CHAPTER 21

CONSENT TO ARBITRATION

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ARBITRATION is by far the most frequently used method to settle investment disputes. Investor–State arbitration has largely replaced other forms of dispute settlement like diplomatic protection and arbitration between the host State and the investor's State of nationality. Therefore, this chapter focuses exclusively on mixed arbitration, that is, arbitration between a host State and a foreign investor.

Like any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction. Participation in treaties plays an important role in the jurisdiction of tribunals but cannot, by itself, establish jurisdiction. Both parties must have expressed their consent.

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 providing for investor–State arbitration are common in contracts between States and foreign investors.

Another technique to give consent to arbitration is a provision in the national legislation of the host State, most often its investment code. Such a provision offers arbitration to foreign investors in general terms. Many capital-importing countries have adopted such provisions. Since consent to arbitration 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.

The third method to give consent to arbitration is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering arbitration to the nationals of one State party to the treaty against the other State 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. Offers of consent contained in treaties must also be perfected by an acceptance on the part of the investor.

The majority of investment arbitrations take place with the framework of ICSID[1] or of the ICSID Additional Facility.[2] Other institutions that may be used for investment arbitration include the International Chamber of Commerce (ICC), the London Court for International Arbitration (LCIA), and the Arbitration Institute of the Stockholm Chamber of Commerce. In non-ICSID arbitration, the most frequently used rules are those of the United Nations Commission on International Trade Law (UNCITRAL).

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, in force 14 October 1966, 575 UNTS 159, 4 ILM 524 (1965). Generally see L Reed, J Paulsson and N Blackaby, *Guide to ICSID Arbitration* (The Hague, Kluwer Law International, 2004); C Schreuer *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001).

[2] See Schreuer, ibid at 92–4.

(1) Consent by Direct Agreement

An agreement between the parties recording consent to 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 arbitration. 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.[3]

It is important to give careful attention to the drafting of consent clauses when negotiating investment agreements. ICSID has developed a set of Model Clauses to facilitate the drafting of consent clauses in investment contracts.[4]

The agreement on consent between the parties need not be recorded in a single instrument. An investment application made by the investor may provide for arbitration. If the application is approved by the competent authority of the host State, there is consent to arbitration by both parties.[5]

An agreement between the parties may record their consent to ICSID jurisdiction by reference to another legal instrument. For instance, a reference in a contract between the parties to a BIT may incorporate the consent to arbitration contained in that BIT into the contract.[6]

The parties are free to delimit their consent to arbitration by defining it in general terms, by excluding certain types of disputes, or by listing the questions they are submitting to arbitration. In practice, broad inclusive consent clauses are the norm. Consent clauses contained in investment agreements typically refer to 'any dispute' or to 'all disputes' under the respective agreements.

Investment operations sometimes involve complex arrangements expressed in a number of successive agreements. Arbitration clauses may be contained in some of these agreements but not in others. The question arises whether the consent to arbitration extends to the entire operation or is confined to the specific agreements containing the arbitration clauses.

Tribunals have taken a broad view of expressions of consent of this kind. The arbitration clauses were not applied narrowly to the specific document containing them but were read in the context of the parties' overall relationship. The interrelated contracts were seen as representing the legal framework for one investment

[3] Agreements to submit existing disputes to arbitration are rare. But see *MINE v Guinea*, Award, 6 January 1988, 4 ICSID Reports 61, 67; *Compania del Desarrollo de Santa Elena SA v Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 157 at para 26.

[4] See ICSID Model Clauses, Doc ICSID/5/Rev.2 of 1993. Reproduced in 4 ICSID Reports 357. Available online at: <http://www.worldbank.org/icsid/model-clauses-en/main.htm>.

[5] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at paras 10, 25.

[6] *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335 at paras 49–59.

operation. Therefore, arbitration clauses contained in some, though not all, of the different contracts were interpreted as applying to the entire operation.[7]

(2) Consent through Host State Legislation

(a) Offer by the Host State

The host State may offer consent to arbitration in general terms to foreign investors or to certain categories of foreign investors in its legislation. However, not every reference to investment arbitration in national legislation amounts to consent to jurisdiction. Therefore, the respective provisions in national laws must be studied carefully.

Some national investment laws provide unequivocally for dispute settlement by international arbitration. For instance, Article 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'.[8] Other provisions are less explicit but still indicate that they express the State's consent to international arbitration. National laws may state that any of the parties to the dispute 'may transfer the dispute' to, or that the dispute 'shall be settled' by, international arbitration.

Other references in national legislation to investment arbitration may not amount to consent. Some provisions make it clear that further action by the host State is required to establish consent. This would be the case where the law in question provides that the parties 'may agree' to settle investment disputes through arbitration.

Some provisions may be unclear and may lead to a dispute as to whether the host State has given its consent. In *SPP v Egypt*,[9] the claimant relied on Article 8 of Egypt's Law No. 43 of 1974 which 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

[7] See *Holiday Inns v Morocco*, Decision on Jurisdiction, 12 May 1974; P Lalive, 'The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems', 51 BY IntL 123 (1980) at 156–9; *Klöckner v Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9, 13, 65–9; *SOABI v Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 175 at paras 47–58, Award, 25 February 1988, 2 ICSID Reports 190 at paras 4.01–4.52.

[8] See *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 54.

[9] *SPP v Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112.

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.[10]

Egypt argued that this clause required a separate implementing agreement with the investor[11] and that 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.[12] The tribunal rejected this contention. In the tribunal's view there was nothing in the legislation requiring a further ad hoc manifestation of consent to the Centre's jurisdiction.[13]

(b) Acceptance by the Investor

A legislative provision containing consent to arbitration is merely an offer by the State to investors. In order to perfect an arbitration agreement that offer must be accepted by the investor. The investor may accept the offer simply by instituting arbitration.[14]

While it is possible to perfect consent through the institution of proceedings, it may be wiser to accept the host State's offer contained in its legislation at an earlier stage. An arbitration agreement will be perfected only upon the acceptance of the offer. Before that happens, the host State may repeal its offer at any time unilaterally. Therefore, an investor will be well advised to accept the offer of consent to arbitration through a written communication as early as possible.[15]

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.

(c) Scope of Consent

Some offers of consent to arbitration in national laws are quite broad and 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

[10] Ibid at para 70.
[11] Ibid at paras 71–3.
[12] *SPP v Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131 at paras 53, 73.
[13] Ibid at paras 89–101.
[14] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 63.
[15] *SPP v Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112 at para 40.

must be in respect of an approved enterprise. Other references to international arbitration relate only to the application and interpretation of the piece of legislation in question.[16] In *Inceysa v El Salvador*,[17] the Tribunal declined jurisdiction because the investment did not meet a condition of legality and because the claim was not based on a violation of the law in question.[18]

Some national laws offer consent only in respect of narrowly circumscribed issues. In *Tradex v Albania*,[19] the consent expressed in the Albanian Law on Foreign Investment was limited to 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...'.[20] The tribunal held that it had jurisdiction, subject to joining to the merits the question of whether or not an expropriation had in fact occurred.[21] 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.[22]

(d) Procedural Requirements

The host State's offer of consent contained in its legislation may be subject to certain conditions, time-limits, or formalities. In a number of investment laws, the investor's consent is linked to the process of obtaining an investment authorization. Other investment laws require that the investor must accept the offer of consent to arbitration within certain time-limits. Maximum clarity about the procedural requirements for the acceptance of an offer to arbitrate by an investor is advisable.

(3) Consent through Bilateral Investment Treaties

The vast majority of bilateral investment treaties (BITs) contain clauses referring to investment arbitration.[23] Most investment arbitration cases in recent years are

[16] See the consent clause, quoted above, in *SPP v Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, para 70.

[17] *Inceysa v El Salvador*, Award, 2 August 2006.

[18] Ibid at paras 332 and 333.

[19] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47.

[20] Ibid at 54–5.

[21] Ibid at 61–2.

[22] *Tradex v Albania*, Award, 29 April 1999, 5 ICSID Reports 70 at paras 132–205.

[23] See R Dolzer and M Stevens, *Bilateral Investment Treaties* (The Hague, Boston, and London, Martinus Nijhoff Publishers, 1995) at 129 ff.

based on jurisdiction established through BITs. The basic mechanism is the same as in the case of national legislation: the States parties to the BIT offer consent to arbitration to investors who are nationals of the other contracting party. The arbitration agreement is perfected through the acceptance of that offer by an eligible investor.

(a) Offer by the Host State

Most investor–State dispute settlement clauses in BITs offer unequivocal consent to arbitration. This would be the case where the treaty states that each contracting party 'hereby consents' or where the dispute 'shall be submitted' to arbitration.

Not all references to investor–State arbitration in BITs constitute binding offers of consent by the host State. Some clauses in BITs referring to arbitration amount to an undertaking by the host State to give consent in the future. For instance, the States may promise to accede to a demand by an investor to submit to arbitration by stating that the host State 'shall consent' to arbitration in case of a dispute.[24] If the host State refuses to give its consent, it would be in breach of its obligation under the BIT, but a mere promise to give consent will hardly be accepted as amounting to consent. Therefore, in such a situation any remedy must, in the first place, lie with the treaty partner to the BIT.

An even weaker reference to consent is contained in some BITs that provide for the host State's sympathetic consideration of a request for dispute settlement through arbitration. Obviously, a clause of this kind does not amount to consent by the host State. Some BITs merely envisage a future agreement between the host State and the investor containing consent to arbitration.

Many dispute settlement clauses in BITs offer several alternatives. These may include the domestic courts of the host State, procedures agreed to by the parties to the dispute, ICSID arbitration, ICC arbitration, and ad hoc arbitration often under the UNCITRAL rules. 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 party that initiates arbitration a choice. Some BITs offering several methods of settlement specify that the choice among them is with the investor.

(b) Acceptance by the Investor

A provision on consent to arbitration in a BIT is merely an offer by the respective States that requires acceptance by the other party. That offer may be accepted by a national of the other State party to the BIT.

[24] See Art 10(2) of the Japan–Pakistan BIT of 1998.

It is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.[25] The tribunal in *Generation Ukraine v Ukraine* said:

> ...it is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State;... It follows that the Claimant validly consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre.[26]

In the case of arbitration clauses contained in treaties, a possible withdrawal of an offer of consent before its acceptance is less of a problem than in the case of national legislation. An offer of arbitration in a treaty remains valid notwithstanding an attempt to terminate it, unless there is a basis for the 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 BITs. Once the arbitration agreement is perfected through the acceptance of the offer contained in the treaty, it remains in existence even if the States parties to the BIT agree to amend or terminate the treaty.

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. There are ways an which an investor may be induced to give consent. Submission to arbitration 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 arbitration.

(c) Scope of Consent

(i) *All Disputes Concerning Investments*

The scope of consent to arbitration offered in BITs varies. Many BITs in their consent clauses contain phrases such as 'all disputes concerning investments' or 'any

[25] *AAPL v Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 250; *AMT v Zaire*, Award, 21 February 1997, 5 ICSID Reports 11 at paras 5.17–5.23; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518 at paras 30–1; *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240 at paras 12.1–12.8; *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, 29 April 2004, 11 ICSID Reports 313 at paras 94–100; *Impregilo v Pakistan*, Decision on Jurisdiction, 22 April 2005, para 108; *Camuzzi Intl. SA v Argentina*, Decision on Jurisdiction, 11 May 2005, paras 130–2; *Sempra Energy International v Argentina*, Decision on Jurisdiction, 11 May 2005, para 140; *El Paso Energy Intl Co v Argentina*, Decision on Jurisdiction, 27 April 2006, paras 35–7; *National Grid PCL v Argentina*, Decision on Jurisdiction, 20 June 2006, para 49; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006, paras 33–7.

[26] *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, paras 12.2, 12.3.

legal dispute concerning an investment'. These provisions do not restrict a tribunal's jurisdiction to claims arising from the BIT's substantive standards. By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include disputes that arise from a contract in connection with the investment.

In *Salini v Morocco*[27] Article 8 of the applicable BIT defined ICSID's jurisdiction in terms of '[t]ous les différends ou divergences... concernant un investissement'.[28] The tribunal noted that the terms of this provision were very general and included not only a claim for violation of the BIT but also a claim based on contract: '... Article 8 obliges the State to respect the jurisdictional choice arising by reason of breaches of the bilateral Agreement and of any breach of a contract which binds it directly'.[29]

In *Compañía de Aguas del Aconquija, SA & Vivendi Universal*,[30] Article 8 of the BIT between France and Argentina, applicable in that case, offered consent for '[a]ny dispute relating to investments'. In its discussion of the BIT's fork-in-the-road clause, the ad hoc committee said:

> ... Article 8 deals generally with disputes 'relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party'. It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT [dealing with State/State dispute settlement], which refers to disputes 'concerning the interpretation or application of this Agreement', or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 'a claim that another Party has breached an obligation under' specified provisions of that Chapter.[31]

The tribunal in *SGS v Pakistan*[32] reached a different conclusion. Article 9 of the applicable BIT between Switzerland and Pakistan referred to 'disputes with respect to investments'. The tribunal found that the phrase was merely descriptive of the factual subject-matter of the disputes and did not relate to the legal basis of the claims or cause of action asserted in the claims. The tribunal said: '... from that description alone, without more, we believe that no implication necessarily arises that both BIT

[27] *Salini Costruttori SpA et Italstrade SpA v Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400.

[28] Art 8 of the Italy and Morocco BIT.

[29] *Salini Costruttori SpA et Italstrade SpA v Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, para 61.

[30] *Compañía de Aguas del Aconquija, SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340.

[31] Ibid at para 55.

[32] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406.

and purely contract claims are intended to be covered by the Contracting Parties in Article 9'.[33] Therefore, the Tribunal held that it had no jurisdiction with respect to contract claims which did not also constitute breaches of the substantive standards of the BIT.[34]

That decision has attracted some criticism.[35] In *SGS v Philippines*,[36] Article VIII(2) of the Switzerland–Philippines BIT offered consent to arbitration for 'disputes with respect to investments'. The tribunal found that the clause in question was entirely general allowing for the submission of all investment disputes. Therefore, the tribunal found that the term included a dispute arising from an investment contract.[37]

(ii) *Umbrella Clauses*

The scope of consent offered in a BIT may also be affected by an umbrella clause contained in the treaty. An umbrella clause is a provision in a treaty[38] under which the State parties undertake to observe any obligations they may have entered into with respect to investments. In other words, contractual obligations are put under the treaty's protective umbrella. It is widely accepted that under the regime of an umbrella clause, violations of a contract between the host State and the investor are treaty violations.[39] It would follow that a provision in a BIT offering consent to arbitration for violations of the BIT extends to contract violations covered by the umbrella clause.

[33] Ibid at para 161.

[34] Ibid.

[35] See also *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, 29 April 2004, 11 ICSID Reports 313, n 42 at para 52.

[36] *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

[37] Ibid at paras 131–5. In the same sense: *Siemens v Argentina*, Award, 6 February 2007 at para 205.

[38] Umbrella clauses, while common in BITs may also be contained in other treaties for the protection of investments. The Energy Charter Treaty in Article 10(1), last sentence, also contains an umbrella clause: 'Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party'.

[39] F Rigaux, 'Les situations juridiques individuelles dans un système de relativité générale', 213 Recueil des Cours 229–30 (1989-I); Ibrahim FI Shihata, 'Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties', in Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, Vol. II (The Hague, Martinus Nijhoff Publishers, 1995) at 601; P Weil, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier', 128 Recueil des Cours 130 (1969-III); FA Mann, 'British Treaties for the Promotion and Protection of Investments', 52 BrY IL 241 (1981) at 246; Dolzer and Stevens, above n 23 at 81–2; KJ Vandevelde, *United States Investment Treaties: Policy and Practice* (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1992) at 78; J. Karl, 'The Promotion and Protection of German Foreign Investment Abroad', 11 ICSID Rev–FILJ 1 (1996) at 23; T Wälde, 'Energy Charter Treaty-based Investment Arbitration', 5 J WI T 373 (2004) at 393; S Alexandrov, 'Breaches of Contract and Breaches of Treaty', 5 J WInT 555 (2004) at 565–7; A Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', 20 Arbi Int'l 411 (2004).

Umbrella clauses have received a mixed reception in the practice of tribunals.[40] In *SGS* v *Pakistan*[41] the claimant relied on Article 11 of the Pakistan–Switzerland BIT which provided: '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'. The Tribunal rejected the claimant's contention that this clause extended its jurisdiction by turning breaches of contract into breaches of the treaty.[42] It said:

> The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law.[43]

The tribunal in *SGS v Philippines*,[44] came to the opposite conclusion when it interpreted the umbrella clause in the Philippines-Switzerland BIT which provides: 'Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party'. The tribunal disagreed with the reasoning of the Tribunal in *SGS v Pakistan*, which it described as unconvincing.[45] The tribunal said: 'Article X(2) makes 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'.[46]

The tribunal in *Joy Mining v Egypt*[47] had to apply an umbrella clause in the Egypt–UK BIT which provided: 'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party'. The tribunal denied the effect of this clause and found that it had jurisdiction only for contract violations that amounted at the same time to BIT violations. It said:

> In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case.[48]

[40] For more detailed treatment, see C Schreuer, 'Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road', 5 JWIT 231 (2004) at 249.

[41] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, at paras 163–73.

[42] Ibid at para 165.

[43] Ibid at para 166.

[44] *SGS v Philipines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

[45] Ibid at para 125.

[46] Ibid at para 128. The tribunal in *Waste Management v Mexico (II)*, Award, 30 April 2004, 11 ICSID Reports 362 seemed to confirm this reading in an *obiter dictum* at para 73.

[47] *Joy Mining v Egypt*, Award, 6 August 2004.

[48] Ibid at para 81.

In *CMS Gas Transmission Company v Argentina*,[49] the umbrella clause in Article II(2)(c) of the BIT between Argentina and the USA provided as follows: 'Each Party shall observe any obligation it may have entered into with regard to investments'. The tribunal reached the following conclusion:

> The Tribunal must therefore conclude that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the treaty.[50]

This led to a finding by the tribunal that Argentina had not only breached its obligation under the BIT's fair and equitable standard but also and additionally its obligation under the umbrella clause of Article II(2)(c) of the BIT.[51]

In *Eureko BV v Poland*,[52] the claimant relied on the following umbrella clause in the BIT between the Netherlands and Poland: 'Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party'. In that case, Poland had changed its privatization strategy and had, contrary to earlier undertakings, withdrawn its consent to the acquisition of further shares by the investor. The tribunal found that Poland's actions constituted a violation of the umbrella clause. The breaches by Poland of its obligations under the contracts were breaches of the BIT's umbrella clause, even if they did not violate the BIT's other standards.[53]

The affirmation of the effectiveness of an umbrella clause in *Noble Ventures v Romania*[54] was similarly categorical. In that case, the text of the clause in Article II(2)(c) of the Romania-US BIT was as follows: 'Each Party shall observe any obligation it may have entered into with regard to investments'. An examination of the clause's exact wording led the Tribunal to the following general conclusion:

> ...in including Art. II(2)(c) in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT.
>
> 62. By reason therefore of the inclusion of Art. II(2)(c) in the BIT, the Tribunal therefore considers the Claimant's claims of breach of contract on the basis that any such breach constitutes a breach of the BIT.[55]

Despite this clear line of cases, other tribunals have doubted the efficacy of similar clauses. In two cases decided by similarly composed tribunals,[56] the umbrella clause

[49] *CMS Gas Transmission Company v Argentina*, Award, 12 May 2005.
[50] Ibid at para 303.
[51] Ibid, dispositif, para 1.
[52] *Eureko BV v Poland*, Partial Award, 19 August 2005.
[53] Ibid at paras 244–60.
[54] *Noble Ventures Inc v Romania*, Award, 12 October 2005.
[55] Ibid at paras 61–2.
[56] *El Paso Energy Intl Co v Argentina*, Decision on Jurisdiction, 27 April 2006; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006.

from the Argentina–US BIT, quoted above, was at issue. Despite the breadth of that clause, referring to 'any obligation... with regard to investments', the tribunals adopted an exceedingly narrow interpretation that effectively deprived the clause of any reasonable meaning.[57] It distinguished between a 'commercial contract' and an 'investment agreement' and held:

> ...the umbrella clause... will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement.[58]

In the tribunal's view, 'an umbrella clause cannot transform a contract claim into a treaty claim' since that would be 'quite destructive of the distinction between national legal orders and the international legal order'.[59]

In *Siemens v Argentina*[60] the tribunal applied a similarly worded umbrella clause in the Argentina–Germany BIT: 'Each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory'. The Tribunal rejected the introduction of a distinction between different types of agreements:

> The Tribunal does not subscribe to the view of the Respondent that investment agreements should be distinguished from concession agreements of an administrative nature. Such distinction has no basis in Article 7(2) of the Treaty which refers to 'any obligations', or in the definition of 'investment' in the Treaty. Any agreement related to an investment that qualifies as such under the Treaty would be part of the obligations covered under the umbrella clause.[61]

The umbrella clause in the Argentina–US BIT was also applied in *LG&E v Argentina*.[62] In that case, the tribunal had to decide whether its application went beyond obligations entered into through contracts and extended to undertakings made through legislation. The tribunal gave an affirmative answer:

> Argentina's abrogation of the guarantees under the statutory framework—...—violated its obligations to Claimants' investments. Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause.[63]

[57] *El Paso*, at paras 66–86; *Pan American*, at paras 92–115.
[58] *El Paso*, at para 81.
[59] Ibid at para 82.
[60] *Siemens v Argentina*, Award, 6 February 2007.
[61] Ibid at para 206.
[62] *LG&E v Argentina*, Decision on Liability, 3 October 2006.
[63] Ibid at para 175.

This overview of decisions demonstrates a clear divergence of opinions on the meaning of umbrella clauses. On balance, the decisions seeking to reduce or nullify its practical effect seem less convincing. There is no reason why States parties to a treaty would not want to grant extra protection to foreign investors by promising to abide by any obligations whether they are contained in contracts or unilateral undertakings. The very purpose of umbrella clauses appears to be to grant the protection of the treaty to obligations, the breach of which would not otherwise constitute a breach of international law.

(iii) *Limited Expression of Consent*

Other BIT clauses offering consent to arbitration circumscribe the scope of consent to arbitration in narrower terms. A provision that is typical of US BITs is contained in Article VII of the Argentina–US BIT of 1991. It offers consent for investment disputes which are defined as follows:

> a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

Other BITs require that the investment to which the dispute relates must have been specifically approved in writing as a condition for consent.[64] The scope for the jurisdiction of tribunals is even narrower where consent is limited to the amount of compensation for expropriation. For instance, the China–Hungary BIT of 1991 provides in Article 10(1): 'Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal'. In applying consent clauses of this kind, the tribunals had to determine the existence of an expropriation as a jurisdictional requirement.[65]

(d) Procedural Requirements

(i) *Waiting Periods for Amicable Settlement*

Nearly all consent clauses in BITs provide for certain procedures that must be adhered to. A common condition for the institution of arbitration proceedings is that an amicable settlement has been attempted through consultations or

[64] *Gruslin v Malaysia*, Award, 27 November 2000, 5 ICSID Reports 483, at paras 22.1–25.7.

[65] See *Telenor v Hungary*, Award, 13 September 2006, at paras 18(2), 25, 57, 81–3; *ADC v Hungary*, Award, 2 October 2006, at paras 12, 445.

negotiations. This requirement is subject to certain time-limits ranging from three to 12 months. If no settlement is reached within that period the claimant may proceed to arbitration. For instance, Article 11 of the German Model BIT provides:

> Article 11
> (1) Divergencies concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.
> (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 investor of the other Contracting State, be submitted for arbitration....

The reaction of tribunals to these provisions requiring an attempt at amicable settlement before the institution of arbitration has not been uniform.[66] In the majority of cases, the tribunals found that the claimants had complied with these waiting periods before proceeding to arbitration.[67] In other cases the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.[68]

In *Ronald S Lauder v The Czech Republic*,[69] the BIT between the Czech Republic and the USA provided as follows: 'At any time after six months from the date on

[66] For more detailed treatment, see Schreuer, above n 40 at 232.

[67] *Salini Costruttori SpA et Italstrade SpA v Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400, at paras 15–23; *CMS v. Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, at paras 121–3; *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, at paras 14.1–14.6; *Azurix v Argentina*, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416, 43 ILM 262 (2004) at para 55; *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, 29 April 2004, 11 ICSID Reports 313, at paras 101–7; *LG&E v Argentina*, Decision on Jurisdiction, 30 April 2004, 11 ICSID Reports 414, at para 80; *MTD v Chile*, Award, 25 May 2004, at para 96; *Occidental v Ecuador*, Award, 1 July 2004, at para 7; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, at paras 163–73; *LESI—DIPENTA v Algérie*, Award, 10 January 2005, at paras 32–3; *AES Corp v Argentina*, Decision on Jurisdiction, 26 April 2005, at paras 62–71; *Continental Casualty Company v Argentina*, Decision on Jurisdiction, 22 February 2006, at para 6; *El Paso Energy Intl Co v Argentina*, Decision on Jurisdiction, 27 April 2006, at para 38; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006, at paras 39, 41. See also *Metalclad v Mexico*, Award, 30 August 2000, 5 ICSID Reports 212 at paras 64–9, applying Art 1120 of the NAFTA; *Petrobart v The Kyrgyz Republic*, Award, 29 March 2005, VIII. 7. in Stockholm Int Arb Rev (3, 2005) at 77–8 applying Art 26(2) of the ECT and *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports, at 47, 60–1 applying a provision on waiting periods in national legislation.

[68] The first such case was not decided under a BIT but under Art 1120 of the NAFTA: *Ethyl Corp v Canada*, Decision on Jurisdiction, 24 June 1998, Decision on Jurisdiction, 7 ICSID Reports 12 at paras 76–88 where the tribunal dismissed the objection based on the six-month provision since further negotiations would have been pointless. In *Wena Hotels v Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 74 at 87, the tribunal noted approvingly that the respondent had withdrawn its objection to jurisdiction based on the waiting period. See also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 88–103, where the tribunal found that a requirement to give notice of the dispute for the purpose of reaching a negotiated settlement was not a precondition of jurisdiction.

[69] *Ronald S Lauder v The Czech Republic*, Final Award, 3 September 2001, 9 ICSID Reports 66.

which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration...'.[70]

The claimant had not waited for six months but had filed his Notice of Arbitration within 17 days of the notification of the breach. The tribunal rejected the jurisdictional objection based on the non-compliance with the waiting period since the provision was merely procedural. It said:

...the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide the merits of the dispute, but a procedural rule that must be satisfied by the Claimant. (*Ethyl Corp. v. Canada*, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74–88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.[71]

The tribunal added that since there was no evidence that negotiations would have led to a settlement, an insistence on the waiting period would have amounted to an excessive formalism.[72]

The tribunal in *SGS v Pakistan*[73] reached the same result. The Pakistan–Switzerland BIT provides for a 12-month consultation period before permitting the investor to go to ICSID arbitration.[74] SGS had filed its request for arbitration only two days after notifying Pakistan of the existence of the dispute. The tribunal accepted the claimant's argument that the waiting period was procedural rather than jurisdictional and that negotiations would have been futile. It said:

Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.[75] Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.... there was little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.[76]

Other tribunals did not share this view. In *Goetz v Burundi*,[77] the respondent relied on a somewhat unusual provision in the Belgium–Burundi BIT, which prescribes a waiting period of three months not only for the usual process of amicable settlement

[70] Ibid at para 183.
[71] Ibid at para 187.
[72] Ibid at paras 188–91.
[73] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406.
[74] Ibid at para 80.
[75] Footnote omitted. The tribunal cited the Decision in *Ethyl*.
[76] *SGS v Pakistan*, above n 73 at para 184. Footnote omitted.
[77] *A Goetz v Burundi*, Award, 10 February 1999, 6 ICSID Reports 5, at paras 90–3.

between the parties to the dispute but also for a process of notification and negotiation through diplomatic channels. The tribunal found that the waiting period had been satisfied with respect to the investor's primary claim,[78] but not with respect to certain supplementary claims put forward by the claimant. For the tribunal, it followed that the supplementary claims were 'not in consequence capable of being decided on, and the dispute on which the Tribunal is called to give an award relates exclusively to the [primary claim]'.[79]

Enron v Argentina[80] involved the Argentina–US BIT, which provided for a six-month period for consultation between the parties to the dispute. The tribunal found that the waiting period had been complied with in the particular case. But it added the following *obiter dictum*:

> The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals.[81] Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.[82]

It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution. A better way to deal with non-compliance with a waiting period may be a suspension of proceedings to allow additional time for negotiations if these appear promising.

(ii) *Domestic Remedies*

Provisions giving consent to investment arbitration do not, in general, require the exhaustion of local remedies before international proceedings are instituted. One of the purposes of investor–State arbitration is to avoid the vagaries of proceedings in the host State's courts. Article 26 of the ICSID Convention specifically excludes

[78] Ibid at paras 91 and 92.

[79] Ibid at para 93.

[80] *Enron Corp and Ponderosa Assets, LP v Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273.

[81] Footnote omitted: the tribunal cited *Lauder* and *Ethyl*.

[82] *Enron Corp*, above n 80 at para 88.

the requirement to exhaust remedies 'unless otherwise stated'.[83] ICSID[84] and non-ICSID tribunals[85] have confirmed that the claimants were entitled to institute international arbitration directly without first exhausting the remedies offered by local courts.

It is open to a host State to make the exhaustion of local remedies a condition of its consent to arbitration. Some BITs offering consent require the exhaustion of local remedies. But clauses of this kind are rare and are found mostly in older BITs.[86] Two countries, Israel and Guatemala, have given notifications to ICSID that they will require local remedies to be exhausted. But Israel subsequently withdrew that notification.

Some consent clauses in BITs provide for a mandatory attempt at settling the dispute in the host State's domestic courts for a certain period of time.[87] Tribunals have held that this was not an application of the exhaustion of local remedies rule.[88] The investor may proceed to international arbitration if the domestic proceedings do not result in the dispute's settlement within a certain period of time or if the dispute persists after the domestic decision. For instance, the Argentina–Germany BIT provides in Article 10(2) that any investment dispute shall first be submitted to the host State's competent tribunals. The provision continues:

(3) The dispute may be submitted to an international arbitration tribunal in any of the following circumstances:

(a) at the request of one of the parties to the dispute if no decision on the merits of the claim has been rendered after the expiration of a period of eighteen months from the date in which the court proceedings referred to in para. 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties persist.

[83] Art 26 of the ICSID Convention provides: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'

[84] *Amco v Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509 at para 63; *Lanco v Argentina*, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 369 at para 39; *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240, paras 13.1–13.6; *AES Corporation v The Argentine Republic*, Decision on Jurisdiction, 26 April 2005, paras 69, 70.

[85] *CME v Czech Republic*, Final Award, 14 March 2003, 9 ICSID Reports 264, para 412; *Yaung Chi Oo v Myanmar*, Award, 31 March 2003, 8 ICSID Reports 463, 42 ILM 540 (2003), para 40; *Nycomb v Latvia*, Award, 16 December 2003, 11 ICSID Reports 158, s 2.4. But see *Loewen v United States*, Award, 26 June 2003, 7 ICSID Reports 442, 42 ILM 811 (2003), paras 142–217.

[86] Schreuer, above n 1 at 392.

[87] For more detail see C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', 4 The Law and Practice of International Courts and Tribunals 1 (2005) at 3–5.

[88] *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, para 28; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), para 104; *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, para 30.

A requirement of this kind as a condition for consent to arbitration creates a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute. A substantive decision by the domestic courts in a complex investment dispute is unlikely within 18 months, certainly if one includes the possibility of appeals. Even if such a decision should have been rendered, the dispute is likely to persist if the investor is dissatisfied with the decision's outcome. Therefore, arbitration remains an option after the expiry of the period of 18 months. It follows that the most likely effect of a clause of this kind is delay and additional cost. One tribunal has called a provision of this kind 'nonsensical from a practical point of view'.[89]

In a number of cases in which clauses of this kind were invoked, the claimants were able to avoid their effect by relying on most-favoured-nation (MFN) clauses.[90] The impact of MFN clauses on consent to arbitration is discussed in section 5 below.

(iii) *Fork-in-the-Road Provisions*

Fork-in-the-road provisions, attached to the consent clauses of some BITs, are the exact opposite of a requirement to try domestic courts before proceeding to international arbitration. These provisions offer the investor a choice between the host State's domestic courts and international arbitration. The choice, once made, is final. Therefore, if the investor has resorted to the host State's domestic courts to have its dispute settled, it has lost its right to resort to arbitration.[91]

A typical example of a fork-in-the-road provision in United States BITs is contained in Article VII of the Argentina–US BIT:

> 2.... If the dispute cannot be settled amicably the national or Company concerned may choose to submit the dispute for resolution:
>
> (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)... the national or Company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration....

[89] *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005) at para 224.

[90] *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, paras 54–64; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), paras 32–110; *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, paras 24–49; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina*, Decision on Jurisdiction, 16 May 2006, paras 52–66; *National Grid PCL v Argentina*, Decision on Jurisdiction, 20 June 2006, paras 80–93; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina and AWG Group Ltd v Argentina*, Decision on Jurisdiction, 3 August 2006, paras 52–68.

[91] For more detailed treatment, see Schreuer, above n 40 at 239.

Under provisions of this kind, the loss of access to international arbitration applies only if the same dispute was submitted to the domestic courts. Investors are often drawn into legal disputes of one sort or another in the course of their investment activities. These disputes may relate in some way to the investment, but they are not necessarily identical to the dispute covered by the BIT's provisions on consent to arbitration.

In *Alex Genin v Estonia*,[92] jurisdiction was based on the Estonia–US BIT. That treaty contains a fork-in-the-road provision, which is substantively identical to the one quoted above. The claimants, US nationals, were the principal shareholders of EIB, a bank incorporated under the law of Estonia. The claims arose, principally, from the purchase of a branch of 'Social Bank' and from the revocation of EIB's licence by the Estonian authorities. EIB sued the 'Social Bank' in a local court for losses from the purchase. EIB also instituted proceedings before the Administrative Court challenging the revocation of the licence.[93] Estonia argued that 'by choosing to litigate their disputes with Estonia in the Estonian courts..., Claimants have exhausted their right to choose another forum to relitigate those same disputes'.[94]

The tribunal found that the lawsuits undertaken by EIB in Estonia were not the same as the 'investment dispute' that was the subject-matter of the ICSID proceedings. Therefore it did not constitute the choice under the BIT's 'fork in the road' provision. The tribunal said:

> ...the Tribunal is of the view that the lawsuits in Estonia relating to the purchase by EIB of the Koidu branch of Social Bank and to the revocation of EIB's license are not identical to Claimants' cause of action in the 'investment dispute' that they seek to arbitrate in the present proceedings. The actions instituted by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia in connection with the auction of the Koidu branch and regarding the revocation of the Bank's license certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings.[95]

Therefore, in order to determine whether the choice under a fork-in-the-road clause has been made, it is necessary to establish whether the parties and the causes of action in the two lawsuits are identical. The loss of access to international arbitration applies only if the same dispute has previously been submitted by the same party to the domestic courts. This principle is now well established and has been confirmed in a considerable number of decisions.[96]

[92] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241.

[93] Ibid at paras 47, 58.

[94] Ibid at para 321.

[95] Ibid at para 331.

[96] *Eudoro A Olguín v Republic of Paraguay*, Decision on Jurisdiction, 8 August 2000, 6 ICSID Reports 156, at para 30; *Compañía de Aguas del Aconquija SA & Compagnie Générale des Eaux (Vivendi) v Argentine Republic*, Award, 21 November 2000, 5 ICSID Reports 296 at paras 40, 42,

(4) Consent through Multilateral Treaties

A number of multilateral treaties also offer consent to arbitration. The ICSID Convention is not one of these treaties. The Convention offers a detailed framework for the settlement of investment dispute but requires separate consent by the host State and by the foreign investor. The last paragraph of the Preamble to the Convention makes this quite clear by saying: '... 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'.

By contrast, a number of regional treaties do offer consent to arbitration. Article 1122 of the NAFTA[97] 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'.

Article 1120 of the NAFTA specifies that an investor may submit a claim to arbitration under the ICSID Convention, under the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules. The scope of the consent is limited to claims arising from alleged breaches of the NAFTA itself.[98] The NAFTA also prescribes a waiting period of six months after the events giving rise to the claim.[99] The NAFTA does not, strictly speaking, contain a fork-in-the-road provision. However, it requires, as a condition of consent to arbitration, that the claimant submit a waiver of the right to initiate or continue before domestic judiciaries any proceedings with respect to the measures taken by the respondent that are alleged to be in breach of the NAFTA.[100]

53–5, 81; *Compañía de Aguas del Aconquija, SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic,* Decision on Annulment, 3 July 2002, 6 ICSID Reports 340 at paras 38, 42, 55; *Ronald S Lauder v The Czech Republic,* Final Award, 3 September 2001, 9 ICSID Reports 66 at paras 162–3; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt,* Award, 12 April 2002, 7 ICSID Reports 178 at para 71; *CMS v Argentina,* Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494 at paras 77–82; *Azurix v Argentina,* Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416 at paras 37–41, 86–92; *Enron Corp and Ponderosa Assets, LP v Argentina,* Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273 at paras 97–8; *Occidental v Ecuador,* Award, 1 July 2004 at paras 38–63; *LG&E v Argentina,* Decision on Jurisdiction, 30 April 2004, 11 ICSID Reports 414 at paras 75, 76; *Champion Trading v Egypt,* Decision on Jurisdiction, 21 October 2003, 10 ICSID Reports 400 at para 3.4.3.; *Pan American v Argentina,* Decision on Preliminary Objections, 27 July 2006, paras 155–7.

[97] North American Free Trade Agreement, December 1992, 32 ILM 605 (1993).

[98] Art 1116 NAFTA.

[99] Art 1120 NAFTA.

[100] Art 1121 NAFTA.

The Energy Charter Treaty (ECT)[101] also provides consent to investment arbitration. Article 26(3)(a) provides in relevant part: '... each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with this Article'. Under the ECT, the investor may submit the dispute to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or under the Arbitration Institute of the Stockholm Chamber of Commerce.[102] The scope of the consent is limited to claims arising from alleged breaches of the ECT itself.[103] However, the ECT contains a broad umbrella clause that protects obligations entered into by a host State with an investor.[104] Consent applies if the dispute cannot be settled within three months from the date on which either party requested amicable settlement.[105] Consent of the States parties listed in Annex ID does not apply where the investor has previously submitted the dispute to the host State's courts.[106]

The 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone (MERCOSUR)[107] and the 1994 Free Trade Agreement between Mexico, Colombia and Venezuela[108] similarly offer consent to various forms of arbitration.

(5) Consent under Most-Favoured-Nation Clauses

A most-favoured-nation (MFN) clause contained in a treaty will extend the better treatment granted to a third State or its nationals to a beneficiary of the treaty.[109] Most BITs and some other treaties for the protection of investment[110] contain MFN clauses. Some of these MFN clauses will specify to which parts of the treaty they apply but most of them are quite general and typically refer to the treatment

[101] 34 ILM 360 (1995) at 399.
[102] Art 26(4) ECT.
[103] Art 26(1) ECT.
[104] Art 10(1) last sentence ECT.
[105] Art 26(2) ECT.
[106] Art 26(3) ECT.
[107] Art 9 MERCOSUR.
[108] Arts 17–18 of the FTA.
[109] See also R Dolzer and T Myers, 'After *Tecmed:* Most-Favored-Nation Clauses in Investment Protection Agreements', 19 ICSID Rev–FILJ 49 (2004).
[110] See Art 1103 NAFTA, Art 10(7) ECT.

of investments. This has led to the question of whether the effect of MFN clauses extends to the provisions on dispute settlement in these treaties. Put differently, is it possible to avoid the limitations attached to consent to arbitration in a treaty by relying on an MFN clause in the treaty if the respondent State has entered into a treaty with a third State that contains a consent clause without the limitation? If the answer to this question is affirmative, a further question may be asked: if the treaty containing the MFN clause does not offer consent to arbitration, is it possible to rely on consent to arbitration in a treaty of the respondent State with a third party?

In *Maffezini v Spain*,[111] the consent clause in the Argentina–Spain BIT required resort to the host State's domestic courts for 18 months before the institution of arbitration. That BIT contained the following MFN clause: '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'.

On the basis of that clause, the Argentinian claimant relied on the Chile–Spain BIT, which does not contain a requirement to try the host State's courts for 18 months. The tribunal undertook a detailed analysis of the applicability of MFN clauses to dispute settlement arrangements[112] and concluded:

> In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favourable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts.[113]

At the same time, the *Maffezini* tribunal warned against exaggerated expectations attached to the operation of MFN clauses and distinguished between the legitimate extension of rights and benefits and disruptive treaty-shopping.[114] In particular, the MFN clause should not override public policy considerations that the contracting parties had in mind as fundamental conditions for their acceptance of the agreement.[115]

Subsequent decisions dealing with the application of MFN clauses to the requirement to seek a settlement in domestic courts for 18 months have adopted the same solution. The tribunals confirmed that the claimants were entitled to rely on the MFN clause in the applicable treaty to invoke the more favourable dispute settlement

[111] *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396.
[112] Ibid at paras 38–64.
[113] Ibid at para 64.
[114] Ibid at para 63.
[115] Ibid at para 62.

clause of another treaty that did not contain the 18 months rule.[116] At the same time these tribunals expressed their conviction that arbitration was an important part of the protection of foreign investors and that MFN clauses should apply to dispute settlement. For instance the tribunal in *Gas Natural v Argentina* said:

> assurance of independent international arbitration is an important—perhaps the most important—element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.[117]

Another group of cases displays a more restrictive attitude towards the applicability of MFN clauses to dispute settlement. These cases did not concern procedural obstacles to the institution of arbitration proceedings but the scope of the consent clauses in question.

In *Salini v Jordan*[118] the dispute was whether the consent to arbitration contained in the Italy–Jordan BIT extended to contract claims as well as to treaty claims. The MFN clause in that treaty provides:

> Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party, no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

The tribunal refused to apply the MFN clause to the question of whether it had jurisdiction over contract claims. It proceeded from a presumption against the application of a generally worded MFN clause to dispute settlement. It stated that it shared the concerns expressed with regard to the solution adopted in *Maffezini*[119] and concluded that the MFN clause, quoted above, 'does not apply insofar as dispute settlement clauses are concerned'.[120]

The tribunal in *Plama v Bulgaria*[121] was even more explicit in its rejection of the application of an MFN clause to dispute settlement arrangements. The claimant had attempted to base the tribunal's jurisdiction on the BIT between Bulgaria and Cyprus. That BIT does not provide for investor–State arbitration. But it contains the following MFN clause in its Article 3(1): 'Each Contracting Party shall apply to

[116] *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, paras 32–110; *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, paras 24–31, 41–9; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina*, Decision on Jurisdiction, 16 May 2006, paras 52–66; *National Grid PCL v Argentina*, Decision on Jurisdiction, 20 June 2006, paras 53–94; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina and AWG Group Ltd v Argentina*, Decision on Jurisdiction, 3 August 2006, paras 52–68.

[117] *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, para 49.

[118] *Salini v Jordan*, Decision on Jurisdiction, 29 November 2004.

[119] Ibid at para 115.

[120] Ibid at para 119.

[121] *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005.

the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states'.

The claimant had sought to use this MFN clause to avail itself of the Bulgaria–Finland BIT in order to establish ICSID's jurisdiction. Therefore, the reliance on the MFN clause was not just directed at overcoming a procedural obstacle but was an attempt to create a jurisdiction that would not have existed otherwise. The tribunal proceeded from the requirement that an arbitration agreement would have to be clear and unambiguous.[122] Therefore, any intention to incorporate dispute settlement provisions would have to be expressed clearly and unambiguously.[123] The tribunal reached the following conclusion:

> an MFN 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.[124]

In *Telenor v Hungary*[125] the clause in the BIT between Hungary and Norway, offering consent to investor–State arbitration, was limited to the compensation or other consequences of expropriation. The claimant sought to rely on the MFN clause in the BIT to benefit from wider dispute resolution provisions in BITs between Hungary and other countries. The MFN clause in Article IV(1) of the BIT provided: 'Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State'.

The tribunal endorsed the solution adopted in *Plama*. It found that the term 'treatment' contained in the MFN clause referred to substantive but not to procedural rights. Deciding otherwise would lead to undesirable treaty-shopping creating uncertainty and instability. Also, the jurisdiction of an arbitral tribunal as determined by a BIT was not to be inferentially extended by an MFN clause seeing that Hungary and Norway had made a deliberate choice to limit arbitration.[126] It said:

> The Tribunal therefore concludes that in the present case the MFN clause cannot be used to extend the Tribunal's jurisdiction to categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question.[127]

The two sets of cases are distinguishable on factual grounds. The cases in which the tribunals accepted the applicability of the MFN clauses to dispute settlement all

[122] Ibid at para 198.
[123] Ibid at para 204.
[124] Ibid at para 223.
[125] *Telenor v Hungary*, Award, 13 September 2006.
[126] Ibid at paras 90–7.
[127] Ibid at para 100.

concerned procedural obstacles. The cases in which the effect of the MFN clauses was denied concerned attempts to extend the scope of jurisdiction substantively to issues not covered by the arbitration clauses in the basic treaties. Nevertheless, there is substantial contradiction in the reasoning of the tribunals. In particular, both groups of tribunals made broad statements as to the applicability, or otherwise, of MFN clauses to dispute settlement in general. These broad statements are impossible to reconcile.

Obviously much will depend on the wording of the particular MFN clause. Some BITs specify whether an MFN clause applies to dispute settlement or not. In the absence of such a specification, it is difficult to understand why a broadly formulated MFN clause should apply only to issues of substance but not to questions of dispute settlement. The argument that the basic treaty, containing the MFN clause, clearly limited or excluded the tribunal's jurisdiction and that the parties' intention in that respect was clear is not convincing. An MFN clause is not a rule of interpretation that comes into play only where the wording of the basic treaty leaves room for doubt. It is a substantive rule that endows its beneficiary with rights that are additional to the rights contained in the basic treaty. The intention of the parties to the treaty, expressed in the MFN clause, is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights are clearly not contained in the basic treaty.

(6) Temporal Issues of Consent

(a) Time of Consent

The time of consent is the date by which both parties have agreed to arbitration. 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 consent to arbitration in its legislation or in a treaty, the time of consent is determined by the investor's acceptance of the offer. This offer may be accepted simply by initiating the arbitration. In principle, the investor is under no time constraints to accept the offer unless the offer, by its own terms, provides for acceptance within a certain period of time.

It is possible that consent to arbitration is expressed before other conditions for the jurisdiction of a tribunal are met. For instance, the parties may have given consent to ICSID arbitration before the Convention's ratification by the host State or the investor's home State. In that case, the date of consent will be the date on which all the conditions have been met. If the host State or the investor's home State ratifies

the Convention after the signature of a consent agreement, the time of consent will be the entry into force of the Convention for the respective State.[128]

The perfection of consent has a number of consequences. The most important of these is that consent can no longer be withdrawn unilaterally. Under the ICSID Convention: 'When the parties have given their consent, no party may withdraw its consent unilaterally'.[129]

Under the ICSID Convention, the nationality of the foreign investor is determined by reference to the date of consent.[130] From the date of consent, other remedies are excluded, unless otherwise stated.[131] Similarly, diplomatic protection is excluded from the time of consent.[132] Proceedings will be conducted in accordance with the Arbitration Rules in effect on the date on which the parties have given their consent.[133]

The decisive date for the existence of consent is the date of the institution of the arbitral proceedings. In the case of ICSID arbitration, a request for arbitration that is unsupported by a documentation of consent to ICSID's jurisdiction will not be registered.[134]

Consent to arbitration that is forthcoming after the institution of the arbitral proceedings may not suffice. In *Tradex v Albania*,[135] 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.[136]

(b) Applicability of Consent *ratione temporis*

Bilateral investment treaties frequently provide that they shall apply also to investments made before their entry into force. Some BITs state, however, that they shall

[128] See *Holiday Inns v Morocco*, Decision on Jurisdiction, 12 May 1974; Lalive, above n 7 at 146; *Autopista v Venezuela*, Decision on Jurisdiction, 27 September 2001, 6 ICSID Reports 419 at paras 90, 91; *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240 at paras 12.4–12.8.

[129] Art 25(1) last sentence ICSID Convention.

[130] Art 25(2) ICSID Convention.

[131] Art 26 ICSID Convention.

[132] Art 27 ICSID Convention.

[133] Art 44 ICSID Convention. The parties may agree otherwise.

[134] Art 36(3) ICSID Convention.

[135] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47.

[136] Ibid at 57–8. The tribunal found that it did have jurisdiction on the basis of domestic legislation.

not apply to disputes that have arisen before that date. For instance the Argentina–Spain BIT provides in Article II(2):

> This agreement shall apply also to capital investments made before its entry into force by investors of one Party in accordance with the laws of the other Party in the territory of the latter. However, this agreement shall not apply to disputes or claims originating before its entry into force.

It follows from provisions of this kind that the time at which the dispute has arisen will be of decisive importance for the applicability of the consent to arbitration. Some of the actions and events leading to the dispute may have occurred before the BIT's entry into force. But the decisive time is the date at which the dispute began.

In *Maffezini v Spain*,[137] the Respondent challenged the tribunal's jurisdiction, alleging that the dispute originated before the entry into force of the Argentina–Spain BIT quoted above. The Claimant relied on facts and events that antedated the BIT's entry into force, but argued that a 'dispute' arises only when it is formally presented as such.[138] The *Maffezini* tribunal, after quoting the International Court of Justice,[139] found that the events on which the parties disagreed began years before the BIT's entry into force, but this did not mean that a legal dispute can be said to have existed at the time.[140] The tribunal said:

> The Tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.[141]

On that basis, the tribunal reached the conclusion that the dispute in its technical and legal sense had begun to take shape after the BIT's entry into force: 'At that point the conflict of legal views and interests came to be clearly established leading not long thereafter to the presentation of various claims that eventually came to this Tribunal'.[142] It followed that the tribunal was competent to consider the dispute.

In *Lucchetti v Peru*,[143] the applicable BIT between Chile and Peru contained a clause very similar to the one in the Argentina–Spain BIT quoted above. In 1997 and 1998, the investor had been involved in a dispute about licensing with the competent municipal authorities leading to proceedings in the domestic courts. These

[137] *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, paras 90–8.

[138] Ibid at paras 92, 93.

[139] International Court of Justice: *Case concerning East Timor*, ICJ Reports (1995) 90 at para 22, with reference to earlier decisions of both the Permanent Court of International Justice and the International Court of Justice.

[140] *Maffezini*, above n 88 at para 95.

[141] Ibid at para 96.

[142] Ibid at para 98.

[143] *Lucchetti v Peru*, Award, 7 February 2005.

proceedings ended with judgments in favour of the investor and were implemented through the issuing of the required construction and operating licences. The BIT entered into force on 3 August 2001. Shortly thereafter, the municipality issued Decrees 258 and 259 resulting in the cancellation of the production licence and an order for the removal of the plant.

The Tribunal rejected the claimant's argument that the earlier dispute of 1997/98 had been definitively resolved and that the Decrees of 2001 had triggered a new dispute. Rather, in the tribunal's view, the subject-matter of the dispute before it was the same as in 1997/98. The tribunal said:

> The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute.[144]

It followed that the tribunal lacked jurisdiction *ratione temporis*.

In *Jan de Nul v Egypt*,[145] the BIT between BLEU[146] and Egypt also provided that it would not apply to disputes that had arisen prior to its entry into force. A dispute existed already when in 2002 the BIT replaced an earlier BIT of 1977. At that time, the dispute was pending before the Administrative Court of Ismaïlia, which eventually rendered an adverse decision in 2003, approximately one year after the new BIT's entry into force. The tribunal accepted the claimants' contention that the dispute before it was different from the one that had been brought to the Egyptian court: '... while the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs...'[147] This conclusion was confirmed by the fact that the court decision was a major element of the complaint. The tribunal said:

> The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original

[144] Ibid at para 53.
[145] *Jan de Nul & Dredging International v Egypt*, Decision on Jurisdiction, 16 June 2006.
[146] Belgo-Luxembourg Economic Union.
[147] *Jan de Nul*, above n 145 at para 117.

dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.[148]

It followed that the Tribunal had jurisdiction over the claim.[149]

Helnan v Egypt[150] concerned a clause in the BIT between Denmark and Egypt which excluded its applicability to divergences or disputes that had arisen prior to its entry into force. The tribunal distinguished between divergences and disputes in the following terms:

> Although, the terms '*divergence*' and '*dispute*' both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a '*divergence*' when they are mutually aware of their disagreement. It crystallises as a '*dispute*' as soon as one of the parties decides to have it solved, whether or not by a third party.[151]

On that basis, the tribunal found that, even though a divergence had existed before the BIT's entry into force, that divergence was of a nature different from the dispute that had arisen subsequently. It followed that the Tribunal had jurisdiction over the dispute.[152]

The question whether acts and events that occurred prior to an expression of consent to arbitration are covered by the latter should be distinguished from the issue of the applicable substantive law. Even if jurisdiction is established under a treaty, this does not mean that the treaty's substantive provisions are necessarily applicable to all aspects of the case. The general rule is that the law applicable to acts and events will normally be the law in force at the time they occurred.[153]

If the consent to arbitration is limited to claims alleging a violation of the treaty that contains the consent, the date of the treaty's entry into force is also the date from which acts and events are covered by the consent. Put differently, the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis*

[148] Ibid at para 128.

[149] Ibid at paras 110–31.

[150] *Helnan International Hotels A/S v The Arab Republic of Egypt*, Decision on Jurisdiction, 17 October 2006.

[151] Ibid at para 52.

[152] Ibid at paras 53–7.

[153] See especially Art 28 of the Vienna Convention on the Law of Treaties providing for non-retroactivity of treaties. For discussions of this issue see *Generation Ukraine v Ukraine*, Award, 16 September 2003, 10 ICSID Reports 240 at paras 11.2, 11.3 and 17.1; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518 at para 166; *Salini v Jordan*, Decision on Jurisdiction, 29 November 2004 at paras 176, 177; *Impregilo v Pakistan*, Decision on Jurisdiction, 22 April 2005, para 309.

since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself.[154]

Some tribunals have applied the concept of a continuing breach to deal with this situation. An act that commenced before the treaty's entry into force may persist thereafter. This would suffice to give the tribunal jurisdiction.

In *Mondev v The United States*,[155] the parties were agreed that the dispute arose as such before NAFTA's entry into force and that NAFTA had no retrospective effect. But both parties also accepted that conduct committed prior to the entry into force of a treaty might continue in effect after that date.[156] The tribunal accepted that view:

> For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage. Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached.[157]

The tribunal held that while conduct committed before the NAFTA's entry into force could not itself constitute a breach of NAFTA:

> ... it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force.[158]
>
> 70. Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach....[159]

On the basis of this distinction, the tribunal found that in respect of most of the claims there was 'no continuing wrongful act in breach (or potentially in breach)... at the date NAFTA entered into force'. Specifically, the alleged expropriation was completed by that date.[160]

The tribunal in *SGS v Philippines*[161] endorsed the concept of a continuing breach. After quoting from *Mondev*, it said:

> It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were

[154] Art 1116 NAFTA.
[155] *Mondev Int. Ltd v United States of America*, Award, 11 October 2002, 6 ICSID Reports 192.
[156] Ibid at para 57.
[157] Ibid at para 58. Footnote omitted.
[158] Ibid at para 69. Footnote omitted.
[159] Ibid at para 70.
[160] Ibid at para 73.
[161] *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.[162]

A variant of the theory of continuing breach was applied in *TECMED v Mexico*.[163] The tribunal held that in principle, a treaty does not bind a party in relation to acts which took place before its entry into force.[164] Also, the BIT's language appeared to be directed at the future.[165] However, it did not follow that events prior to the BIT's entry into force were irrelevant. If there was still a breach after the treaty's entry into force, acts or omissions occurring before that date might play a role. The tribunal said:

> ...conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction. This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement....[166]

(7) Interpretation of Consent

As outlined above, expressions of consent to arbitration have led to disputes in a number of cases. Tribunals applying these expressions of consent have had to grapple with their proper interpretation.

(a) Extensive or Restrictive Interpretation

In a number of cases, the respondents argued that an expression of consent to arbitration should be construed restrictively. This argument was generally not successful. 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

[162] Ibid at para 167.
[163] *Técnicas Medioambientales TECMED SA v United Mexican States*, Award, 29 May 2003, 10 ICSID Reports 134.
[164] Ibid at para 63.
[165] Ibid at paras 64, 65.
[166] Ibid at para 68.

a limitation of its sovereignty should be construed restrictively.[167] 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.[168]

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.[169]

In *SOABI v Senegal*,[170] the government argued that Article 25 of the ICSID Convention must be given a strict interpretation 'as with any provision derogating from general rules of municipal law'.[171] The tribunal noted that consent to arbitral proceedings constitutes a derogation from the right to have recourse to national courts. Such consent should not be presumed. But it refused to accept the consequence that the interpretation of an expression of consent should be stricter with regard to the consent of a State than with regard to that of an investor.[172] In the tribunal's view, the correct approach, as with any other agreement, was an interpretation consistent with the principle of good faith:

> In other words, the interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings. It is this principle of interpretation, rather than one of *a priori* strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.[173]

In *SPP v Egypt*,[174] the argument of the restrictive interpretation of jurisdictional instruments was raised again, this time in relation to an arbitration clause in national legislation. The tribunal found that there was no presumption of

[167] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at paras 12, 16.

[168] Ibid at para 14. Emphases original. See also remarks to the same effect at paras 18 and 29. This decision was cited with approval in *Cable TV v St. Kitts and Nevis*, Award, 13 January 1997, 5 ICSID Reports 108 at para 6.27; *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335 at para 34; *Ethyl Corp v Canada*, Decision on Jurisdiction, 24 June 1998, Decision on Jurisdiction, 7 ICSID Reports 12 at para 55.

[169] *Amco*, above n 167 at para 24.

[170] *SOABI v Senegal*, Award, 25 February 1988, 2 ICSID Reports 190.

[171] Ibid at para 4.08.

[172] Ibid at para 4.09.

[173] Ibid at para 4.10.

[174] *SPP v Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 131.

jurisdiction and that jurisdiction only existed in so far 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 judgments 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.[175]

In *Mondev v United States*[176] the respondent argued that its consent to arbitration under the NAFTA was given only subject to the conditions set out in that treaty, 'which conditions should be strictly and narrowly construed'.[177] The tribunal rejected this contention. It said:

> In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31–33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.[178]

A number of other tribunals have since endorsed a balanced approach to the interpretation of consent clauses which rejects both a presumption against and in favour of jurisdiction.[179]

Other tribunals seemed to be leaning more towards an extensive interpretation of consent clauses.[180] In *Tradex v Albania*,[181] the tribunal expressed a certain preference, although with some qualifications, in favour of a doctrine of effective interpretation for clauses conferring jurisdiction upon ICSID. After finding that the Albanian Investment Law of 1993 was an expression of Albania's commitment to the full protection of foreign investment, the tribunal said:

> It would, therefore, seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the 1993 Law should

[175] Ibid at para 63. This passage was quoted with approval in *Inceysa v El Salvador*, Award, 2 August 2006, at para 176.

[176] *Mondev Intl Ltd v United States of America*, Award, 11 October 2002, 6 ICSID Reports 192.

[177] Ibid at para 42.

[178] Ibid at para 43. Footnotes omitted. The tribunal cited several decisions by the International Court of Justice and by other tribunals.

[179] *Duke Energy v Peru*, Decision on Jurisdiction, 1 February 2006, paras 76–8; *El Paso Energy v Argentina*, Decision on Jurisdiction, 27 April 2006, paras 68–70; *Inceysa v El Salvador*, Award, 2 August 2006, paras 176–81.

[180] *Methanex v United States*, Preliminary Award on Jurisdiction, 7 August 2002, 7 ICSID Reports 239, paras 103–05; *Aguas del Tunari, SA v Bolivia*, Decision on Jurisdiction, 21 October 2005, para 91; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, para 116; *Eureko v Poland*, Partial Award, 19 August 2005, para 248; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina*, Decision on Jurisdiction, 16 May 2006, paras 59, 64.

[181] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47.

rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular.[182]

In *SGS v Philippines*,[183] the tribunal was even more categorical in this respect. In the context of interpreting an umbrella clause in the Philippines–Switzerland BIT it said:

> The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[184]

But there is also authority for the opposite position.[185] In *SGS v Pakistan*,[186] the tribunal also had to interpret an umbrella clause. It subscribed to a restrictive interpretation in the following terms: 'The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*'.[187]

(b) Applicable Law

Another issue affecting the interpretation of a consent agreement is the applicable law. A possible approach is to treat the consent agreement between the parties by analogy to treaties and to apply the normal rules of treaty interpretation. This method would appear particularly suitable where the original clause providing for settlement under the ICSID Convention is contained in a treaty. But a consent clause in a treaty is merely an offer to investors that needs to be accepted. The perfected consent is not a treaty but an agreement between the host State and the investor.

An interpretation of consent to arbitration in the framework of domestic law would seem particularly appropriate if the original consent clause is contained in

[182] Ibid at 68.

[183] *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

[184] Ibid at para 116. See also R Dolzer 'Indirect Expropriations: New Developments', 11 NYU Environmental L J 64 (2002) at 73: 'Inasmuch as Article 31 of the Vienna Convention lays emphasis on the object and purpose of a treaty, it might be argued that a teleological approach to interpreting bilateral or multilateral treaties should be based on the assumption that these treaties have been negotiated to facilitate and promote foreign investment, which is often reflected in the wording of the preambles. Thus it might be concluded that, when in doubt, these treaties should be interpreted *in favorem* investor, stressing and expanding his rights so as to promote the flow of foreign investment'. Footnotes omitted.

[185] *Noble Ventures v Romania*, Award, 12 October 2005, para 55.

[186] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406.

[187] Ibid at para 171. The Tribunal's interpretation prompted a letter by the government of Switzerland to the Deputy Secretary-General of ICSID in which it expressed its disapproval and alarm over the very narrow interpretation given to the umbrella clause. See Alexandrov above n 39 at 570–1.

domestic legislation. But, again, the consent clause in legislation is merely an offer that may lead to an agreement if accepted. The consent agreement is neither a treaty nor simply a contract under domestic law.

Yet another approach would consist in interpreting consent agreements in the light of the law applicable to the substance of the dispute. This would often be a combination of international law and the host State's domestic law. Tribunals have rejected this approach also.

In *SPP v Egypt*,[188] the consent to arbitration was based on a provision in Egyptian legislation. The tribunal refused to accept the argument that the parties' consent to arbitration should therefore be interpreted in accordance with Egyptian law. Neither did it accept the argument that the arbitration clause was subject to the rules of treaty interpretation.[189] The issue was whether certain unilaterally enacted legislation had created an international obligation under a multilateral treaty (the ICSID Convention). This involved statutory and treaty interpretation as well as certain aspects of international law governing unilateral juridical acts. The tribunal said:

> ...in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.[190]

In *CSOB v Slovakia*,[191] consent to arbitration was based on a contract between the parties that referred to a BIT. Although the BIT had never entered into force, the tribunal concluded that the parties by referring to the BIT had intended to incorporate the arbitration clause in the BIT into their contract.[192] With respect to the interpretation of the consent agreement, the tribunal had no doubt that it was governed by international law: 'The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention'.[193]

Tribunals have also held consistently that questions of jurisdiction are not subject to the law applicable to the merits of the case.[194] Rather, questions of jurisdiction are governed by their own system, which is determined by the peculiarly mixed nature

[188] *SPP v Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.

[189] Ibid at paras 55–60.

[190] Ibid at para 61.

[191] *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335.

[192] Ibid at paras 49–55.

[193] Ibid at para 35.

[194] *Azurix v Argentina*, Decision on Jurisdiction, 8 December 2003, 10 ICSID Reports 416, 43 ILM 262 (2004) at paras 48–50; *Enron Corp. and Ponderosa Assets, LP v Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273 at para 38; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004 at paras 29–31; *Camuzzi v Argentina*, Decision on Jurisdiction, 11 May 2005, paras 15–17, 57; *AES Corp v Argentina*, Decision on Jurisdiction, 26 April 2005, paras 34–9; *Jan de Nul NV Dredging Intl NV v Egypt*, Decision on Jurisdiction, 16 June 2006, paras 65–8.

of the agreement to arbitrate in investment disputes. In the words of the tribunal in *CMS v Argentina*:

> Article 42 [of the ICSID Convention][195] is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decision on jurisdiction, governed solely by Article 25 of the [ICSID] Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions.[196]

Concluding Remarks

The existence of a valid consent to arbitration is one of the most complex issues in the settlement of international investment disputes. The difficulties stem in part from the different methods of giving consent. These methods have undergone a dramatic development over time. Early cases were based on consent clauses in agreements between host States and investors. More recent cases are mostly based on offers of consent in treaties and occasionally in national legislation. Not surprisingly, the different ways of giving consent have led to different questions and problems.

The scope of consent is also subject to wide variations. It ranges from very narrow instances of consent, covering only specific disputes or narrowly circumscribed types of dispute, to very broad categories, covering any dispute relating to an investment. Certain treaty clauses, like umbrella or MFN clauses, which are not specifically related to consent or even to dispute settlement, further complicate the picture.

Procedural requirements are potential obstacles to the effectiveness of consent to jurisdiction. These may impose periods for negotiations or mandate an attempt to settle the dispute in domestic courts for a certain period of time. Contrariwise, fork-in-the-road clauses may nullify consent to international arbitration where domestic remedies have been utilized.

The practice of tribunals on these various issues is remarkable in more than one respect. It has reached considerable proportions and most issues are well illustrated by case-law. However, the availability of authority does not always lead to clarity. A number of questions have been answered by tribunals in clearly contradictory ways. The interpretation of umbrella clauses and the application of MFN clauses to

[195] Art 42 of the ICSID Convention deals with the law applicable to the dispute.

[196] *CMS v Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, 42 ILM 788, at para 88.

dispute settlement are obvious examples. Therefore, the topic of this chapter is also an apt reminder of the need to improve the harmonization of tribunal practice.

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