ARBITRATION IN INVESTMENT TREATIES: PUBLIC OFFER OF ARBITRATION IN INVESTMENT-PROTECTION TREATIES

Prof. Dr. Bernardo M. Cremades*

Summary of Contents: I. INTRODUCTION.— II. CONSENT IN ARBITRATION AGREEMENTS UNDER THE ICSID CONVENTION. 1. Consent to be in writing. 2. Meaning and scope of the term consent under the ICSID Convention. 3. The ICSID Additional Facility.— III. SPECIFIC SUBMISSION BY STATES OF DISPUTES WITH INVESTORS TO ICSID ARBITRATION. 1. Form of consent. 2. Features of the offer of arbitration contained in Bilateral Investment Treaties. 3. Offer of arbitration as contained in Bilateral Investment Treaties concluded by Spain.

I. INTRODUCTION.

Investment of private capital in a foreign country has been a long-standing feature of international economic intercourse. Capital tends to flow to places where its use is more productive (i.e., where the return is higher), and from economies where it is abundant, such as developed countries and financial centres, towards countries where capital is scarce and where the capabilities associated with private enterprises are lacking, provided that the economic and legal situation of the host State (i.e., recipient of the investment) enables the investment abroad to be profitable.

Given that human activity of whatever nature inevitably produces conflicts -and foreign investment is no exception- the possibility of subjecting foreign investment disputes to an impartial dispute-settlement procedure of an international nature (i.e., international arbitration) depends on the existence of a previous agreement[1] between States receiving

* Senior Partner at B. Cremades & Asociados. C/ Goya 18, 28001 Madrid, Spain. Telf.: + 34.91.423.72.00. Fax.: + 34.91.576.97.94. E-mail: bcremades-mad@bcremades.com

[1] Unless the national law of the State receiving foreign investment provides otherwise.

investment and investors or their home States[2], generally in the form of Bilateral Investment Treaties (BITs).

Among the different arbitration alternatives and institutions,[3] the most important and successful initiative linked to resolution of investment disputes is the International Centre for the Settlement of Investment Disputes (the "ICSID" or "Centre"). Created in 1965 under the auspices of the International Bank for Reconstruction and Development (known as the World Bank), the ICSID was established in Washington, and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "Convention") was brought into being in an attempt to provide a process for the resolution of investor-State disputes. Insofar as the ICSID is governed by an international treaty, rather than by national law, ICSID arbitration is truly delocalised and denationalised. These features, along with the Centre's specialised focus on the resolution of investment issues, make the ICSID the natural forum for solving investor-State disputes. Apart from ICSID arbitration the International Court of Arbitration of the ICC has played and continues to play a leading role in the settlement of investment disputes through arbitration as well as conciliation.

In great measure, the singularity of ICSID arbitration resides both in the consent required for the Centre to have competence and jurisdiction in any given dispute, and in the possibility that such consent be embodied, on the one hand, in an instrument of Public International Law (such as a BIT) and, on the other, in the lodging of a claim with the ICSID.

II. CONSENT IN ARBITRATION AGREEMENTS.

[2] For a general overview on State-investor disputes see B. Cremades "*Promoting and Protecting International Investments*", speech at the 20th Anniversary Meeting of the ICC Institute of World Business Law on 28 March 2000 at Paris, §19 to §22.

[3] *Ad hoc* arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the Stockholm Chamber of Commerce, the International Court of Arbitration of the ICC or other arbitration institutions.

In arbitration, problems concerning jurisdiction and competence are basically limited to the question of consent and evidence of same. The magnitude of the problem increases where one finds oneself confronted by mechanisms, such as the ICSID Convention, which provide for complex solutions to problems that are likewise complex. Bearing this in mind, the existence of an arbitration clause or an arbitration agreement will then depend upon whether or not there has been the necessary concurrence of intent and, following on from this, whether or not the existence of such concurrence of intent can indeed be proved.

In brief, the point at issue here is the intended meaning of the phrase, "*consent in writing*", as used in Article 25.1 of the ICSID Convention.[4]

1. Consent to be in writing.-

It has been asserted on numerous occasions that the arbitration agreement is the corner stone of arbitration[5] and, despite being so often repeated, it is an assertion that is none the less valid for that. Leaving to one side the substantive considerations entailed in such an assertion, namely, freedom of agreement and *l'autonomie de la volonté*, it is essential that the formal aspects of the arbitration agreement be addressed, basically because it is on formal grounds that the enforcement of any award is upheld or dismissed and that arbitral tribunals are deemed to enjoy or to lack competence, and, above all, because in matters of public offer of arbitration under BITs, form is accorded a certain degree of importance.

Needless to say, this formal aspect is a matter of no little importance to international arbitration insofar as arbitration clauses are concerned.[6] International conventions and

[4] Article 25.1 of the Convention lays down that: *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally*".

[5] Paragraph 23 of the Report of the World Bank Executive Directors accompanying the Convention. Doc ICSID/2.

[6] In general terms, arbitration is not overly formalistic on the procedural side, though indeed it can be so in certain cases. An example in point is the pre-arbitration dispute-settlement mechanism envisaged under the FIDIC General and Standard Conditions in their different modalities (Civil, Mechanical, Electrical, Turn-key, etc.). The FIDIC Conditions lay down that prior to arbitration, a dispute must be

treaties[7] and most bodies of national statute law[8] stipulate the need for arbitration clauses to be recorded in writing. There are two fundamental reasons for this:

1. writing lends permanent form to, establishes and provides evidence of the external and concurrent expression of intent of the parties, designed to ensure that settlement of any possible disputes existing within the context of a defined legal relationship[9] be submitted to arbitration; and,

2. in the case of an agreement that excludes recourse to the jurisdiction of national courts of law, the need for writing would seem only logical in view of the fact that the parties are waiving a fundamental and essential right.[10]

Hence, writing determines the validity and effectiveness of the arbitration agreement, a point covered by the Washington Convention at Article 25.1, on laying down that, "*The jurisdiction of the Center shall extend to any legal dispute arising directly out of an*

---

submitted to the Engineer or a Dispute Adjudication Board. Compliance or non-compliance with this requirement may determine the Arbitral Tribunal's competence or lack of same (see "*Extraits de sentences arbitrales en matière de contracts de construction faisant référence aux conditions FIDIC*", in ICC International Court of Arbitration Bulletin, June 1991 vol. 2 No. 1 and "*Extracts from ICC awards on construction contracts referring to the FIDIC conditions -Part II*", in ICC International Court of Arbitration Bulletin, November 1998 vol. 9 No. 2).

[7] Geneva Convention on International Commercial Arbitration of 1961 (Art. I.2.a), New York Convention on the Recognition and Enforcement of Foreign Awards (Art. II. 1 and 2) and the Inter-American Convention on International Commercial Arbitration of (Art. 1).

[8] The former Netherlands Arbitration Act established that an arbitration agreement could be concluded orally but that an arbitration agreement is deemed to be concluded if the parties appear before the arbitral tribunal without invoking the lack of an agreement prior to raising its defence (see commentary on Art. 1202.1 in Sanders and van den Berg, "*The Netherlands Arbitration Act 1986*", Kluwer 1987). Also Sweden and the former German Democratic Republic allowed oral arbitration agreements (see Craig, Park & Paulson, "*International Chamber of Commerce Arbitration*" page 75, Oceana & ICC, 1990).

[9] This is the term used by the New York Convention at Article II.1.

[10] "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*.[...]" Article 14.1 of the International Covenant on Civil and Political Rights of 19 December 1966. This is likewise laid down by Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

investment, [...], *which the parties to the dispute consent in writing to submit to the Center*".

It can thus be concluded that, under the terms of the ICSID Convention, it is an essential prerequisite that the agreement of intent or, what amounts to the same thing, the arbitration agreement, be in writing. It is writing and the legal vehicles containing the agreement that imbue certain arbitration conventions relating to settlement of investment disputes with their distinctive nature.

2. Meaning and scope of the term consent under the ICSID Convention.-

Black's Law Dictionary[11] defines consent as, "*Agreement; approval; permission; the act or result of coming into harmony or accord.* [...]".

In an abstract sense, the above definition of consent can be accepted. For the purposes of arbitration clauses or arbitration agreements concluded between two parties in a normal legal relationship, such a definition would be valid. Nevertheless, this definition is not applicable to the dispute-settlement mechanism established under Articles 1.2[12] and 25.1 of the ICSID Convention, in that this involves two separate legal relationships of a distinctly different nature, each of which requires consent in order to attain the ultimate state of "*harmony or accord*" that constitutes the arbitration agreement. These two legal relationships are:

(i) an international treaty of a multilateral nature, viz., the ICSID Convention.

[11] Black's Law Dictionary, Sixth Edition, West Publishing Co.1990, St. Paul, Minn.

[12] Article 1.2 lays down that: "*The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.*"

In order for this mechanism to impose any manner of obligation, there must be consent[13] given by such persons as may be parties to international treaties and conventions, i.e., by an international person and, specifically, by World Bank Member States.[14] Consent given by States implies the creation as between themselves of a legal relationship capable of generating rights and obligations, which, in the case of the ICSID Convention, translates as the obligation to accept ICSID arbitration in the event that *"the parties to the dispute consent in writing to submit* [the dispute] *to the Centre" provided that the State involved is a party to the Convention and that the Home State of the other party to the dispute is also a Contracting State to the Convention*. This then is consent pursuant to Articles 67 and 68 of the Convention; and

(ii) a legal relationship of a contractual or extracontractual nature[15] between a State and a natural or juridical person , i.e., an individual or corporation.

For there to be submission to the ICSID, any State that has consented to enter into Convention in the capacity of an international person must in turn consent to submit to the ICSID the settlement of any such dispute as may arise from this defined legal relationship and, in addition, the individual/corporation that is a national of a Contracting State to the

[13] Such consent in no way corresponds to signature of the treaty. Simple signature of a Treaty will not suffice to bind a signatory thereto. In the great majority of cases, there must be ratification by the competent constitutional body, followed by formal exchange or deposit of ratification instruments (see Brownlie, "*Principles of Public International Law*", Oxford University Press, Fifth Edition, page 611).

However, consent need not necessarily be forthcoming in the form of signature and ratification of a Treaty, it may also take the form one State succeeding to the obligations of another (succession of States) (see Schreuer, *"Commentary on the ICSID Convention: Article 25*", ICSID Review, Foreign Investment Law Journal, Vol. 11, No. 2, Fall 1996, pages 401 to 403).

[14] This is laid down by Article 67 of the Washington Convention. Accordingly, international persons that are not World Bank Member States or fail to meet the conditions established in said Article are not entitled to be a party to the ICSID Convention. Hence other international persons are excluded, such as non-self-governing territories (e.g., Gibraltar, though on 7 May 1968 the United Kingdom made use of the power envisaged under Article 25.1 to designate Gibraltar as a constituent subdivision) or international organisations (e.g., United Nations).

[15] The relationship would be contractual if there were a contract between State and investor (e.g., civil engineering works for the construction of a port terminal), or extracontractual if an obligation were to be created between State and investor arising from certain actions by the State or from certain events envisaged under a BIT (e.g., expropriation, nationalisation or losses due to war). In this regard, see Paulson, "*Arbitration without privity*", ICSID Review, Foreign Investment Law Journal, Vol. 10, No. 2, Fall 1995, page 238.

Convention (Contracting State) must likewise give his/its consent to the settlement of said dispute being submitted to ICSID arbitration. This constitutes consent pursuant to Article25.1 of the ICSID Convention.

A consequence flowing from the above is that, as a prerequisite, both investment-recipient and investor-home States must necessarily be parties to the ICSID Convention,[16] thus establishing the need for dual or two-phase consent.[17]

The fact of being a signatory to the ICSID Convention does not, *per se*, give rise to an arbitration agreement, nor to any obligation to have recourse to the ICSID in the event of dispute. For this latter purpose, additional consent is required, on the part both of the States and of investors that are nationals of an ICSID Convention Contracting State. Indeed, the final paragraph of the Preamble to the Convention states this in so many words:[18]

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

The ICSID Convention is a framework agreement, an open-door or umbrella agreement, that, should the need arise, allows for possible agreement between an investor, whose home State is a Contracting State, and a host State which, moreover, is a Contracting State,

[16] Or at least one of them, in cases where application of the ICSID Additional Facility is sought.

[17] The *raison d'être* for such two-phase consent lies in the fact that, whilst States are party both to the Convention and to the dispute, individuals or corporations, whose home State is party to the Convention, are parties only to the dispute (see Vives Chillida, *"El Centro International de Arreglo de Diferencias Relativas a Inversiones (CIADI)"*, M^{c}Graw Hill, Madrid 1998 page 60).

[18] The Preamble of the Convention stresses the fact that consent of the parties to the dispute determines the Centre's competence "[...] ***Recognizing*** *that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and* [...]".

thereby creating a certain degree of expectation with regard to agreement on recourse to the ICSID as a means of settling disputes.

Returning to the matter of the second type of consent, the point should be made that the respective parties' consent or concurrence of intent need not be simultaneous. In fact, it may be deferred over a period of time, and/or different instruments may be used for the purpose, provided that such consent be given or evidenced in writing. This possibility is nothing new in International Arbitration Law,[19] though the instrument whereby parties give their consent in writing in the ambit of the ICSID may indeed be somewhat singular.

3. The ICSID Additional Facility.-

Though not in every case, and subject to the proviso that in all cases concurrence of both of the above-mentioned consents is essential, the former may, in certain measure and under certain circumstances, nonetheless be dispensed with.

On 27 September 1978, The Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings was approved by a majority vote of the ICSID Administrative Council. This facility was created with the aim of lending greater impetus to ICSID activity and, in particular, of enabling submission to the ICSID of disputes over which it had no jurisdiction under the Washington Convention. This lack of competence arose by virtue of the fact that, at times, either the investor's home State or the disputing State was not a Contracting State.

[19] Art. II.2 of the New York Convention; Art. 7.2 of the UNCITRAL Model Law; Art. I.2 b) of the Geneva Convention 1961; and Article 1 of the Inter-American Convention on International Commercial Arbitration.
This point is expressly covered at paragraph 24 of the Report of the World Bank Executive Directors accompanying the Convention (Doc ICSID/2), where it states that, "*Nor does the Convention require that the consent of both parties be expressed in a single instrument*".

This mechanism was conceived with the idea that it would be included in arbitration agreements and arbitration clauses.[20] The Arbitration (Additional Facility) Rules are based on the ICSID Rules of Arbitration and such provisions of the Convention as lend themselves to being included in an instrument of a contractual nature, and, in addition, incorporate some provisions derived from the UNCITRAL Arbitration Rules and ICC Rules of Arbitration.[21]

The Additional Facility enables the ICSID Secretariat to administer certain types of proceedings that fall outside the scope of the Convention, either:[22]

(i) by reason of the parties involved (*ratione personae*), inasmuch as the ICSID Additional Facility applies to all legal disputes concerning investment-related matters, as defined and construed by the Convention, in cases where the disputing State, be it the State party or the investor's home State, is not a party to the Washington Convention; or

(ii) by reason of the issue in dispute (*ratione materiae*), inasmuch as the ICSID Additional Facility applies to all such legal disputes as do not arise directly from an investment,

[20] Practice has shown that submission to ICSID Arbitration (Additional Facility) Rules is not only something agreed in contracts and agreements between individuals or private corporations and investment-recipient States (or any constituent subdivision or agency thereof), but that it is fairly common for such States themselves to agree under a BIT to have recourse to the Additional Facility as a dispute-settlement mechanism. Thus, Spain, for instance, has provisions to this effect in BITs entered into with Colombia (not yet in force) Costa Rica, Croatia, Chile, India, the Lebanon, Mexico, South Africa, the Ukraine (not yet in force) and Venezuela.

Moreover, the North America Free Trade Agreement (NAFTA) lays down in Article 1120.1 that, "[...] *a disputing investor may submit the claim to arbitration under: (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules*". The reason for including this reference to the ICSID Additional Facility is that neither Mexico nor Canada are Contracting States to the ICSID Convention (the updated list of ICSID Convention signatory States is available at: < http://www.worldbank.org/icsid/conStates/c-States-en.htm >)

[21] ICSID Document/11/Rev.1 (pages 62-64) contains a series of tables listing the respective sources for each of the provisions of the Arbitration (Additional Facility) Rules. Appearing in this same publication are similar tables referring to the Conciliation (Additional Facility) Rules.

[22] Art. 2 of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (Additional Facility Rules).

provided that same are not ordinary commercial disputes, and that at least one of the parties is a Contracting State or a national thereof.

It should be recalled here that, insofar as the ICSID Convention does not apply to the Additional Facility,[23] the latter does not benefit from the extraordinarily favourable regime of recognition and enforcement of awards established under Section 6 of the Convention, thereby rendering it necessary for recourse to be had to the New York Convention for the purposes of recognition and enforcement of awards.[24]

III. SPECIFIC SUBMISSION BY STATES OF DISPUTES WITH INVESTORS TO ICSID ARBITRATION.-

1. Form of consent.-

Consent under Article 25.1 may be given in three different ways or by means of three different legal instruments, namely,: (a) via an internal enactment passed into law by a Contracting State to the Convention; (b) via an agreement concluded between a Contracting State or any constituent subdivision or agency of a Contracting State designated to the Centre, and an investor whose home State is a contracting party to the Convention; or (c) via a treaty for the reciprocal promotion and protection of investments, whether bilateral or multilateral.

As has been pointed out above, the parties' consent under Article 25.1 of the ICSID Convention must be evidenced in writing, albeit not necessarily in a single instrument or even at one and the same time. This is precisely the case with consent given by Contracting States under their respective national legislations or in international treaties (whether bilateral or multilateral). In such instances, the Contracting State makes a statement of consent[25] for the

[23] Art. 3 of the Additional Facility Rules.

[24] See (i) Redfern and Hunter, *"Law and Practice of International Commercial Arbitration"*, Sweet & Maxwell, Third Edition 1999, London pages 57 and 58; (ii) ICSID Document/11/Rev.1 note to Art. 3 of the Additional Facility Rules, page 4; and (iii) Art. 20 Arbitration (Additional Facility) Rules.

purposes of ICSID arbitration, a statement which in the case of an investor of another Contracting State,[26] may then be taken up and completed by the addition of his/its own consent, thereby completing the circle required under Article 25.1.

These three instruments will now be discussed in detail below:

A. A declaration contained in a national statutory enactment

The possibility that a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation is perfectly valid under the Convention.[27] Many countries, most of them developing or formerly socialist countries, have passed special laws to regulate the treatment of foreign investment, in many cases by compiling all existing rules and regulations of relevance and enacting these in one consolidated piece of legislation. Such laws are known as "investment codes", which in some cases include references to ICSID dispute settlement.[28]

In other cases, host States have legal regimes governing foreign investment, made up of rules contained in different statutes.

Consent given by the host State must of course be combined with that given by the investor. Consent must be verified at the time when ICSID proceedings begin[29] and can be given in a

---

[25] This statement will be unilateral, bilateral or multilateral in nature, according to whether it is made pursuant to a rule of internal law, a BIT or a multilateral treaty for the promotion and protection of investments.

[26] Insofar as a rule of internal law is concerned, in principle any national of a Contracting State is in turn entitled to give his consent with binding effect. In the case of a BIT or multilateral treaty, the investor's home State would have to be a party to such an agreement for said statement to be taken up and completed by the addition of his/its own consent.

[27] See paragraph 24 of the Report of the World Bank Executive Directors accompanying the Convention (Doc ICSID/2).

[28] Hence, for example, see Art. 28.2 of the Guinean 1987 Investment Code; Article 8.2 of the Albanian 1993 Foreign Investment Act; Art. 10 of the Ivory Coast 1984 Investment Code; etc. For greater detail, see Schreuer, "*Commentary on the ICSID Convention: Article 25*", pages 429 to 437.

[29] See Art. 28.3 and 36.3 of the Convention, and also paragraph 24 of the Report of the World Bank Executive Directors accompanying the Convention (Doc ICSID/2).

number of ways: by addressing a request for arbitration to the Centre;[30] by entering into an investment agreement with the host State; by including a statement in an application for an investment licence; or by means of a simple communication to the host State, stating that consent to ICSID jurisdiction in accordance with the legislation, is accepted.

B. Arbitration clause included in a contract or investment agreement

Consent may be included in a single instrument, which may be a contract or an investment agreement. This is the classic arbitration clause, included in contracts entered into by a Contracting State or any subdivision or agency thereof and an investor of another Contracting State (e.g., a highway rehabilitation contract, a hydroelectric power concession, a port terminal concession agreement, and the like).

The ICSID has published a series of model clauses that envisage different eventualities and can be included in contracts to be concluded between host States and investors[31]. Nevertheless the ICC standard arbitration clause is the most common dispute settlement mechanism included in international contracts, a consecuence no doubt of the ICC's position at the forefront of international dispute resolution institutions.

C. International treaties

The host State may, in turn, give its consent to ICSID arbitration under international treaties, whether bilateral or multilateral. These can be broken down into:

C.1. Bilateral Investment Treaties (the BITs referred to above) have been promoted since the 1960s by developed market-economy countries, in order to lay down guarantees for the protection of investments[32]. They remain the principal instrument for agreeing on specific rules for the legal protection of foreign investments i.e., ICSID arbitration.[33]

---

[30] In this case, the investor runs the risk of the law or legal provision containing the host State's consent being derogated prior to the corresponding request being brought before the Secretary-General.

[31] An updated list of such clauses may be found at:
< http://www.worldbank.org/icsid/model-caluses-en/main-eng-htm >

In BITs, it is usual for a clause to be included providing for dispute-settlement mechanisms, which are, in turn, designed to ensure arbitral settlement of investment disputes between a contracting party to the BIT (Contracting Party) and an investor, generally by reference to institutional or other pre-existing arbitration rules.

Owing to the great number of BITs and the reference to ICSID arbitration made in same,[34] it may be asserted with a still greater degree of certainty that the ICSID is the natural forum for resolution of investor-State disputes. ICC arbitration is also frequently included in BITs[35].

Since the case of *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* it has been understood that this type of BIT clause may constitute necessary and sufficient consent on the part of the host State for the purposes of Article 25.1 of the Convention.[36] While it is true that nowhere in the Report of the Executive Directors is mention made of the possibility that consent by the host State might be expressed in a bilateral treaty, mention is nevertheless made of the possibility that "*a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing*".[37] Paradoxically, this kind of offer has proliferated far more in BITs than in the internal legislation of Contracting States.

---

[32] Concerning the investor protecting features contained in BITs see B. Cremades "*Promoting and Protecting International Investments*" at §9 to §15.

[33] An updated list of over 1,100 BITs concluded until 1996 may be found at:
< http://www.worldbank.org/icsid/treaties/treaties.htm >

[34] "*The overwhelming majority of BITs contain a reference to ICSID*"; Dolzer & Stevens, "*Bilateral Investment Treaties*", Martinus Nijhoff Publishers, The Hague 1995, page 129.

[35] In sixteen of the forty-seven BITs entered into by Spain a reference is made to ICC arbitration (e.g. Spain-Pakistan BIT (1994) Art. 11.2; Spain-Nicaragua BIT (1994) Art. XI.2; Spain--Latvia BIT (1995) Art. 11.2; etc.).

[36] "*The present case is the first instance in which the Centre has been seized by an arbitration request exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the Parties among whom the dispute has arisen*"; see Yearbook of Commercial Arbitration XVII (1992), page 103.

[37] Paragraph 24 of the Report of the World Bank Executive Directors accompanying the Convention (Doc ICSID/2).

Hence, any clause contained in a treaty under which a Contracting Party gives the necessary consent required under Article 25.1, is, in essence, a unilateral and binding offer[38] directed at the national investors of the other contracting Party. The latter may then proceed to take up such an offer, give their consent to the Centre's jurisdiction and, in so doing, thereby conclude an arbitration agreement that is valid and binding on both parties.

Insofar as BITs are concerned, it is frequent for clauses to be included that provide for several alternative forms of arbitration[39] (multiple clauses[40]). In such a case, the choice of one form of arbitration or another may be mutually agreed by the disputing parties or, alternatively, left for the investor to decide,[41] with the State in the latter instance thus giving its consent to any of the respective mechanisms of arbitration[42]. This type of clause can prove especially useful in cases where, for some reason or other, the ICSID system (ICSID Convention or ICSID Additional Facility) may not be available, since it circumvents the possibility of investors being confronted by a *clause pathologique* or no arbitration clause at all, with the ensuing need for recourse to the Courts of Law of the host State.

---

[38] It is a unilateral offer pursuant to a bilateral agreement between two States. Those to whom the offer is directed (the national investors of the other contracting Party) are not a party to the Treaty, so that, vis-à-vis such parties, the offer is unilateral.

[39] Usually included among these possibilities are: arbitration under the UNCITRAL Arbitration Rules; and, to somewhat lesser degree, ICC Arbitration; and, of course, ICSID Arbitration and ICSID Additional Facility Rules. To a smaller extent still, and normally under BITs entered into with former Soviet-bloc countries, it is frequent for arbitration under the Rules of the Stockholm Chamber of Commerce to be included (e.g., Art. 10.2 of the Spain-Hungary BIT (1989) and Art. 11.2 of the Spain-Poland BIT (1992), among others).

[40] Multiple arbitration clauses are not exclusive to BITs. They are also offen included in private instruments such as Merger & Acquisitions agreements (see B. Cremades "*Settlement of Disputes in Cross-Border Mergers & Acquisitions*", Conference of the *Rechtszentrum für europäische und internationale Zusammenarbeit* on 6 april 2000 at Cologne, §13 and §14).

[41] In some treaties it is even left to the investor to choose whether or not to have recourse to the courts of the host State. This is the situation, for example, in the Spain-El Salvador BIT (1995) Art. 11.2 and the Spain-Kazakhstan BIT (1994) Art. 11.2, among others.

[42] This is the usual formula in BITs entered into by Spain: of 41 BITs concluded by Spain, approximately 80% contain this formula (e.g., Art. XI.2 of the Spain-Costa Rica BIT (1993); Art. 11.2 of the Spain-Egypt BIT (1992); Art. VIII.2 of the Spain-Malaysia BIT (1995); etc.).
This is also the formula employed by the U.S.A.; see Dolzer & Stevens, "*Bilateral Investment Treaties*", page 147.

Note should be taken of the fact that not all clauses referring to the ICSID necessarily constitute binding offers of consent by the host State. Only those that effectively give such consent will be binding. Thus, whilst some clauses unequivocally establish this consent (automatic consent clauses), others simply contain promises of a future agreement or evince a willingness to conclude such an agreement. In some cases, this consent does not appear expressed in manner that is unequivocal[43] and it would then be for the Arbitral Tribunal itself to rule on its own competence[44] in accordance with the principle of *Kompetenz-Kompetenz* reflected in Article 41.1 of the ICSID Convention. The sheer variety of clauses is such that, in order to determine the scope and content of same, a case-by-case analysis becomes necessary.

Consent on the part of the investor may be given in the manner indicated under Head A above, though it has to be said in this regard that, in contrast to national statutory enactments, it is usual for international treaties to be vested with a fixed and finite term during which they are to be in force, and that, despite withdrawal from or denunciation of such a treaty by one of the Contracting Parties, it is nevertheless also standard practice for a term to be stipulated during which the treaty is to remain in force thereafter[45]. Accordingly, when

---

[43] This may be the case with clauses whereby contracting parties to the BIT undertake to give their consent where same is requested by an investor of the other party (clauses with *pactum de contrahendo*). Indeed, this is so in the case of Art. 10.1 of the U.K.-Philippines BIT (1980), which lays down that, *"The contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit to conciliation or arbitration, to the Center* [...]", see Vives Chillida, *"El Centro Internacional de Arreglo de Diferencias Relativas a Investments (CIADI)*, page 80.

[44] A different state of affairs is posed by inter-governmental disputes concerning interpretation of the BIT and, by extension, interpretation of the clause which ultimately contains the contracting Parties consent to ICSID Arbitration. In the normal course of events, BITs establish *ad hoc* arbitral tribunals to settle these types of disputes. One is thus faced with the possibility of different arbitral tribunals, in different proceedings, handing down rulings on the same dispute (the presence or absence of such consent), always bearing in mind however that, in the case of a settlement in the context of a dispute between States, the award would have effect on all subsequent disputes between investors and the relevant host State (effectiveness *erga omnes*), while in the case of a dispute between an investor and a host State, the award would only affect that specific dispute (effectiveness *inter partes*).

[45] In the case of BITs concluded by Spain, it is usual to lay down that, in the event of withdrawal from or denunciation of the treaty, certain provisions (e.g., that containing the offer of submission to the ICSID) or the treaty as a whole will continue to apply for ten years thereafter to investments undertaken prior to

it comes to giving consent, a request for arbitration addressed to the Centre would afford investors a far greater degree of security[46].

C.2. Multilateral treaties and instruments[47] are less numerous than BITs and, as with the latter, States that are a party to same may give their consent to ICSID arbitration. Multilateral treaties also contain offers by party States to consent to ICSID jurisdiction, and such offers may be taken up by investors of any other party States to the treaty. Of these multilateral instruments, the most important are:

C.2.i The North American Free Trade Agreement (NAFTA):[48] Article 1122 provides for recourse to ICSID Additional Facility rules (see note 20 above).

C.2.ii The 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone (MERCOSUR)[49]. Article 9 of the Colonia Protocol affords investors the option of instituting one of several procedures. These include, *inter alia*, arbitration under the ICSID Convention or ICSID Additional Facility.

C.2.iii The Treaty on Free Trade Between Colombia, Mexico and Venezuela, signed on June 13, 1994. Under Articles 17-18, investors are given the option of instituting ICSID arbitration, Additional Facility arbitration or UNCITRAL arbitration, depending upon the degree to which the ICSID Convention has been ratified by the three States.

C.2.iv The Energy Charter Treaty.[50] Article 26 provides for consent to ICSID jurisdiction by party States vis-à-vis investors of any other party State. The Treaty contains

---

said withdrawal or denunciation. By way of example, see Spain-Algeria BIT (1994) Art. 12.2; Spain-Korea BIT (1995) Art. 12.3; Spain-Mexico BIT (1995) Art. 12.3; etc.

[46] The ICSID Convention itself provides for similar caution with respect to obligations arising out of consent to the jurisdiction of the Centre, in cases where a Contracting State should withdraw from or denounce the ICSID Convention (Art. 72).

[47] Concerning investment in a multilateral context see B. Cremades "*Promoting and Protecting International Investments*" at §6 to §8.

[48] Reprinted in 32 International Legal Materials 289 (1993).

[49] The Colonia Protocol on the Reciprocal Promotion and Protection of Investments within Mercosur, signed on January 17, 1994 and the Buenos Aires Protocol on the Promotion and Protection of Investments made by Countries that are not Parties to Mercosur, signed on August 8, 1994 (both protocols concluded under the Asunción Treaty Establishing a Common Market Between Argentina, Brazil, Paraguay and Uruguay (Mercosur), signed on March 26, 1991).

[50] Reprinted in 34 International Legal Materials 381 (1995).

unconditional consent to both the ICSID and ICSID Additional Facility, depending upon which of the two is available.

C.2.v The draft Multilateral Agreement on Investment[51] proposed at the initiative of the OECD. At Chapter V (Dispute Settlement), letter D (Disputes between an Investor and a Contracting Party), No. 2 (Means of Settlement),[52] the proposed treaty lays down that investors may choose to submit any dispute to the competent court or administrative tribunal, to arbitration, or to any other dispute-settlement procedure agreed upon prior to said dispute having arisen. In this context, arbitration possibilities include the ICSID Convention and ICSID (Additional Facility) Rules

C.2.vi Non-binding references to ICSID jurisdiction are also to be found in: the 1987 ASEAN Agreement for the Promotion and Protection of Investments; the 1992 World Bank Guidelines on Treatment of Foreign Direct Investment; and the 1992 European Community Statement on Investment Protection Principles.

Once again, investors may give consent in the manner indicated under Heads A and C.1. above.

2. Features of the offer of arbitration contained in Bilateral Investment Treaties.-

Of the different types of dispute-settlement clauses envisaged under BITs, only those that contain clear and unequivocal consent by Contracting Parties to the ICSID dispute-settlement mechanism will automatically determine the existence of an ICSID arbitration clause and, by the same token, of ICSID jurisdiction, subject always to the proviso that consent in writing be given by the investor of a Contracting State in such a way as to amount to "the act or result of coming into harmony or accord".

---

[51] The version in question is the Negotiating Text as of April 24, 1998.

[52] A general analysis of this rule may be found in Small "*Règlement des différends entre investisseurs et États d'accueil dans un accord multilatéral sur l'investissement*" in the Journée d'études de la Société Française pour le Droit International, on the subject of "*un accord multilatéral sur l'investissement: d'un forum de négotiation à l'autre?*", published by Éditions A. Pedone, Paris 1999.

These clauses -known as unequivocal consent, automatic consent or advanced consent clauses- are characterised[53] by containing an offer to arbitrate[54] that is: public in nature (i.e., contained in an instrument of public international law); unilateral in character (i.e., in respect of all investors that are nationals of the other Contracting Party); binding on the party issuing same (in that the State receiving foreign investment is internationally bound vis-à-vis the State of which the investor is a national);[55] solely revocable by means of an instrument of equal rank; and having a set term during which same is to remain in force.[56]

3. Offer of arbitration as contained in Bilateral Investment Treaties concluded by Spain.-

As of February 2000, Spain had entered into a total of forty-seven BITs, forty-one of which are currently in force.[57] All, with the exception of those concluded with Cuba, the Dominican

---

[53] In no way are these characteristic features meant to comprise a *numerus clausus*; it should be borne in mind here that, owing to the many forms which such types of clause may take, the likelihood of there being other features is extremely high.

[54] Whether, in the case of clauses providing for several alternatives, said offer is in respect of the ICSID mechanism or any other form of arbitration.

[55] A treaty in force is binding upon the parties and must be performed by them in good faith. See Art. 26 of the Vienna Convention on the Law of Treaties.

[56] The term during which the offer is in legal force coincides with that of the treaty. It should however be borne in mind that some treaties contemplate certain of their provisions remaining in force during a period of time subsequent to withdrawal from or denunciation of same (see note 45), and that, on occasions, the retroactive effect of treaty provisions is similarly envisaged, including that of clauses dealing with settlement of disputes between a Contracting State and investors who are nationals of another (e.g., Spain-Croatia BIT (1997) Art. 2.5; Spain-India BIT (1997) Art. 2; Spain-Lithuania BIT (1994) Art. II.2; etc.).

[57] Spain has BITs **in force** with Algeria, Argentina, Bolivia, Bulgaria, Korea (Republic), Chile, China, Costa Rica, Croatia, Cuba, the Czech and Slovak Republics, the Dominican Republic, Ecuador Egypt, El Salvador, Estonia, Honduras, Hungary, India, Indonesia, Kazakhstan, Latvia, the Lebanon, Lithuania, Malaysia, Morocco (27.09.1989), Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, the Philippines, Poland, Romania, the Russian Federation, South Africa, Tunisia, Turkey, Uruguay and Venezuela. The remaining BITs, which have been signed but are **not in force**, are with Colombia, Gabon, Jordan, Morocco (11.12.1997), Slovenia and the Ukraine (data furnished by the Treaty Section of the Spanish Ministry of Foreign Affairs).

Republic, the Russian Federation and Hungary, make some reference to ICSID Arbitration as a method of settling disputes between one State and a national of another.[58]

In general terms, it could be said that the offer of arbitration contained in BITs concluded by Spain is an automatic offer. Nowhere is it explicitly established[59] that consent to ICSID arbitration is being given, yet this is nonetheless to be construed from the wording. Standard consent, as expressed in treaties entered into by Spain, reads as follows:

"In the event that a dispute cannot be settled amicably in a period of six months to run from the date of written notice mentioned in paragraph 1 hereinabove, said dispute shall be submitted, as the investor chooses: to ..." (*Si la controversia no pudiera resolverse amigablemente en un plazo de seis meses a contar desde la fecha de notificación escrita mencionada en el párrafo 1, será sometida a elección del inversor: a ...*).

Such advanced consent is to be construed from the mandatory injunction, "*shall be submitted, as the investor chooses*". As will be observed from the standard text quoted above, consent clauses as contained in BITs concluded by Spain are of the type known as several-alternative clauses, with the time limit for consent being, in the main, fairly wide.[60]

Practically all BITs designate the law that is to be applicable to the dispute. Said governing law is usually made up of: (i) the provisions of the BIT and, where applicable, the provisions of other treaties in force between the parties; (ii) the internal law of the host State, including the rules of Private International Law; and, (iii) the generally recognised Rules and Principles of International Law. It comes as a surprise then to note that, despite the fact that these same three blocks inevitably appear, the order in which they are numbered nevertheless

[58] However, reference to the ICSID Additional Facility is found to a lesser extent. In only ten of these is this mechanism included (Chile, Colombia, Costa Rica, Croatia, the Lebanon, India, Mexico, South Africa, the Ukraine and Venezuela).

[59] This is the case with certain BITs concluded by the Netherlands, the U.K. and the U.S.A. See Dolzer & Stevens, "*Bilateral Investment Treaties*", page 135-136.

varies, with the singular peculiarity that the provisions of the BIT are always ranked first. However, nowhere in any BIT is there any statement to the effect that the order of precedence of sources is to correspond to the order of their enumeration.

In general terms, it can be said that in BITs entered into by Spain, the clause covering disputes between one Contracting Party and the investors of another is couched in the following terms:

"1. Notice of any such dispute, including detailed information thereof, as may arise between one of the Contracting Parties and an investor of another Contracting Party with respect to matters governed hereunder shall be given in writing by said investor to the Contracting Party receiving the investment. Insofar as may be possible, the parties to the dispute shall endeavour to resolve any such differences by means of an amicable settlement.
2. In the event that a dispute cannot be settled amicably in a period of six months to run from the date of written notice mentioned in paragraph 1 hereinabove, said dispute shall be submitted, as the investor chooses:
- to the competent court of the Contracting Party in whose territory the investment was made;
- to an *ad hoc* court of arbitration established under the Arbitration Rules of the United Nations Commission for International Trade Law;
- to the International Centre for the Settlement of Investment Disputes (ICSID), created by the "Convention on the Settlement of Investment Disputes between States and Nationals of other States", open for signature in Washington on 18 March 1965, in the event that both Contracting Parties are signatory states thereto. Where either of the Contracting Parties is not a signatory state to said Convention, the dispute may be settled by recourse to the ICSID Additional Facility for the Administration of Proceedings."

[60] Almost all BITs concluded by Spain establish some type of retroactivity with respect to the term during which they are to have legal force, a retroactivity which, in the majority of cases, embraces clauses containing consent to ICSID Arbitration.