent inadmissible but also makes provision for the institution and continuance of proceedings despite the refusal of a party to cooperate. The provisions on the constitution of arbitral tribunals (Arts. 37-38) on *ex parte* procedure (Art. 45) and on the enforcement of awards (Art. 54) are designed to secure the successful conclusion of proceedings even in the face of a recalcitrant party.

The parties are free to subject their consent to limitations and conditions (see sections 6 and 7.above) However, once consent has been given, its irrevocability extends to the introduction of new limitations and conditions. In other words, the prohibition of withdrawal covers the full extent of the consent to jurisdiction.

No indirect revocation of consent

Consent, once it is perfected, may not be withdrawn indirectly through an attempt to remove one of the other jurisdictional requirements under the Convention. To this end Art. 72 of the ICSID Convention provides that the Convention's denunciation by the host State or the investor's home State shall not affect consent to jurisdiction given previously.

Similarly, if the consent to ICSID's jurisdiction was given by way of an investment licence or similar authorization, the withdrawal of the licence will not defeat jurisdiction.

Repeal of national legislation

A host State is free to change its investment legislation including the provision concerning consent to ICSID's jurisdiction. An offer of consent contained in national legislation that has not been taken up by the investor will lapse when the legislation is repealed. The situation is different if the investor has accepted the offer in writing while the legislation was still in force. The consent agreed to by the parties then becomes insulated from the validity of the legislation containing the offer. It assumes a contractual existence independent of the legislative instrument that helped to bring it about. Therefore, repeal of investment legislation providing for ICSID's jurisdiction will not effect a withdrawal of consent if the investor has accepted the offer during the legislation's lifetime.

Termination of treaties

Bilateral investment treaties (BITs) and multilateral international instruments providing for consent to ICSID's jurisdiction are more difficult to terminate than national legislation. The fact remains that consent based on treaties is only perfected once it is accepted by the investor. It is only after its acceptance by the investor that an offer of consent contained in a BIT or other international instrument becomes irrevocable and hence insulated from attempts by the host State to terminate the treaty.

In *CSOB* v. *Slovakia*, the Tribunal found that the BIT had never entered into force despite the fact that it was published in Slovakia's Official Gazette together with a notice announcing its entry into force. After the institution of ICSID proceedings, Slovakia published a corrective notice in its Official Gazette asserting the BIT's invalidity. The Tribunal said:

> *In this connection, it should be noted that if the Notice were to be held to constitute a valid offer by the Slovak State to submit to international arbitration, the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997, asserting the invalidity of the BIT, would be of no avail to Respondent, since Claimant accepted the offer in the Request for Arbitration filed prior to the publication of the corrective notice.*[67]

Severability of arbitration agreement

If an investment agreement between the host State and the investor containing a clause providing for ICSID's jurisdiction is alleged to be invalid or is terminated, it may be argued that the consent clause is also invalidated or ceases to operate. But a unilateral invocation of invalidity or termination of the investment agreement will not defeat the consent clause. A tribunal must

[67] CSOB *v.* Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 267 (1999).*

have the power to decide on disputes concerning the alleged invalidity of investment agreements even if the tribunal's very existence depends on the agreement's validity. Under the doctrine of the severability or separability of the arbitration agreement, the agreement providing for arbitration assumes a separate existence, which is autonomous and legally independent of the agreement containing it. This principle of severability of the arbitration agreement is supported by the weight of international arbitral codifications[68] as well as by national and international arbitral practice.[69]

Invalidity of State's consent

The argument that a State's own expression of consent was defective under its law and hence invalid is unlikely to succeed. There are weighty arguments to dismiss a plea of incapacity as vitiating a State's consent. It is the primary duty of the Contracting State to ensure the observance of its own law. Alternatively, good faith requires that any incapacities or procedural requirements must be divulged to the other side. A party may not avail itself of its own violation of legal rules.

Summary:

- **As soon as all requirements for jurisdiction, including consent by both parties, are met a party may not withdraw consent unilaterally.**
- **Consent, once it is perfected, constitutes a binding agreement.**
- **An attempt by a party to revoke consent indirectly by removing one of its prerequisites, will not be successful.**

[68] *See ICC Rules of Arbitration (1998), Art. 6(4), 36 ILM 1604, 1609 (1997); UNCITRAL Arbitration Rules (1976), Art. 21(2), 15 ILM 701, 709 (1976); UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 16(1), 24 ILM 1302, 1306 (1985); Institut de Droit International, Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, Art. 3(a), 63 Annuaire II 324, 326 (1989).*

[69] Schwebel*, International Arbitration: Three Salient Problems, 24-59 (1987).*

10. CONSENT BY A CONSTITUENT SUBDIVISION OR AGENCY

Constituent Subdivison or Agency

In many States investment agreements are entered into not by the government itself but by statutory corporations and public companies that exercise public functions but are legally distinct from the State. Also, in some States it is not the central government but a smaller entity, such as a province or even a municipality, that deals with foreign investors. The Convention provides that such entities may become parties in ICSID proceedings instead of or in addition to the host State itself.

Two requirements for party status

Party status for a constituent subdivision or agency depends on two requirements:

(a) The constituent subdivision or agency must have been designated to the Centre (see Module2.4).

(b) The consent of the constituent subdivision or agency must have been approved by the State to which it belongs.

Consent must be appoved by government

Consent by a constituent subdivion or agency is regulated in Art. 25 (3) of the ICSID Convention in the following terms:

> *(3) Consent by a constituent subdivison or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.*

No withdrawal of approval

Once approval of consent by a constituent subdivision or agency has been given, such approval is protected by the prohibition to withdraw consent contained in the last sentence of Art. 25 (1) (see section 9 above). In other words, consent, once approved, may not be invalidated through a retraction of the approval.

Form of approval

The Convention does not require any particular form for the approval of consent. In particular, unlike designation of the constituent subdivision or agency and unlike waiver of approval, the approval need not be communicated to the Centre. In principle, approval is a unilateral act of the host State that need not be formally communicated to anyone. For practical reasons, it is desirable that the foreign investor and the constituent subdivision or agency are informed of the approval so that they may rely on the validity of consent. An investor will be well-advised to insist on approval by the State prior to or simultaneously with the consent agreement.

Approval may be contained in a separate agreement between the host State and the investor. Or the approval may be contained in an instrument of designation communicated to the Centre.[70] It may be practical to obtain approval

[70] *For a combined designation and approval clause see Art. 7.10 of the 1982 participation agreement between New Zealand and Mobil Oil NZ Ltd., cited in* Attorney General *v.* Mobil Oil NZ Ltd.*, New Zealand High Court, 1 July 1987, 4 ICSID Reports 123/4.*

by way of making the host State a party to the consent agreement. Alternatively, written approval by the host State may be affixed directly to the agreement between the constituent subdivision or agency and the investor. In addition, the consent clause may confirm that the investor's partner is indeed a designated subdivision or agency. The Model Clauses of 1993 offer the following choices in regard to a constituent subdivision or agency:

> ***Clause 5***
>
> *The name of constituent subdivision or agency is [a constituent subdivision]/[an agency] of the Host State, which has been designated to the Centre by the Government of that State in accordance with Article 25(1) of the Convention. In accordance with Article 25(3) of the Convention, the Host State [hereby gives its approval to this consent agreement]/[has given its approval to this consent agreement in citation of instrument in which approval is expressed]/[has notified the Centre that no approval of [this type of consent agreement]/[of consent agreements by the name of constituent subdivision or agency] is required]].*[71]

As noted in the Model Clauses, it is clear that the direct expression of approval of consent can only be used if the Government is also a party to the agreement.

Time of approval

The Convention does not specify at what time the host State's approval of consent, given by one of its constituent subdivisions or agencies, must be obtained. Approval may be given in advance of consent or thereafter. But it should be kept in mind that the validity of consent by a constituent subdivision or agency depends on its approval. Therefore, the actual date of consent is not before its approval. The date of consent triggers a number of consequences under the Convention (see section 5 above).

Approval of consent must be obtained by the time ICSID proceedings are instituted. A request for arbitration relating to a constituent subdivision or agency must contain information on its designation to the Centre and on the approval of its consent. Failure to provide this information in the request may lead to its rejection by the Secretary-General in accordance with his screening power under Art. 36 (3) of the Convention.

Waiver of approval

The possibility of a notification to the Centre that no approval of a consent to jurisdiction by a constituent subdivision or agency is required has its reason in the constitutions of some States. If the matter is within the exclusive competence of a constituent subdivision it may be unconstitutional to require the approval by the central government.

The notification that no approval is required would normally be made in general terms for the future in respect of a particular constituent subdivision or agency. It may be limited to certain types of consent agreements. A notification by the host State that no approval of a particular consent agreement is required is also possible. This is barely distinguishable from actual approval. But it may satisfy constitutional requirements in the host State if the subdivision or agency

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[71] *4 ICSID Reports 361.*

has exclusive competence under domestic law and if no advance notice has been given that approval is not required.

The Centre has published a list of designated constituent subdivisions and agencies as document ICSID/8-C. This document also indicates in respect of which subdivisions or agencies Contracting States have notified the Centre that approval of consent is not required. This document is available on ICSID's website at ***http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-c.htm*** .

Effect of approval on host State

Approval by the host State of consent to ICSID jurisdiction by a constituent subdivision or agency does not amount to consent to jurisdicion by the host State itself. Even if the host State has interfered in the investment activity, it would be impossible to bring it before the Centre without independent consent. The host State's obligation would be limited to ensuring the enforcement of an award against its constituent subdivision or agency.

The situation may be different if the host State abolishes or otherwise eliminates the procedural capacity under the ICSID Convention of a constituent subdivision or agency after having given approval of consent. In such a case an argument may be made that the host State is substituted for its constituent subdivision or agency for purposes of ICSID's jurisdiction. This would follow from the principle, contained in Art. 25 (1) of the ICSID Convention, that consent once given may not be withdrawn even indirectly (see section 9 above).

Summary:

- **In some countries investment agreements are entered into by constituent subdivisions or agencies that are legally distinct from the State.**
- **Constituent subdivisions or agencies may become parties to ICSID proceedings.**
- **Party status for constituent subdivisions or agencies requires their designation to the Centre and the approval of their consent by the State.**
- **Approval of consent may be given informally.**
- **A State may notify the Centre that the approval of the consent of certain constituent subdivisions or agencies is not required.**

TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation.

1. Can ICSID's jurisdiction be established through a unilateral act of the host State?
2. Is it possible to give consent to ICSID's jurisdiction with respect to disputes that may arise in the future?
3. Does every reference to ICSID arbitration in national legislation amount to an expression of consent to jurisdiction?
4. Is it possible for a host State to withdraw its expression of consent to ICSID's jurisdiction contained in national legislation by repealing the legislation? Can the investor forestall such an attempt to withdraw consent?
5. Is it possible to establish ICSID's jurisdiction merely through a provision in a treaty between the host State and the investor's State of nationality?
6. Who are the beneficiaries of consent to ICSID's jurisdiction expressed in a treaty?
7. What factors determine the time of consent?
8. Why is the time of consent important?
9. Is it possible to give consent to jurisdiction after the institution of arbitration proceedings?
10. Is it possible to give consent to ICSID's jurisdiction not in general terms but only in respect of certain types of issues?
11. Is it necessary to exhaust local remedies before instituting ICSID arbitration?
12. Is it plausible to argue that consent to ICSID's jurisdiction given by a State must be interpreted restrictively since such a consent constitutes a derogation from that State's sovereignty?
13. Can a State terminate consent to the jurisdiction of ICSID by cancelling an investment licence that contained the consent clause?
14. Is it possible for a province or municipality of a host State to become a party to ICSID arbitration?
15. If the answer to question 14 is affirmative, in what way does a host State control the giving of consent by constituent subdivisions or agencies?

HYPOTHETICAL CASES

Extraction Corp. *v.* Tadistan

In May 1993 Extraction Corp., a company established under the law of Capitalia, started investing in an oil and gas mining enterprise in the State of Tadistan. The investment is governed by an agreement of the same year between Tadistan and Extraction Corp. containing a stabilization clause which exempts the investor from future legislation "unless such future legislation shall be accepted specifically by the investor". The agreement does not contain any reference to ICSID.

In 1997, Tadistan issued Government Decree 77, having the force of law, which sets out the legal framework for foreign investors. The Decree offers national treatment and constant protection and security to foreign investors. Art. 7 of Government Decree 77 provides:

> *"All foreign nationals engaged in lawful investment activity in the Republic of Tadistan shall have the right to utilize the settlement machinery of the International Centre for Settlement of Investment Disputes".*

In June 1998 Extraction Corp. addressed a letter to the government of Tadistan expressing its willingness to have its investment governed by Government Decree 77 of 1997.

In 1999 Tadistan introduced a new tax code which provides for a substantial increase of corporation tax for foreign corporations doing business in Tadistan. Extraction Corp. immediately contested the application of the new tax code to itself arguing that this would violate the stabilization clause contained in the agreement of 1993 and the principle of national treatment contained in Decree 77 of 1997.

In June 2000 Capitalia and Tadistan entered into a Bilateral Investment Treaty (BIT). Art. 8 of this BIT provides:

> *"The Contracting Parties shall assent to a demand for arbitration or conciliation under the auspices of the International Centre for Settlement of Investment Disputes by investors of the other Contracting Party in respect of any investment made after the entry into force of this agreement."*

In the course of 2001 the dispute between Extraction Corp. and Tadistan escalated and Extraction Corp. threatened to institute arbitration. In December 2001 Tadistan, through Government Decree 136, repealed Article 7 of Government Decree 77 of 1997.

In February 2002 Extraction Corp. is ready to file a Request for Arbitration with ICSID.

Please advise Extraction Corp. on its chances to obtain a favourable decision on jurisdiction and help in the drafting of a Request for Arbitration.

Alternatively:

Advise Tadistan on its chances to obtain a decision declining jurisdiction and help in the drafting of a memorial containing relevant objections to the jurisdiction of ICSID.

Capitalia and Tadistan have been parties to the ICSID Convention since 1972 and 1986 respectively. They are also parties to the Energy Charter Treaty since 1994.

Mark & Frank Inc. *v.* Radia

Mark & Frank Inc.(M&F) is a garment business incorporated in the State of Eureka. In October 1989 M&F applied for an investment licence in the Republic of Radia. The investment was directed at the setting up of a production facility in order to take advantage of low labour costs in Radia.

The application for the licence relied on Radia's Investment Code of 1982. The Investment Code contains the following Article 9:

> *"Investors of foreign nationality holding a valid investment licence may submit a dispute with the Republic of Radia and the Republic of Radia hereby consents to the submission thereof, alternatively to the domestic courts of Radia, to the International Centre for Settlement of Investment Disputes or to arbitration in accordance with the UNCITRAL Rules if the dispute arises out of or relates to expropriation or compensation for expropriation of the investment. In the case of international arbitration, the accepted principles of international law shall apply."*

Upon M&F's application, the Radia National Investment Board (RNIB) issued the investment licence in January 1990. The licence states that it "is issued under and is controlled by the Investment Code of 1982".

At the time the licence was issued, Radia had signed but not yet ratified the ICSID Convention. After ratification, the ICSID Convention entered into force for Radia on 1 October 1990. Soon after ratification, Radia designated RNIB to ICSID as a constituent subdivision or agency in accordance with Article 25(1) of the ICSID Convention. In making the designation, Radia did not make a notification under Article 25(3) of the ICSID Convention that no approval of any consent to jurisdiction by RNIB would be required. Eureka has been a party to the ICSID Convention since 1986.

In 2001 a dispute arose between M&F and the RNIB concerning the employment practices of M&F. RNIB charged that M&F routinely recruited local labour for low paying menial jobs but reserved better paid managerial positions to nationals of Eureka. As a consequence of the dispute, RNIB cancelled the investment licence in November 2001. All nationals of Eureka who were present in Radia in connection with the activities of M&F were given 48 hours to leave the country. The premises of M&F in Radia were put under the administration of a commissioner appointed by RNIB. In June 2002 M&F filed a Request for Arbitration with ICSID against Radia and RNIB. The Request was duly registered and the Tribunal constituted.

Before the ICSID Tribunal, Radia and RNIB present the following objections to ICSID's Jurisdiction:

1. The consent to ICSID's jurisdiction contained in Art. 9 of the Investment Code of 1982 only applies to foreign investors holding a valid investment licence. As a consequence of the cancellation of the licence in November 2001, M&F is no longer entitled to institute ICSID proceedings.
2. Art. 9 of the Investment Code provides, alternatively for dispute settlement by domestic courts, ICSID and under the UNCITRAL Rules. Before instituting proceedings, the parties must reach agreement on one of the three methods.
3. Art. 9 of the Investment Code only relates to disputes arising out of an expropriation. The measures of November 2001 did not constitute an expropriation.
4. At the time of the purported consent to ICSID's jurisdiction, Radia had not yet ratified the ICSID Convention. Any consent expressed prior to the Convention's entry into force for Radia was premature and is invalid.
5. M&F has failed to exhaust local remedies in Radia. In referring to "accepted principles of international law", Art. 9 of the Investment Code preserved the requirement to exhaust local remedies.
6. In filing a Request for Arbitration against Radia, M&F chose the wrong respondent. The complaint is really directed against RNIB an independent agency under the law of Radia with separate legal personality.
7. The Request for Arbitration against RNIB must fail because RNIB has never consented to ICSID arbitration. Even if such consent could be construed, it has never been approved by Radia in accordance with Art. 25(3) of the ICSID Convention.

Please discuss these objections to ICSID's jurisdiction. Try to make arguments in favour and against each of them. Try to anticipate the likely decision of the Tribunal.

FURTHER READING

Books

- ***Dolzer, R., Stevens, M.***, Bilateral Investment Treaties (1995).
- ***Schreuer, C.***, The ICSID Convention: A Commentary (2001).

Articles

- ***Amerasinghe, C. F.***, How to Use the International Centre for Settlement of Investment Disputes by Reference to its Model Clauses, 13 Indian Journal of International Law 530 (1973).
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- ***Szasz, P. C.***, The Investment Disputes Convention—Opportunities and Pitfalls (How to Submit Disputes to ICSID), 5 Journal of Law and Economic Development 23 (1970).
- ***Tupman, W. M.***, Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes, 35 International and Comparative Law Quarterly 813 (1986).

Documents

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States:
  http://www.worldbank.org/icsid/basicdoc/9.htm
- List of Contracting States and other Signatories of the Convention:
  http://www.worldbank.org/icsid/constate/c-states-en.htm
- Contracting States and Measures Taken by them for the Purpose of the Convention:
  http://www.worldbank.org/icsid/pubs/icsid-8/main-eng.htm
- Bilateral Investment Treaties, 1959-1996, Chronological and Country Data
  http://www.worldbank.org/icsid/treaties/treaties.htm
- ICSID Model Clauses:
  http://www.worldbank.org/icsid/model-clauses-en/main.htm
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