



CONSENT TO JURISDICTION OF THE ICSID

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Abstract

The ICSID mechanism is voluntary and the disputes can be submitted only by consent of both the host state and the investor, which has to be in writing. It is not necessary for a state to express its consent on the level of government. The consent may be given also by a constituent subdivision or agency of the state. Unless the host state and the investor agree otherwise, consent to arbitration under the Convention is deemed to be consent to the exclusion of any other remedy. The parties may also agree on certain conditions concerning their consent to arbitration, particularly on exhaustion of local remedies or attempts to amicable settlement.

Consent under the ICSID Convention is irrevocable and none of the parties may withdraw its consent unilaterally. If the consent is expressed in an arbitration clause which forms a part of an investment agreement, it may survive the invalidity or termination of the agreement in light of the separability doctrine. The changes in the legislation and termination of the BIT in which the consent of the state was provided would not affect only those investors who had accepted the offer and expressed its consent. It is not required for consent to be in a single instrument. It may be established in different forms: through the investment agreements between the host state and the investor, through the national legislation of the host state and through the international (bilateral or multilateral) treaties of the host states. Although the more common and traditional way of expressing consent was through the direct agreements between the parties, nowadays the situation is different and majority of the cases that have been submitted to the ICSID is based on consent provided in BITs.

In the BIT and in the investment agreement disputes may be subjected to different forums. In such a case, the claims arising from the contract and the claims arising from the treaty have to be distinguished. Also, the consent provided in one BIT may be extended to the other

BIT through the most-favored-nation clause if such was the intention of the contracting states. Along with more than 1000 BITs, provisions referring to the ICSID have been inserted also to 4 multilateral treaties: the NAFTA, the Colonia Investment Protocol to MERCOSUR the Cartagena Free Trade Agreement and the Energy Charter Treaty. Expression of consent in BITs and multilateral treaties opened a door to ICSID for a large number of investors.

Introduction

More than 40 years passed from the establishment of the International Centre for Settlement of Investment Disputes, which provides arbitration and conciliation services as an autonomous institution. Now, 143 states are parties to the ICSID Convention and till present 263 disputes have been submitted to the Centre. But, the significance of the ICSID is not based only on these quantitative indicators. Throughout its history, the Centre became a forum, which contributed to development and increase of foreign investment flow by resolving major legal issues concerning international investments. Knowing that they can stand with the states on equal foot before the ICSID tribunals gives the investors additional stimulus and minimizes their concerns about the possible disputes. But, in order to be able to submit the dispute to the Centre certain conditions must be met, the most important of which is consent of the parties. Since, the ICSID mechanism is voluntary both the host state and the investor have to express their consent to jurisdiction of the ICSID if they want to use it.

In the first chapter of the paper, the consent under the ICSID Convention and its features would be examined. This chapter will cover issues such as the scope of the consent, formal requirements for consent, time, interpretation and conditions for consent, consent given by constituent subdivision or state agency. As a separate question the irrevocable nature of the consent will be analyzed under different circumstances.

Parties may express their consent in three different forms, each of which will be examined as a separate question in the second chapter. Special attention will be given to most problematic issues in practice such as meaning of the provisions of national investment legislations referring to the ICSID and difference between them, the problem of incorporation when consent is stated in direct agreements between the parties, and problems with the consent

provided in bilateral investment treaties, such as the conflict between treaty and contract claims in the presence and absence of umbrella clauses, and extension of consent through the most-favored-nation clause. Multilateral treaties which provide for consent to ICSID arbitration also will be examined as they are gaining more significance and more and more disputes are being submitted on their basis.

The problems mentioned above are actual problems, with which the ICSID tribunals are faced and try to find out some solutions and make the issues clear. Since, the case-law of ICSID is the most reliable source to find out the current approach, relevant cases also will be examined.

The problems touched in this paper might be useful for the people who are interested in basic information about the consent to the ICSID, the most problematic issues and existing approaches concerning them.

CHAPTER I

Consent as the Cornerstone of Jurisdiction of the ICSID and Its Main Features

1. Consent under Article 25(1) of the ICSID Convention

Probably the main condition or “the cornerstone of the jurisdiction” of the International Centre for Settlement of Investment Disputes (hereinafter the ICSID or the Centre) is the consent of the parties.¹ Established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the ICSID Convention or the Convention), the ICSID mechanism is voluntary and the disputes can be submitted only by consent of both the host state and the investor. This is stated in Article 25(1) of the Convention:

“The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State (or any constituent subdivision or agency of a contracting state designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute *consent* in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”²

Like every arbitral tribunal, authority of an ICSID tribunal is based on an agreement between the parties, in which they express their consent to submit the dispute to the arbitration.

Article 25(1) requires consent to be in writing. A written form requirement for an arbitration agreement was not a novelty of the Convention, since Article II of the New York Convention, which was adopted several years earlier, also required an arbitration agreement in writing.³ Under the New York Convention, an agreement in writing includes an arbitral clause in

¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), in 1 ICSID Reports 1993, pp. 23-33, para 23 at 28

² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965), in 1 ICSID Reports 1993, pp. 3-22

³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), in Documents Supplement to International Commercial Arbitration: A Transnational Perspective, pp. 1-6, Tibor Varady et al. eds., 3rd ed. 2006

a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The ICSID Convention itself doesn't explain what constitutes a written form. If we look at the Report of the Executive Directors on the Convention (hereinafter the RED), we can see similarities with the New York Convention, such as arbitral clause in a contract or a separate arbitration agreement.⁴ Like the New York Convention, ICSID Convention also does not require the consent of both parties to be expressed in a single instrument. However, there are some differences due to the specific nature of states as parties to the arbitration agreement. Under the ICSID Convention a state may express its consent in its investment legislation or in its international treaties, which would be sufficient for written form requirement.

It should be noted that, participation of a state in the Convention can not be considered as its consent and this does not mean that state or its nationals have to use ICSID mechanism for resolution of investment disputes.⁵ This issue was discussed during the drafting of Convention due to the fact that representatives of some developing countries expressed their fear of compulsory consent by the mere existence of the Convention.⁶ The result of discussions is reflected in the Preamble of the Convention. As stated in the last paragraph of Preamble of the Convention:

“...no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”⁷

This shows the voluntary nature of the ICSID mechanism and that there has to be consent by a state in respect to relevant disputes. Regarding this issue Delaume states that “it is within the sole

⁴ Report of the Executive Directors, *supra* note 1, para. 24 at 28

⁵ Lamm, Carolyn B., Jurisdiction of the International Centre for Settlement of Investment Disputes, 6 ICSID Review-Foreign Investment Law Journal 464 (1991)

⁶ Schreuer, Christoph H., The ICSID Convention: A Commentary 192, CUP 2001

⁷ The ICSID Convention, *supra* note 2 at 4

discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID.”⁸ Article 25(4) makes this issue clear by stating that:

“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre...”⁹

If each dispute may be submitted to the Centre only if the state gives its consent what is the reason of such a notification. According to the RED such a notification serves as information for the investors who might expect from the states to give consent for all disputes since they are party to the Convention.¹⁰ By submitting such a notification misunderstandings may be avoided. Till today, only 7 states have submitted such notifications.¹¹

It is not necessary for a state to express its consent on the level of government. According to Article 25 of the Convention, the consent may be given by a constituent subdivision or agency of a state.¹² But two conditions have to be fulfilled in order to do this. The state must designate such a subdivision or agency to the Centre and has to approve the consent given by such a subdivision or agency. The second condition may be avoided if the state notifies the Centre that no such approval is required. Investors should keep in mind two important points. First is that the approval by the host state does not constitute the consent of the state itself.¹³ The consent still belongs to the relevant subdivision or agency. And the second point is that time of the consent would be the date when both the consent and the approval is given.¹⁴ At present, 9 states have

⁸ Delaume, Georges R., ICSID Arbitration: Practical Considerations, 1 Journal of International Arbitration 105 (1984)

⁹ The ICSID Convention, *supra* note 2 at 10

¹⁰ Report of the Executive Directors, *supra* note 1, para 31 at 29

¹¹ Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID Documents 8-D (2007), available at www.worldbank.org/icsid

¹² The ICSID Convention, *supra* note 2 at 9/10

¹³ Schreuer, Christoph H., Dispute settlement. International Centre for Settlements of Investment Disputes ; 2.3: Consent to arbitration 43 (2003)

¹⁴ *Id.* at 43

designated 13 state agencies in total and territorial subdivisions have been designated only by Australia and the UK.¹⁵

Time of the consent is the date by which both of the parties have agreed on the jurisdiction of the Centre.¹⁶ Time of the consent is important as it has some legal consequences:

1. The consent becomes irrevocable
2. Resort to domestic courts or to other forums becomes unavailable unless the parties agreed otherwise
3. Diplomatic protection by the investor's state becomes unavailable
4. The nationality requirement of the foreign investor must be met at the time of the consent.
5. Arbitration Rules in effect at the time of consent will govern the proceedings, unless the parties agreed otherwise¹⁷

Due to some ambiguities of the consent there might be some problems concerning its interpretation. Parties may argue on restrictive or broad interpretations. In such situations, tribunals tend to follow the path taken by the tribunal in *Amco v. Indonesia*, which stated:

“...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.”¹⁸

Unless the host state and the investor agree otherwise, consent to arbitration under the Convention is deemed to be consent to the exclusion of any other remedy.¹⁹ It should be noted

¹⁵ *supra* note 11 at 8-C

¹⁶ Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (1984) in 1 ICSID Reports at 154 (1993)

¹⁷ *supra* note 13 at 25/26

¹⁸ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 394

¹⁹ The ICSID Convention, *supra* note 2 at 10

that the consent to the jurisdiction of the ICSID also constitutes a submission to the rules and regulations of the Centre.²⁰

As arbitration depends on the agreement between parties, the parties may agree on some conditions concerning their consent to arbitration.²¹ This is same with the consent to the jurisdiction of the ICSID. One of such conditions is attempt to resolve the dispute by amicable settlement. In many investment agreements and BITs the provisions to this effect can be found. Although such provisions serve a good purpose such as avoidance of unnecessary further costs for resolution of the dispute, in practice they generally cause problems. The problem is the following. Provisions that provides for amicable settlement as a condition usually include a time limit for an attempt and only after that time limit parties may refer to arbitration. It might be difficult to establish when this time begins to flow. Thus, parties should avoid such conditions or establish time frames in such a manner that they would not cause difficulties.

The other and probably more important condition is exhaustion of local remedies. As stated in Article 26 of the Convention: "...A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."²² Thus, under the Convention exhaustion of local remedies is not a general condition. It is not necessary for the applicant to exhaust local remedies in order to submit its request to the Centre. This would be the case only if the state used its right and required exhaustion of local remedies. If the state does not subject its consent to exhaustion of local remedies it is deemed to waive such right.²³

²⁰ *Id.* at 14

²¹ *supra* note 13 at 31

²² The ICSID Convention, *supra* note 2 at 10

²³ *supra* note 18 at 526

Due to its nature, it is a condition that may be required only by one of the parties, the host state and investors would like to avoid such conditions in order to get remedies as early as possible. As Schreuer says, this requirement does not really serve any useful purpose and it would be both in the interest of the host state and the investor to avoid such a condition.²⁴

²⁴ *supra* note 6 at 395

2. Irrevocability of Consent

As stated in Article 25(1) of the ICSID Convention “When the parties have given their consent, no party may withdraw its consent unilaterally.”²⁵ This provision shows the irrevocable nature of the consent to ICSID jurisdiction. This is a feature which belongs to arbitration in general, since after agreeing to arbitration none of the parties may revoke its consent unilaterally. Otherwise, the agreement would not make sense and parties would not be able to rely on it. It is clear that the Convention prohibits withdrawal (or revocation) of the consent unilaterally. But what if the consent is not revoked directly, but the instrument in which it is provided is terminated or in another way ceases to have effect?

If the consent is expressed in an arbitration clause which forms a part of an investment agreement, the invalidity or termination of the agreement would not automatically affect it. In light of the separability doctrine, the arbitration agreement is a separate contract, independent and distinct from the main contract. Consequently its validity neither depends nor is bound by that of the main contract and vice versa. According to Schwebel “whenever parties enter into an agreement containing an arbitration clause, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.”²⁶ Even if the contract between the investor and the host state is terminated, the arbitration clause survives.

What happens if the very existence of the investment agreement is under question? Is it possible to sever arbitration clause from the main contract which never came into existence? The views on this issue are different. According to Sanders whose opinion is also cited in *Sojuznefteexport v. JOC Oil* “if there is no contract at all, the legal basis of the arbitrator’s powers

²⁵ The ICSID Convention, *supra* note 2 at 9

²⁶ Schwebel, S.M., *International Arbitration: Three Salient Problems*, 5 (1987)

which reside in the arbitration clause found in the contract is also missing.”²⁷ The position of Schwebel is similar: “...if the agreement was never entered into, then it is invalid as a whole, including its arbitration clause.”²⁸ On the other hand, some scholars state that “separability extends the effect of the arbitration clause to cover the claims that the main contract is void *ab initio* or never came into existence. Fouchard, Gaillard and Goldman take the position that, “a mere allegation that a main contract never existed is not considered as sufficient for a denial of arbitrator’s jurisdiction.”²⁹ If we refer to the Convention itself, we can find Article 41, under which the tribunal is the judge of its own competence and any objection to its jurisdiction shall be considered by the tribunal itself.³⁰ Even if the party objects to jurisdiction on the ground that the investment agreement does not exist and thus there is no consent, it is the tribunal who will decide on this issue. Since there is no ICSID case-law concerning the separability of arbitration clauses from the agreements, the existence of which are disputed it is difficult to say what the prevailing approach of the ICSID tribunals is. However, it is clear that, once the state entered into a contract with an investor in which gave its consent to jurisdiction of ICSID, that consent would survive termination and invalidity of the underlying contract.

Unless the offer to consent which is expressed in a BIT is accepted by an investor, the offer of the state is revocable and it would not survive termination of the BIT. However, if an investor accepted the offer and there is a mutual consent established, it would survive termination of the BIT.³¹ It should be noted that, under Article 70(1) (b) of Vienna Convention

²⁷ Sojuznefteexport v. JOC Oil reprinted in Varady, Tibor et al., International Commercial Arbitration: A Transnational Perspective 135 (3rd ed. 2006)

²⁸ *supra* note 26 at 11

²⁹ Fouchard et al. On International Commercial Arbitration, 211 (1999)

³⁰ The ICSID Convention, *supra* note 2 at 14

³¹ *supra* note 6 at 259

on International Treaties parties may agree that certain articles of the treaty (as dispute settlement provisions) will continue to apply for definite time (usually 10-20 years) after its termination.³²

Of course, states may change their national legislation and this may concern also the provisions that express the offer to consent to jurisdiction of the ICSID. The changes in the legislation would not affect only those investors who had accepted the offer and expressed its consent.³³ However, there might be situations when the consent provided in the legislation would be irrevocable even if the investor had not accepted it. One of such situations is when the laws itself provide that the consent is irrevocable.³⁴ There is an opinion that a basis for such a situation might be also the principle of estoppel.³⁵ If the investor relies on the relevant provision of the law and prejudices its position because of this reliance, then theoretically the consent might be considered as irrevocable. The weak point of this theory is that according to it, every consent provided in national law would be irrevocable because investors rely on those provisions and make investments. However, binding and irrevocable consent may be established only if both of the parties express their consent. The approach of tribunals is not known since there is no case-law concerning such an issue.

An interesting situation concerning the revocation of consent arose in *Alcoa Minerals v. Jamaica*. In 1968, Alcoa entered into an investment agreement concerning aluminum production with the government of Jamaica in which the consent to ICSID arbitration was expressed.³⁶ The dispute arose between the parties when Jamaica adopted a law increasing the tax on the bauxite mining. When Alcoa submitted its request for arbitration Jamaica objected to the jurisdiction of

³² The Vienna Convention on the Law of Treaties, 8 ILM 679 (1969)

³³ *supra* note 13 at 38

³⁴ Hirsch, Moshe, The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes 53 (1993)

³⁵ *Id.* at 54

³⁶ Schmidt, John T., Arbitration under the auspices of the International Centre for settlement of Investment disputes: implications of the decision on jurisdiction in *Alcoa minerals of Jamaica Inc. v. Government of Jamaica*, 17 Harvard International Law Journal 90 (1976)

the Centre stating that it had notified the Centre that “legal dispute arising directly out of an investment relating to minerals or other natural resources” shall not be subject to the jurisdiction of the Centre. By saying this Jamaica invoked Article 25(4) of the Convention. The tribunal held that such a notification could not affect the previous agreement as it is applicable only to future disputes. And according to the tribunal to decide otherwise would very largely, if not wholly, deprive the Convention of any practical value.³⁷ It is impossible not to agree with the reasoning of the tribunal.

³⁷ *Id.* at 103

CHAPTER II

Forms of Consent

As stated in the RED, consent of a state and an investor is not required to be in a single instrument.³⁸ In practice, this gave rise to different forms of consent to the jurisdiction of ICSID:

1. Consent may be expressed in investment agreements between the host state and the investor.
2. Consent may be reached through the national legislation of the host state: State offers its consent in its legislation and investor accepts this offer.
3. Consent may be reached through the international (bilateral or multilateral) treaties of the host states: state offers its consent in its bilateral or multilateral treaties and investor accepts this offer.³⁹

The phrase “arbitration without privity” is used in order to describe the second and third forms since they create arbitration agreement even without direct relationship or previous contacts between the parties.⁴⁰ The majority of the cases now pending before the Centre are cases of “arbitration without privity”

3. Consent in Direct Agreements between the Parties

The traditional way of giving consent to ICSID jurisdiction is through a direct agreement between the host state and the investor. Till the increase of the claims based on the bilateral investment treaties (hereinafter the BITs), the majority of cases brought to ICSID arbitration were based on such agreements.

³⁸ Report of the Executive Directors, *supra* note 1, para 24 at 28

³⁹ *supra* note 13 at 6

⁴⁰ Paulsson Jan, Arbitration Without Privity, 10 ICSID Review-Foreign Investment Law Journal pp. 232-257 (1995)

In general, arbitration agreements can be in two forms:

1. *Compromis*: parties agree to submit to arbitration already existing disputes
2. *Clause compromissoire*: parties agree to submit to arbitration disputes that may arise in the future⁴¹

Paragraph 24 of the DER clearly shows that both of these forms may be used in order to submit disputes to ICSID:

“...Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromise regarding a dispute which has already arisen.”⁴²

As it is easier to agree upon arbitration when there are no disputes arisen yet, *clause compromissoire* is much more common in practice and this is true not only for ICSID, but also for arbitration in general. However, there are also disputes which were submitted to the Centre on the basis of compromise between the parties.⁴³

Since the proper drafting of arbitration agreements is important in order to avoid ambiguities and possible misunderstandings, the Centre has published several model clauses which might be useful which might be useful in the drafting process.⁴⁴ Parties can adjust these clauses to the specific circumstances. The model clause for future disputes provides:

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”) 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

⁴¹ Varady, Tibor et al. *International Commercial Arbitration: A Transnational Perspective* 85 (3rd ed. 2006)

⁴² Report of the Executive Directors, *supra* note 1, para 24 at 28

⁴³ *Swiss Aluminium Ltd and Icelandic Aluminium Company Ltd. v. Iceland* (ICSID Case No. ARB/83/1) and *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1)

⁴⁴ *supra* note 13 at 7

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”).⁴⁵

If the parties want to submit already existing dispute they can use the following model clause:

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 {hereinafter the “Convention”), the following dispute arising out of the investment described below:...⁴⁶

The Convention does not require the consent of the parties to be expressed in a single instrument.⁴⁷ The host state and the investor may give their consent in separate documents such as application for investment license and the approval given by the state. It should be noted that, by not requiring the consent to be in a single instrument, the Convention opened a stage for consents reached through the national legislation and international treaties, which will be discussed below.

It is not necessary for the consent to be expressed in the investment agreement itself. The agreement may refer to another instrument in which the consent is provided. In *CSOB v. Slovakia*, Claimant based the Centre’s jurisdiction on 3 grounds.⁴⁸

⁴⁵ ICSID Model Clauses, Clause 1, available at www.worldbank.org/icsid/

⁴⁶ *Id.* Clause 2

⁴⁷ Report of Executive Directors, *supra* note 1, para 24 at 28

⁴⁸ *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4) Decision on Objections to Jurisdiction 24 May 1999, para 4, available at www.worldbank.org/icsid/

1. Article 8(2) of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal protection of Investments, signed in 1992
2. Notice published in the Official Gazette of the Slovak Republic on October 22, 1993, in which the Slovak Foreign Ministry declared that the BIT had entered into force on January 1, 1993 (Thus, the BIT was binding on Slovak Republic, even if it had not entered into force as between the two states)
3. Article 7 of the Consolidation Agreement, which incorporated the BIT by reference

The Slovak Republic raised its objections to jurisdiction by stating that the BIT did not enter into force and that the Notice did not bring it into force. Article 12 of the BIT, which was about its entry into force, stated:

“Each Party shall give notice to the other Party of the completion of the constitutional formalities required for this Agreement to enter into force. The treaty shall come into force as of the date of the division of the two Republics.”⁴⁹

Exchange of notices did not take place, however the division occurred on January 1, 1993. Interpreting this article, the tribunal agreed with the Slovak Republic that “once the exchange of notices had taken place, the treaty would have been effective as of the date of division.” The tribunal did not decide whether the BIT entered into force or not and held that: “the uncertainties related to its entry into force prevent that instrument from providing a sound basis upon which to found the parties’ consent to ICSID jurisdiction.”⁵⁰

Regarding the Notice, the tribunal stated that it was a unilateral declaration, and as such it required the intention of the state to be taken into account. According to tribunal the intention of Slovak republic to be bound by the BIT through the Notice was not established. According to

⁴⁹ *Id.* Para 39-41

⁵⁰ *Id.* Para 43

tribunal it could not be considered as an estoppel, because CSOB did not rely in the BIT being in force. Turning to the third ground of claimant, namely the Consolidation Agreement, the tribunal examined the negotiations between the parties in respect to the provision which incorporated the BIT. Finding that the issue was discussed between the parties, that the domestic arbitration in Prague was rejected by the Slovak Republic and that the words “after it is ratified” was replaced with the signature date of the BIT, the tribunal held that the parties intended to incorporate the arbitration clause of the BIT into the Agreement and thus, the consent requirement was met.⁵¹ The reasoning the tribunal based on the last sentence of Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration, which states that: “The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”⁵²

What makes this case interesting is that, although the consent of the Slovak Republic was expressed in the BIT, the consent to ICSID jurisdiction was reached through the direct agreement between the parties, and not through the BIT.

Another kind of problematic situation may arise when the host state and the investor enter into several agreements interrelated with the main investment agreement. According to ICSID case-law, in such situations the consent provided in one agreement would be interpreted in the context of the overall relationship between the parties and the consent may cover all related agreements depending on the circumstances.⁵³

⁵¹ *Id.* Para 47-55

⁵² UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration (1985) reprinted in Documents Supplement to International Commercial Arbitration: A Transnational Perspective, pp. 24-38, Tibor Varady et al. eds., 3rd ed. 2006

⁵³ *supra* note 13 at 34

4. Consent through National Legislation

An investment agreement between host state and investor is not an only way to give consent to jurisdiction of ICSID. Consent can also be reached through national legislation of host state. This type of consent occurs when a state inserts a provision into its investment law, by which shows its consent to submit investment disputes to the Centre. This is considered as an offer and if investor accepts this offer and gives its own consent, then this becomes binding on both parties.⁵⁴

These kinds of provisions are generally adopted by developing countries in order to improve their investment climate and to attract foreign investments.⁵⁵ There are about 20 investment laws that contain such kind of provisions.⁵⁶ Although the main purpose is same, the way that states construct such provisions are different and might have different legal consequences. Two kinds of provisions have to be distinguished:

1. a provision which shows the state's consent to refer investment disputes to the centre.
2. a provision which requires a further specific agreement between state and investor and doesn't establish state's consent by itself.

First type of provisions can refer to ICSID as the sole or one of the alternative methods.⁵⁷ In *Tradex v. Albania* the tribunal examined Albanian Law on Foreign Investment of 1993 in order to determine its jurisdiction. According to the tribunal Article 8(2) of this law constituted

⁵⁴ Report of Executive Directors, *supra* note 1, para 24 at 28

⁵⁵ *supra* note 34 at 51

⁵⁶ Shihata Ibrahim F.I., 3 The World Bank in a Changing World 735 (2000)

⁵⁷ *supra* note 13 at 11

an unambiguous consent: "...the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the ICSID..."⁵⁸

Investment legislations of Guinea, Botswana, Sri Lanka, Togo and Zaire also follow this approach and refer to the ICSID as the sole method of dispute settlement.⁵⁹

However, mainly states refer to ICSID as one of the possible means of dispute settlement. Alternatives to ICSID generally include dispute settlement procedures agreed by the parties, provided in the BITs, Court of Arbitration of the ICC or *ad hoc* arbitration under the UNCITRAL Rules.⁶⁰ In *SPP v. Egypt* the tribunal dealt with a provision which referred to ICSID as one of the several means. Art. 8 of the Egyptian Law No. 43 of 1974 stated:

"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 states and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies."⁶¹

Egypt argued that this provision only lists the possible alternatives and a further specific agreement was necessary in order to establish consent. However, after examining the provision the tribunal found 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 Convention in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty."⁶²

⁵⁸ *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case ARB/94/2), Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47 (2002)

⁵⁹ *supra* note 6 at 200

⁶⁰ *Id.*

⁶¹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 126

⁶² *Id.* at 161

Since there was no agreement between the parties and no BIT between the relevant states, reference to ICSID was enough to establish Egypt's consent in that case. In legislations of Cameroon, Chad, Kazakhstan, Somalia, Tunisia, Yemen and Zambia ICSID is also shown as one of the dispute settlement methods.⁶³

As stated above, there are some provisions which require further agreement between the parties to establish consent.⁶⁴ These types of laws cannot be considered as consent in the meaning of art.25 (1).

The relevant provisions of legislation shows only consent of the host state. The investor also has to give its consent by accepting the offer of the host state. The investor may do this by instituting the proceedings of the Centre.⁶⁵ In *Tradex v. Albania*, where the consent of the Albania was found in its national legislation, request for arbitration submitted by Tradex constituted its consent.⁶⁶ But it would be better for an investor to accept the offer earlier, since after this acceptance a mutual consent is constituted, which becomes irrevocable and which would not be affected by changes or repeals in the legislation.⁶⁷

There are several ways in which investor may express its acceptance. Investor may submit a notification to the host state informing acceptance of the state's consent expressed in legislation. Investor may show its acceptance also in its investment license application.⁶⁸ Some laws, which refer to the Centre among other alternatives, require the investor explicitly to show in its application that the ICSID is chosen as dispute resolution mechanism.⁶⁹ There may be a

⁶³ *supra* note 6 at 201

⁶⁴ *Id.* at 204

⁶⁵ Amerasinghe C.F., Submissions to the Jurisdiction of the ICSID, 5 Journal of maritime Law and Commerce 217 (1973/74)

⁶⁶ *supra* note 59 at 47

⁶⁷ *supra* note 6 at 207

⁶⁸ *supra* note 13 at 14

⁶⁹ Those states are: Cameroon, Cote d'Ivoire, Central African Republic, Mauritania and Zaire, See: *supra* note 6 at 208

requirement for investor to show its acceptance separately from the investment license application.⁷⁰

If there are no formal requirements in the legislation, acceptance by the investor in any written form would be sufficient to provide its consent. Acceptance of the investor also may find its reflection in a direct agreement between the host state and the investor which transforms the consent to another form. It should be noted that the scope of the investor's consent may be narrower than the state's offer, but cannot be broader.⁷¹

⁷⁰ Such a requirement is in the legislation of Botswana, See: *supra* note 6 at 209

⁷¹ *supra* note 13 at 30

5. Consent through Bilateral Investment Treaties

On June 27 of 1990 the ICSID tribunal composed of A.S.El-Kosheri, B.Goldman and S.K.B.Asante rendered its award resolving the dispute between Asian Agricultural Products Limited and Republic of Sri Lanka.⁷² What makes this award important is that the jurisdiction of the tribunal was based on consent expressed in the Agreement of 1980 between the United Kingdom and Republic of Sri Lanka for the Promotion and Protection of Investments. In other words, this was the first case where the consent to jurisdiction of the ICSID was expressed in a bilateral investment treaty. Now, it is a well-established practice.

While explaining the consent in writing the RED touches the expression of consent in national legislation, but it does not say anything about international treaties. However, if a state may offer its consent in a provision of its municipal legislation, it is reasonable to consider that it can do this also in its international treaties. The fact that Republic of Sri Lanka in the case mentioned above did not object to jurisdiction of the tribunal on the ground that the consent had been given in the BIT also shows the clear and undisputable nature of such consent. The reason why EDR does not touch the BITs, might have been their insignificant amount, since there were only 31 signed BITs at that time.⁷³ Today, when this amount is 2278 and almost 1000 of them contain ICSID arbitration provisions the situation is totally different.⁷⁴

It might be an interesting fact that since the establishment of the ICSID in 1966 till the award in *AAPL v. Sri Lanka* only 26 disputes had been submitted to the Centre, but the number of the disputes that have been submitted from 1990 till present is 237.⁷⁵ The difference is significant: 26 cases for 24 years and 237 cases for 18 years. It is clear that, the main reason of

⁷² Asian Agricultural Products Limited and Republic of Sri Lanka (ICSID Case ARB/87/3), 4 ICSID Reports 246 (1997)

⁷³ ICSID Database of Bilateral Investment Treaties, available at www.worldbank.org/icsid

⁷⁴ *supra* note 57 at 735

⁷⁵ List of ICSID cases, available at www.worldbank.org/icsid

this increase was the recognition of the principle that consent may be provided in the BITs. The amount of the ICSID cases based on consent in the BITs is more than those based on the consent in direct agreements between the parties, which was more common and traditional way of giving consent.

At present, there is no doubt that the consent of a state to the jurisdiction of ICSID may find its expression in dispute settlement provisions of a BIT. Such a provision constitutes an offer of a state which is open to the nationals of other contracting state and if an investor accepts this offer, the consent becomes binding on both parties. Although many BITs reflect the provisions referring to ICSID, those provisions are differently formulated and have different practical consequences. In some BITs, the Centre is shown as the sole mechanism for settlement of investment disputes. For example, Article 8(1) of the UK-Azerbaijan BIT provides that:

“Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States...any legal dispute arising between that Contracting Party concerning an investment of the latter in the territory of the former.”⁷⁶

The Azerbaijan-France BIT follows a similar approach by referring only to the ICSID.⁷⁷ But usually ICSID is shown as one of the alternatives that might be chosen and the investor is provided with the right to chose among these alternatives.⁷⁸ Along with the ICSID, these alternatives may include domestic courts, ICC Court of Arbitration, or *ad hoc* arbitration under

⁷⁶ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Azerbaijan Republic for the Promotion and Protection of Investments (4 January 1996), Treaty Series No. 19 (1997), UNCTAD Investment Instruments Online Bilateral Investment Treaties Database available at www.unctad.org

⁷⁷ Agreement between the Government of France and the Government of the Azerbaijan Republic for the Promotion and Reciprocal Protection of Investments, UNCTAD Investment Instruments Online Bilateral Investment Treaties Database available at www.unctad.org

⁷⁸ *supra* note 6 at 213

UNCITRAL Arbitration Rules. BIT between the US and Azerbaijan is a good example of such an approach:

“2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that three months have elapsed from the date on which the dispute arose the national or company concerned may submit the dispute for settlement by binding arbitration:

(i) to the Centre, if the Centre is available; or

(ii) to the Additional Facility of the Centre, if the centre is not available; or

(iii) in accordance with the UNCITRAL Arbitration Rules; or

(iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.”⁷⁹

The provisions which refer to the ICSID as one of the alternatives can also be found in most of the BITs of Azerbaijan, such as BITs with Belgium, Greece, Finland, Lebanon, and Pakistan.⁸⁰

Some BITs may require a future agreement between the state and the investor in order to establish consent.⁸¹ Although the state is not obliged to give its consent, there is an opinion that the state can not refuse if there is no reasonable justification given in good faith.⁸² Otherwise, this would constitute a breach of obligation under the treaty. A BIT may also provide that state shall give its consent in case it is requested by an investor.

⁷⁹ Treaty between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment (1 August 1997), UNCTAD Investment Instruments Online Bilateral Investment Treaties Database available at www.unctad.org

⁸⁰ Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments (18 May 2004); Agreement between the Government of the Hellenic Republic and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments (21 June 2004); Agreement between Government of the Republic of Azerbaijan and the Government of the Republic of Finland on Promotion and Protection of Investments; Agreement between the Republic of Lebanon and the Republic of Azerbaijan on the Reciprocal Encouragement and Protection of Investments; Agreement between the Islamic Republic of Pakistan and the Azerbaijan Republic on the Reciprocal Encouragement and Protection of Investments (9 October 1995), UNCTAD Investment Instruments Online Bilateral Investment Treaties Database available at www.unctad.org

⁸¹ See: Sweden-Egypt BIT (1978); Sweden-Malaysia BIT (1979); Sri Lanka- Switzerland BIT (1981)

⁸² Delaume G.R, ICSID and Bilateral Investment Treaties, 2 News from ICSID 14 (1985)

For example, Article 10 of the Netherlands-Pakistan BIT provides:

“The Contracting Party in the territory of which a national of the other Contracting Party make 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.”⁸³

Similar provisions can be found also in other BITs.⁸⁴ In such a case, the state is obliged to give consent and the refusal by the state to give consent would constitute a violation of the BIT.⁸⁵ Such kind of references to ICSID cannot be considered as consent since in either situation, the consent may be established only by direct agreement between the parties.

The consent given in the BIT reflects the consent of the state. As the jurisdiction requires consent by both parties, the investor also has to give its consent by accepting the offer provided by the state in the BIT. Regarding the acceptance by the investor the situation is similar to the national legislation. If a dispute has arisen and there is a provision referring to ICSID in the BIT between the host state and the investor's state investor may institute the proceedings against the state. The institution would be considered as its consent. For instance, in *AMT v. Zaire*, the consent of Zaire was found in 1984 US-Zaire BIT and by submitting the dispute to the ICSID, AMT had shown its consent.⁸⁶ In *Fedax v. Venezuela* the BIT between Venezuela and the Netherlands provided the consent of Venezuela and by instituting proceedings before ICSID, Fedax gave its consent.⁸⁷ However, As Prof. Schreuer states, it would be wise for investor to accept this offer at an earlier stage and not wait till the dispute arises.⁸⁸ The reason is to establish

⁸³ Netherlands-Pakistan BIT (1988)

⁸⁴ See: Japan-Egypt BIT (1977); UK-Philippines BIT (1980)

⁸⁵ *supra* note 13 at 19

⁸⁶ *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No.ARB/93/1), 5 ICSID Reports 11 (2002)

⁸⁷ *Fedax NV v. Republic of Venezuela* (ICSID Case No. ARB/96/3), 5 ICSID Reports 186 (2002)

⁸⁸ *supra* note 6 at 219

a mutual consent which would be irrevocable and which would not be affected by possible termination of the BIT.

Although it is very advantageous, consent given in the BITs may cause some problems in practice. One of the problematic issues is possible contradiction between the BIT and the investment agreement. What happens if the investor relies on the BIT and submits the dispute to the ICISD despite the fact that in agreement between the host state and the investor another dispute settlement mechanism is provided.

In *Lanco v. Argentine Republic* the tribunal had to deal with such a situation which had not been arisen till that time.⁸⁹ Claimant invoked the Article 7 of the Argentine-US BIT, which stated that the investor may choose to submit the dispute for resolution to national courts, or in accordance with any applicable, previously agreed dispute-settlement procedures, or to binding arbitration under ICSID, among other forums. But there was also a concession contract between the parties, under the dispute settlement clause of which the parties agreed to the jurisdiction of the Federal Contentious-Administrative Tribunals of Buenos Aires, for all purposes derived from the agreement and the bid conditions. According to the tribunal, competence of the domestic courts was not subject to party agreement and thus, the forum selection clause of the contract did not constitute a previously agreed dispute settlement procedure under the BIT. Consequently, it could not oust the jurisdiction of ICSID, which was based on the BIT.

In *Salini v. Morocco*, where the BIT between Italy and Morocco referred to ICSID, but the contract between the investor and Moroccan state agency had a clause referring the disputes

⁸⁹ *Lanco International Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6) Preliminary Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 367 (2002)

to Rabat courts, the reasoning of the tribunal was similar and it also disregarded the dispute resolution clause of the contract.⁹⁰

These tribunals determined the effect of the dispute resolution clause of the contract under the terms of the BIT and they could not solve answer the main question whether the investor can waive its right under the BIT and agree with the host state on a different forum.

The issue became clearer in *CAA & CGE (Vivendi Universal) v. Argentina*.⁹¹ Concession Contract between CAA, an Argentine affiliate of the CGE (French company) and Tucuman (province of Argentina) stated: “for purposes of interpretation and application of this contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucuman.” On the other hand, Article 8(2) of the France-Argentina BIT referred to ICSID. The tribunal distinguished between treaty and contract claims:

“... [the] claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucuman, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.”⁹²

Consequently the tribunal held that it had jurisdiction over the claims against Argentina for violation of the obligations under the BIT. However, it did not proceed with the merits, since in order to deal with treaty claims it had to separate BIT violations from breaches of the contract which required interpretation and application of the provisions of the contract. As stated above, this was under exclusive jurisdiction of Tucuman courts due to the dispute resolution clause of the contract. But according to the *ad hoc* Committee, which partially annulled the award, the tribunal had to proceed with the merits because:

⁹⁰ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, 6 ICSID Reports 400 (2004)

⁹¹ *Compania de Aguas del Aconquija S.A. and Compagnie Generale des Eaux v. Argentine Republic* (ICSID Case No. ARB/97/3), 16 ICSID Review – Foreign Investment Law Journal 643 (2001)

⁹² *Id.* at para 53

“...where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.”⁹³

In *SGS v. Pakistan* the contract (PSI Agreement) between SGS and Republic of Pakistan did not refer to domestic courts, but to domestic arbitration in Pakistan.⁹⁴ This caused parallel proceedings where, Pakistan initiated arbitration in Pakistan on the basis of the arbitration clause in the contract and SGS instituted ICSID proceedings in accordance with the Pakistan-Switzerland BIT.⁹⁵ The tribunal in *SGS v. Pakistan* also distinguished the treaty and contract claims by stating that the same facts can give rise to different claims and held that it has jurisdiction over BIT claims and that the PSI arbitrator had jurisdiction over contract claims:

“We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as concerns the Claimant’s contract claims which do not also amount to BIT claims, and it is a clause that this tribunal should respect.”⁹⁶

From all these cases it can be concluded that if between the host state and the state of the investor there is a BIT which refers to the ICSID and there is a different dispute resolution mechanism contained in a contract between the investor and the host state, the contract clause does not affect the jurisdiction of the tribunal over the claims arising out of the BIT as they have to be distinguished from the claims arising out of the contract.

The tribunal in *SGS v. Philippines* went further stating that it had jurisdiction also over contract claims although the contract referred to regional trial courts of Makati or Manila.

⁹³ *Compania de Aguas del Aconquija S.A. and Vivendi Universal (former Compagnie Generale des Eaux) v. Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340 (2002), at para 101

⁹⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, 8 ICSID Reports 406 (2005)

⁹⁵ *Id.* at Introductory Note

⁹⁶ *Id.* at para 161

However, it stayed its proceedings pending a decision of the regional courts on the amount due but unpaid under the contract:

“The tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved and have done so exclusively.”⁹⁷

If the treaty and contractual claims are different, how can tribunal have jurisdiction over the contractual claims? There are two possible grounds for such a jurisdiction: broad definition of the jurisdiction in the BIT or an “umbrella clause”.⁹⁸ An umbrella clause is a provision of a BIT, under which the contracting states undertake to observe any obligations they may have entered into with respect to investments. As Schreuer describes it, “contractual obligations are put under the treaty’s protective umbrella.”⁹⁹

SGS v. Pakistan was the first case, in which the ICSID tribunal had to deal with the legal effects of the umbrella clause. Article 11 of the BIT between Switzerland and Pakistan stated that: “Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.”¹⁰⁰ According to *SGS*, under this provision breach of its contractual commitments by Pakistan amounted to breach of the BIT. The tribunal examined the intention of the parties in order to decide whether, under an umbrella clause, a breach of the investment agreement could amount to a violation of the BIT and stated that:

⁹⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004, 8 ICSID Reports 518 (2005) at para 155

⁹⁸ Gaillard Emmanuel, *Investment Treaty Arbitration and jurisdiction Over Contract Claims – the SGS Cases Considered in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Todd Weiler ed. 2005) at p. 330

⁹⁹ Christoph Schreuer, *Investment Treaty Arbitration and jurisdiction Over Contract Claims – the Vivendi I Case Considered in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Todd Weiler ed. 2005) at p. 299

¹⁰⁰ *supra* note 95 at para 163

“...the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party; we believe that clear and convincing evidence must be adduced by the Claimant...that such was indeed the shared intent of the Contracting Parties...in incorporating Article 11 in the BIT.”¹⁰¹

The tribunal did not reject the idea that states may agree with each other in a BIT that all breaches of the contracts with investors of the other state are converted into and to be treated as breaches of the BIT. However, the tribunal did not find clear and convincing evidence that such was in fact the intention of Pakistan and Switzerland in adopting Article 11 of the BIT. It should be noted that, after the decision was made public, the Swiss authorities expressed that the intention of Switzerland indeed was such one.¹⁰²

In *Salini v. Jordan* the tribunal interpreted Article 2(4) of the Italy-Jordan BIT and distinguished it from the *SGS v. Philippines* case stating that “Under Article 2(4) each Contracting Party did not commit itself to “observe” any “obligation” it had previously assumed with regard to specific investments of investors of the other contracting party as did the Philippines.”¹⁰³

In *SGS v. Philippines*, which was mentioned above, the tribunal gave effect to the umbrella clause holding that Article X (2) of the Swiss-Philippines BIT made it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments which it has assumed with regard to specific investments.¹⁰⁴

In the absence of umbrella clause, jurisdiction over contractual claims may be found on the basis of the dispute settlement provision itself. According to tribunals in *Salini v. Morocco*

¹⁰¹ *Id.* at para 167

¹⁰² *supra* note 98 at 341

¹⁰³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, 29 November 2004, 20 ICSID Review – Foreign Investment Law Journal 148 (2005), at para 126

¹⁰⁴ *supra* note 98 at para 128

the phrase “all disputes or differences...between a Contracting party and an investor of the other contracting Party concerning an investment...”, and in *SGS v. Philippines* the phrase “...disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party...” were broad enough to encompass even the purely contractual claims.¹⁰⁵ The *ad hoc* Committee in *Vivendi v. Argentina* also found the phrase “...relating to investments made under the Agreement between one Contracting Party and an investor of the other Contracting Party” sufficient to give jurisdiction over claims arising from contract.¹⁰⁶ But according to the tribunal in *SGS v. Pakistan* the phrase “...disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party...” could not, in and of itself, provide a basis for jurisdiction over purely contractual claims.¹⁰⁷ According to Gaillard, in contrast with other dispute settlement provisions such as “disputes concerning an obligation of the [host state] under this agreement” such a broad provision provides a sufficient basis for jurisdiction over purely contractual disputes.¹⁰⁸

All above mentioned cases show that broad definitions and umbrella clauses may constitute consent to ICSID jurisdiction over the claims arising from contracts between host states and investors depending on the phrasing of such provisions, intention of the contracting states and interpretation of the tribunals.

ICSID tribunals also had difficulties in dealing with the most-favored-nation (MFN) clauses contained in the BITs. The relevance of the MFN clauses to the consent is based on the following reasoning:

¹⁰⁵ *supra* note 91; *supra* note 98

¹⁰⁶ *supra* note 94

¹⁰⁷ *supra* note 95

¹⁰⁸ *supra* note 99 at 331

1. The BIT between the host state and the investor's state does not allow foreign investors direct access to ICSID but it contains an MFN clause
2. Such a clause extends to procedural matters, such as dispute settlement provisions
3. Under the MFN clause, the provisions referring to the ICSID in other BITs of the host state should be applied also to investors of the state, which is party to the BIT containing MFN clause.¹⁰⁹

As this is one of the most actual problems concerning consent in a BIT, it would be useful to analyze case-law of the ICSID on this issue. In *Maffezini v. Spain* Claimant, a national of the Argentine Republic submitted his request for arbitration against Spain concerning a dispute arising from treatment by Spanish entities in connection with his investment in an enterprise in Spain.¹¹⁰ In his request, along with the Argentine-Spain BIT, Claimant also invoked the Chile-Spain BIT by way of the MFN clause in the Argentine-Spain BIT. Under Article X (2) of the Argentine-Spain BIT, the dispute had first to be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made. In this case, the competent authorities were Spanish courts. But, Mr. Maffezini did not comply with this provision and directly filed for ICSID arbitration. He relied on the MFN Clause of the Argentine-Spain BIT which stated that:

“In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”¹¹¹

¹⁰⁹ Eduardo Savarese, Investment Treaties and the Investor's right to Arbitration between Broadening and Limiting ICSID Jurisdiction 7 *The Journal of World Investment & Trade* 416 (2006)

¹¹⁰ Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7), Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396 (2002)

¹¹¹ *Id.* at para 38

Claimant argued that due to this MFN clause, he can invoke the Chile-Spain BIT, which was more favorable as it did not contain the pre-condition of application to local courts and provided direct access to ICSID arbitration.

In order to determine whether the MFN clause covered also the dispute resolution procedures, the tribunal referred to the *Ambatielos* case, where the Commission of Arbitration stated that:

“...it can not be said that the administration of justice, in so far as it is concerned with the protection of [the] rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes all matters relating to commerce and navigation.”¹¹²

Relying on this statement and after examining the BIT practice of both states, the tribunal held that the MFN clause applied also to dispute settlement provisions and thus, claimant could invoke the Chile-Spain BIT which was more favorable to him. Consequently, the consent of Spain found its reflection in combination of two BITs.

However, there is another approach regarding the MFN clauses, which is reflected in decisions in *Salini v. Jordan* and *Plama Consortium v. Bulgaria*. In *Salini v. Jordan* the tribunal did not reject the idea that MFN clauses can apply also dispute settlement mechanisms, but it put the burden on claimant to prove that such application was the common intention of the parties and claimant could not prove it.¹¹³

In *Plama Consortium v. Bulgaria*, as a basis for jurisdiction claimant (national of Cyprus) invoked the Article 26 of the Energy Charter Treaty (to which Bulgaria and Cyprus are parties), which provides for ICSID arbitration and alternatively the ICSID provision of the Bulgaria-Finland BIT, through the MFN clause of the Bulgaria-Cyprus BIT.¹¹⁴ After examining the BIT practice of Bulgaria during and after Soviet period the tribunal concluded that Bulgaria

¹¹² *Id.* at para 49

¹¹³ *supra* note 104

¹¹⁴ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, 20 ICSID Review – Foreign Investment Law Journal 262 (2005)

did not have intention of extending the dispute resolution provisions through the MFN provision. Stating that the arbitration agreement should be clear and unambiguous, the *Plama Consortium* tribunal also reversed the presumption of applicability of MFN clauses to dispute resolution provisions:

“The principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN clause provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them.”¹¹⁵

In a more recent decision in *Telenor Mobile Communications AS v. Hungary*, where the MFN clause of the Hungarian-Norway BIT was invoked, the tribunal not only held that MFN clause does not cover the procedural rights, but also found that there was a common intention of the contracting states to limit the jurisdiction of ICSID to certain disputes.¹¹⁶

These cases show that the tribunals tend not to follow the approach in *Maffezini*. And now, in order to extend the MFN clause to procedural matters and to invoke the consent expressed in another BIT, investors have to provide clear evidence that such an extension was the intention of the contracting states. Otherwise, the tribunal would not apply the MFN clause.

¹¹⁵ *Id.* at para 223

¹¹⁶ *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), 13 September 2006, 21 ICSID Review – Foreign Investment Law Journal 603 (2006)

6. Consent through Multilateral Treaties

Consent of the states to ICSID jurisdiction can be expressed also in multilateral treaties. Like the similar provisions of BITs, this constitutes an offer, which would become binding on a contracting state if it is accepted by an investor. The difference and probably the main significance of the consent provided in a multilateral treaty is that it is an offer which is addressed not towards the nationals of one certain state, but to nationals of several states, the number of which may increase in time. At present, there are four multilateral treaties, which include provisions referring to ICSID. These are:

1. North American Free Trade Agreement (1992)¹¹⁷;
2. Colonia Investment Protocol of the MERCOSUR (1994)¹¹⁸;
3. Cartagena Free Trade Agreement (1994)¹¹⁹;
4. Energy Charter Treaty (1994)¹²⁰.

The NAFTA was the first multilateral treaty, which included a provision referring to ICSID arbitration. Article 1122 of the NAFTA provides:

- “1. Each Party consents to the submission of a claim to arbitration in accordance with the provisions of this Subchapter.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration in accordance with the provisions of this Subchapter 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;¹²¹”

¹¹⁷ Signatories to the North American Free Trade Agreement are Canada, Mexico and the United States. It was concluded on 17 December 1992 and came into force on 1 January 1994.

¹¹⁸ The Common Market of the Southern Cone (MERCOSUR) was established by Argentina, Brazil, Paraguay and Uruguay by the Treaty of Asuncion on 26 March 1991. The mentioned protocol is the Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR, which was concluded on 17 January 1994 in Colonia.

¹¹⁹ The Free Trade Agreement was concluded by Colombia, Mexico and Venezuela on 13 June 1994 in Cartagena.

¹²⁰ The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. To date the Treaty has been signed by 51 states and the European Communities.

¹²¹ The North American Free Trade Agreement, reprinted in 32 ILM 289 (1993)

As among NAFTA states, only the US is party to the ICSID Convention, ICSID arbitration provided in the NAFTA is available only under the Additional Facility Rules. Moreover, if the disputes are between Canadian investors and Mexico, or vice versa even the Additional Facility Rules are not available, since neither of these countries is a party to the ICSID Convention. Such a situation limits the application of the ICSID arbitration only to the disputes, to which the US or the US investors are parties.

Probably the most significant of the above mentioned treaties is the Energy Charter Treaty, which is signed by 51 states and on the basis of which 12 cases have been submitted to the ICSID.¹²² According to the provisions of Article 26 of the ECT, investor may submit the dispute to domestic courts, to a previously agreed dispute settlement procedure or to international arbitration.¹²³ ICSID is shown as one of three alternatives among which the investor may choose if it decides to submit the dispute to arbitration. Other two forums are: *ad hoc* arbitration under UNCITRAL Rules and the Arbitration Institute of the Stockholm Chamber of Commerce. In case, the host state or the investor's state is not party to the ICSID Convention then investor may institute ICSID proceedings under Additional Facility Rules.¹²⁴

It should be noted that, under ECT, states may provide that they do not give consent to arbitration if the investor has previously submitted the dispute to domestic courts or previously agreed dispute settlement procedure. This provision was inserted to satisfy the states which follow the "fork in the road" policy. Investors should take into account that 23 of 51 signatory states provided their consent under this condition.

¹²² The list of cases is available at www.encharter.org Investor-State Dispute Settlement Cases Database

¹²³ The Energy Charter Treaty, reprinted in 34 ILM 360 (1995), also available at www.encharter.org

¹²⁴ 6 of 51 signatory states to the ECT are not parties to the ICSID Convention: Kyrgyzstan, Liechtenstein, Moldova, Poland, Russian Federation and Tajikistan.

One of the most important achievements of the ECT was that it opened a door for a large amount of potential disputes in the energy (oil & gas) sector to be brought before an ICSID tribunal even in the absence of agreements between the investors and host states. As cited in *Plama Consortium v. Bulgaria*, where the jurisdiction of the tribunal was based on the consent provided in the mentioned treaty, “perhaps the most important aspect of the ECT’s investment regime is the provision for compulsory arbitration against governments at the option of foreign investors.”¹²⁵ And more the investors become aware of their rights under this treaty, more the requests for arbitration are submitted to the ICSID Secretariat.

While the signatory states to the ECT are mostly Eurasian and the NAFTA is an agreement among the North American states, the other two treaties mentioned above cover the states of South America.

Article 9 of the Colonia Investment Protocol of the MERCOSUR refers to the ICSID arbitration as one of the possible alternatives, among which the investor may choose to submit the dispute.¹²⁶ Since Brazil and Bolivia are not parties to the ICSID Convention, only Additional Facility Rules would be possible in the disputes between these states and the investors of other MERCOSUR states.

The provisions of the Cartagena Free Trade Agreement between Mexico, Colombia and Venezuela are similar as they also provide ICSID arbitration as one of the alternatives.¹²⁷ And the disputes, to which Mexico or Mexican investors are parties, may be submitted to ICSID only under the Additional Facility Rules, since Mexico is not party to the ICSID Convention.

Success of the relevant provisions of the multilateral treaties discussed above, particularly the ECT may serve as a justification for inclusion of such provisions to other treaties in future.

¹²⁵ *supra* note 115 at para 141

¹²⁶ *supra* note 13 at 23

¹²⁷ *supra* note 13 at 24

Conclusion

During last year, 36 investors submitted their request for arbitration to the Centre and the amount of the disputes that have been submitted since beginning of this year is 4. This is an additional proof to the efficient nature of the ICSID arbitration mechanism. Both states and investors realize the advantages of the ICSID and agree to resolve the existing or possible future disputes between them by using the ICSID mechanism. They may express their consent in different forms; the main requirement being that it has to be in writing. And they have to keep in mind that once they had given their consent they can not withdraw (revoke) it unilaterally. Any attempt to indirectly revoke the consent also would not work and even under the circumstances when the instrument in which the consent is provided ceases to have effect consent will survive and the disputes between the parties will be resolved by ICSID arbitration.

States may give their consent in the investment agreement that they enter with foreign investors, or they may insert provisions into their investment legislation providing a general offer addressed to investors and investors may accept this offer either by instituting the ICSID proceedings or at any time prior to this.

With increasing amount of bilateral investment treaties, the significance of the provisions in them referring to ICSID has also increased and now most of the disputes submitted to the Centre are based on the consent provided in a BIT. In order to avoid possible misunderstandings and problems of interpretation, states should try to use clear language while constructing the provisions of the BITs and they should be aware that their relationship with investors may be based on different instruments, such as treaties and contracts and any possible contradictions between these instruments should be avoided.

While inserting the most-favored-nation clause into the BITs, states should make their intention clear concerning extension of such clauses also to procedural matters if they want to avoid the situation in which Spain found itself in 2000. Along with BITs, there are 4 multilateral treaties which provide for ICSID arbitration. This number may increase since the mentioned treaties have shown their efficiency.

Irrespective of the form in which it is expressed, consent of the both parties is the cornerstone of the jurisdiction of the ICSID and being a totally voluntary mechanism the ICSID will have jurisdiction over the dispute only if the parties to the dispute consent to submit it to the Centre.

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