THE ICSID CONVENTION:
A COMMENTARY

A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

SECOND EDITION

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Article 25

(1) 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.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

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

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

OUTLINE

		Paragraphs
I.	INTRODUCTION	1–13
	A. General	1–8
	B. The Additional Facility	9–13

II. INTERPRETATION 14–941
A. **"(1) The jurisdiction of the Centre . . ."** 14–40
1. Jurisdiction, Competence and Admissibility 14–18
2. Scope of Jurisdiction 19–34
a) Conciliation or Arbitration 19–28
b) Fact-Finding 29–34
3. The Relevant Date for the Determination of Jurisdiction 35–40
B. **". . . shall extend to any legal dispute . . ."** 41–82
1. The Existence of a Dispute 41–47
2. The Time of the Dispute 48–56
3. The Legal Nature of the Dispute 57–82
a) Legal and Non-Legal Disputes 57–67
b) The Justiciability of Disputes 68–73
c) Questions of Fact 74–75
d) Non-Legal Means of Dispute Settlement 76–82
C. **". . . arising directly . . ."** 83–112
1. General Meaning under the Convention 83–87
2. Direct Disputes or Direct Investments 88–92
3. The General Unity of an Investment Operation 93–105
4. General Measures affecting Investments 106–112
D. **". . . out of an investment, . . ."** 113–210
1. General Meaning under the Convention 113–121
2. The Dual Test for the Existence of an Investment 122–128
3. Contracts Relating to Investments 129–133
4. Definitions of Investment in National Legislation 134–138
5. Definitions of Investment in Treaties 139–147
6. Types of Investments 148–151
7. A Test for the Existence of an Investment? 152–174
8. Investments: Special Issues 175–201
a) Pre-Investment Activities 175–181
b) Origin of the Investment 182–187
c) Investment in the Host State's Territory 188–198
d) Investment and Host State Law 199–201
9. Use of the Additional Facility in the Absence of an Investment 202–210
a) Conciliation and Arbitration 202–209
b) Fact-Finding 210
E. **". . . between a Contracting State . . ."** 211–229
1. Participation in the Convention 211–220
2. Contingent Submission 221–223
3. The Additional Facility 224–226
4. *Ad Hoc* Arbitration 227–229

F. **". . . (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) . . ."** 230–267
1. General Meaning 230–239
a) Designation Distinguished from Attribution 233–237
b) Negotiating History 238–239
2. Constituent Subdivision or Agency 240–246
3. Designation to the Centre 247–267
a) Form of Designation 252–257
b) Time of Designation 258–267
G. **". . . and a national of another Contracting State, . . ."** 268–302
1. General Significance 268–269
2. The Private Character of the Investor 270–276
3. Multipartite Arbitration 277–282
4. The Nationality of the Investor 283
5. Participation of the Investor's State of Nationality in the Convention 284–288
6. Identification of the Investor's State of Nationality 289–298
7. Contingent Submission 299
8. The Additional Facility 300–301
9. *Ad Hoc* Arbitration 302
H. **". . . which the parties to the dispute . . ."** 303–373
1. Identity of Consenting and Litigating Parties? 303–305
2. The Identification of the Party on the Host State's Side 306–318
a) State Succession 306–310
b) Constituent Subdivisions or Agencies 311–318
3. The Identification of the Party on the Investor's Side 319–363
a) Designation and Representation 319–335
b) Assignment and Succession 336–363
4. Subrogation 364–373
I. **". . . consent in writing to submit to the Centre."** 374–595
1. General Significance 374–378
2. Consent in Writing 379–381
3. Consent through Direct Agreement between the Parties 382–391
a) Consent Recorded in a Single Instrument 382–387
b) Consent Based on an Investment Application 388–389
c) Consent by Reference to Another Legal Instrument 390–391
4. Consent through Host State Legislation 392–426
a) Binding Offer of Consent by the Host State 395–409
b) Prospect of Future Consent 410–415
c) Acceptance by the Investor 416–426
5. Consent through Bilateral Investment Treaties 427–455
a) Binding Offer of Consent by the Host State 431–435

b) Prospect of Future Consent 436–440
c) Consent to Different Forms of Arbitration 441–446
d) Acceptance by the Investor 447–455
6. Consent through Multilateral Treaties 456–467
a) NAFTA 457–459
b) Energy Charter Treaty 460–461
c) Regional Treaties in Latin America 462–463
d) Non-Binding References to ICSID 464–467
7. The Temporal Elements of Consent 468–512
a) Time of Consent 468–469
b) Contingent Expression of Consent 470–474
c) Relevance of the Time of Consent 475–478
d) Consent at the Time of the Institution of Proceedings 479–480
e) Consent After the Institution of Proceedings: *Forum Prorogatum* 481–498
f) Applicability of Consent *Ratione Temporis* 499–512
8. Limitations on Consent 513–539
a) Limitations on Consent in Direct Agreements 515–517
b) Limitations on Consent in Legislation 518–525
c) Limitations on Consent in Treaties 526–539
9. Procedural Conditions to Consent 540–550
a) Waiting Periods for Amicable Settlement 541–547
b) Attempt at Settlement in Domestic Courts 548–550
10. Applicability of Consent to Successive Instruments 551–566
11. The Applicability of MFN Clauses to Consent 567–577
12. The Interpretation of Consent 578–595
a) The Law Applicable to the Interpretation of Consent 578–585
b) Restrictive or Extensive Interpretation of Consent 586–595

J. **"When the parties have given their consent, no party may withdraw its consent unilaterally."** 596–634
1. The Irrevocability of Consent 596–606
2. Prohibition of Indirect Withdrawal of Consent 607–634
a) Notification under Art. 25(4) 607–608
b) Denunciation of the Convention 609–611
c) Withdrawal of Designation or Approval in Respect of a Constituent Subdivision or Agency 612–613
d) Withdrawal of Investment Authorization 614–617
e) Repeal of National Legislation providing for Consent 618
f) Termination of a Treaty providing for Consent 619
g) Invalidity or Termination of the Investment Agreement containing Consent 620–624
h) Incapacity to Give Consent 625–632
i) Conferral of Host State Nationality 633–634

K. **"(2) 'National of another Contracting State' means:"** 635–639
L. **"(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;"** 640–687
1. Determination of Nationality 641–659
a) Applicable Law 641–647
b) Certificate of Nationality 648–656
c) Agreement on Nationality 657–659
2. Nationality of a Contracting State 660–663
3. No Nationality of the Host State 664–678
4. Critical Dates 679–687
M. **"and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration . . ."** 688–759
1. Juridical Persons 689–693
2. Determination of Corporate Nationality 694–740
a) Incorporation, Seat or Control 694–707
b) Agreement on Nationality 708–717
c) Legislation and Treaties 718–740
3. Nationality of a Contracting State 741–751
4. Critical Date 752–759
N. **". . . and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."** 760–902
1. General Significance 760–763
2. Host State Nationality 764–767
3. Agreement to Treat the Investor as a National of Another Contracting State 768–812
a) Form of Agreement 768–774
b) Implicit Agreement 775–794
c) Identification of the Other Contracting State 795–805
d) Legislation and Treaties 806–812
4. Foreign Control 813–870
a) Objective Requirement of Foreign Control 813–825
b) Nationality of Foreign Control 826–839

c) Indirect Control 840–849
d) Form and Extent of Control 850–870
5. Critical Dates 871–895
6. Consequences of Agreement on Nationality 896–902

O. **"(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required."** 903–920
1. Approval of Consent 903–915
a) Need for Approval 903–908
b) Form of Approval 909–912
c) Time of Approval 913–915
2. Waiver of Approval 916–918
3. Consequences of Approval for the Host State 919–920

P. **"(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."** 921–941
1. Notification of Intent Concerning Classes of Disputes 921–927
2. Consent and the Notification of Intent 928–941

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I. INTRODUCTION

A. General

1 Art. 25 lays down the general parameters for ICSID's activity. It is the first of three articles in Chapter II, which is headed "Jurisdiction of the Centre". The other two articles deal with the much narrower questions of excluding other remedies (Art. 26) and diplomatic protection (Art. 27). Unlike Arts. 26 and 27, Art. 25 is not restricted to arbitration but refers to "The jurisdiction of the Centre" thereby also encompassing conciliation (see also paras. 19–28 *infra*). Art. 25 sets out the preconditions for the operation of Chapter III (Conciliation) and Chapter IV (Arbitration).

2 Art. 25 only deals with the substantive questions of jurisdiction. The procedure for the determination of the Centre's jurisdiction is regulated in Arts. 28(3) and 36(3), dealing with the Secretary-General's screening power, and in Arts. 32 and 41 which make the conciliation commission or the arbitral tribunal the judges of their own competence.

3 Art. 25 contains requirements relating to the nature of the dispute (*ratione materiae*) and to the parties (*ratione personae*). In addition, the parties must have given their consent. The requirements relating to the nature of the dispute are that it must arise directly from an investment and that it must be of a legal nature. Those relating to the parties specify that one side must be a Contracting State and the other a national of another Contracting State. All other parts of Art. 25 either define or otherwise specify these essential requirements.

4 The mixed nature of the dispute, that is the limitation to cases arising between a State and a foreign national, is in keeping with one of the Convention's purposes, to close a perceived procedural gap. Legal disputes between individuals or corporations are normally settled before domestic courts. States may settle their legal disputes before the International Court of Justice. However, in mixed disputes, especially arising from international investment relationships, no appropriate forum was seen to exist.

5 The requirements, as set out above, are in part regulated by the Convention – the nature of the dispute and of the parties – and in part left to the parties' disposition in framing their consent. The relationship between the objective and consensual sides of jurisdiction has given rise to some debate. In the course of the Convention's drafting, there were extensive discussions as to whether the objective criteria, notably "investment", "legal dispute" and the investor's nationality, required precise definition (see esp. History, Vol. II, pp. 491, 826, 831, 936, 956/7). Especially Mr. *Broches* explained that, since jurisdiction was optional in character, there was no need to give precise definitions. It was always up to the parties to give or withhold consent (at pp. 83, 258, 267, 268, 397, 491, 497, 499, 505, 540, 563, 566, 567, 700, 702, 707, 710, 972). He was joined by a number of delegates who felt that the parties' consent in a particular case implied their recognition that the objective criteria had been met. In other words, it should be the terms

of consent that ultimately defined the Centre's jurisdiction (at pp. 286, 450, 659, 701, 702, 706, 831, 972). Another group of delegates objected to an imprecise or open-ended description of the Centre's scope of activities. They feared that the mere participation in a convention which opens the door to a far-reaching jurisdiction would create expectations that would make it difficult for host States to resist pressure to give their consent. This, in turn, was liable to lead to friction and embarrassment (at pp. 259, 260, 285, 471, 494, 499, 501, 566, 653, 660, 700, 703, 704, 822). A Brazilian member of the Legal Committee summarized this position by saying that "the more the jurisdiction of the Centre is restricted, the closer we shall be to a satisfactory result" (at p. 838).

6 The fact that most of the proposed definitions for the objective criteria for jurisdiction were not adopted was motivated less by the view that they were redundant than by an inability to agree on them. It would be inaccurate to assume that the general phrasing of these objective criteria in Art. 25 gives the parties complete freedom to determine, by the terms of their consent, which disputes they wish to submit to the Centre. This fact is borne out by the Report of the Executive Directors:

> 25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.[1]

7 Consequently, it is necessary to take a closer look at the meaning of the objective jurisdictional requirements set out in Art. 25. The interpretation by the parties of these objective requirements carries great weight. Nevertheless, there are outer limits to the Centre's jurisdiction that are not subject to the parties' disposition (see paras. 62, 63, 80, 84, 85, 122–128, 515, 638, 639 *infra*). This conclusion is borne out by Rule 41(2) of the Arbitration Rules and Rule 29(2) of the Conciliation Rules: a conciliation commission or an arbitral tribunal will not only take note of an objection to jurisdiction filed by a party but may also consider on its own initiative whether the dispute before it is within the Centre's jurisdiction.

8 Jurisdictional questions under Art. 25 may arise at different stages in the proceedings: at the stage of instituting proceedings, especially in connection with the Secretary-General's screening power under Arts. 28(3) and 36(3), at a preliminary stage before the conciliation commission or arbitral tribunal if the commission or tribunal decides to deal with some or all of them as preliminary questions, and at any time in the course of the proceedings if the commission or tribunal decides to join all or some of them to the merits of the dispute in accordance with Arts. 32(2) and 41(2). In the case of an arbitral award, questions of jurisdiction may also be raised in the context of a request for annulment: a violation of Art. 25 may have the consequence that the tribunal has manifestly exceeded its powers in accordance with Art. 52(1)(b) of the Convention (see Art. 52, paras. 155–166).

1 1 ICSID Reports 28.

B. The Additional Facility

9 Certain investors and capital exporting States regarded some of Art. 25's jurisdictional requirements as too restrictive. The requirement that both the host State and the investor's State of nationality must be Contracting States excluded access to the Centre in many situations. In addition, doubts persisted as to the precise meaning of "dispute arising directly out of an investment". In response to these concerns, the Administrative Council of the Centre on 27 September 1978 adopted Additional Facility Rules.[2] These rules are designed to open access to the Centre in certain situations where the Convention's jurisdictional requirements *ratione personae* and *ratione materiae* have not been met.

10 The conditions for access to the Centre under the Additional Facility are described in Art. 2 of its Rules:

> **Article 2**
>
> *Additional Facility Rules*
>
> The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:
>
> (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
>
> (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
>
> (c) fact-finding proceedings.
>
> The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility.

11 Therefore, the Additional Facility created three new types of proceedings:

1. Conciliation or arbitration for the settlement of investment disputes where only one side is a party to the Convention or a national of a party to the Convention;
2. Conciliation or arbitration for the settlement of disputes that do not arise directly from an investment, provided that at least one side is a party to the Convention or a national of a party to the Convention;
3. Fact-finding proceedings.

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2 The Additional Facility was initially approved for a five-year term. It was continued indefinitely by decision of the Administrative Council on 26 September 1984. See News from ICSID, Vol. 2/1, pp. 6/7 (1985). Generally on the Additional Facility see *Broches*, The "Additional Facility"; *Delaume*, Transnational Contracts, pp. 79–83; *Toriello*, The Additional Facility.

In all three cases, proceedings must arise from a mixed dispute; that is, between a State and a foreign national. In the case of 1. and 2. at least one side must be either a Contracting State or a national of another Contracting State of the Convention.[3] In the case of fact-finding no further jurisdictional requirements *ratione personae* or *ratione materiae* are indicated (see paras. 30–34 *infra*).

12 Art. 3 of the Additional Facility Rules points out that the Convention is not applicable to Additional Facility proceedings. This means, in particular, that arbitration proceedings are not insulated from national law and that the recognition and enforcement of awards is not subject to Arts. 53 and 54 of the Convention but is governed by the law of the forum and any applicable treaties (see Art. 53, paras. 5–9; Art. 54, paras. 12–22).

13 The Additional Facility is reflected in a considerable number of investment agreements, bilateral investment treaties, multilateral treaties and national investment legislation. Many of these documents offer consent to jurisdiction under the Additional Facility. Since 1997 the Additional Facility has generated a considerable number of proceedings. It is especially significant in the framework of the NAFTA, since neither Canada nor Mexico are parties to the ICSID Convention (see para. 458 *infra*). Some of the more detailed questions arising in relation to the Additional Facility are discussed below in the context of the concept of investment (paras. 202–210 *infra*), Contracting States (paras. 224–226, 300–301 *infra*) and fact-finding (paras. 30–34 *infra*) (see also Art. 6, para. 25).

II. INTERPRETATION

A. "(1) The jurisdiction of the Centre . . ."

1. Jurisdiction, Competence and Admissibility

14 Art. 1 of the Convention makes clear that the use of the term "the Centre" refers to the International Centre for Settlement of Investment Disputes. No similar clarification is offered for the term "jurisdiction". The concept may be defined generally as "the power of a court or judge to entertain an action, petition or other proceeding".[4]

15 The term "jurisdiction of the Centre" was used throughout the Convention's drafting history (History, Vol. I, pp. 110–118). There were some queries as to the appropriateness of the word jurisdiction seeing that the Centre only exercises

3 One author has surmised that a literal reading of the French version of Art. 2 of the Additional Facility Rules might be read in the sense that the Additional Facility is also open to parties both of which are foreign to the Convention: *Toriello*, The Additional Facility, p. 73. This interpretation does not appear to be supported by the French text and is flatly contradicted by the Introductory Notes to the Additional Facility Rules and the Comments to their Art. 2 prepared by the Centre. See 1 ICSID Reports 213, 218.

4 Jowitt's Dictionary of English Law, Vol. 1, p. 1034 (1977). See also Black's Law Dictionary (7th ed.), p. 855 (1999).

administrative functions (History, Vol. II, p. 830). Also, there was some feeling that the term might not reflect the purely voluntary nature of the Centre's activity and might indicate an element of compulsion (at pp. 491, 700). At times, the word "competence" was suggested (at pp. 396, 409, 451). The retention of "jurisdiction" was justified by reference to its use in Art. 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes dealing with the Permanent Court of Arbitration (at pp. 203, 255, 320, 491).[5]

16 The Report of the Executive Directors to the Convention gives a broad interpretation to the term:

> 22. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings.[6]

17 A look at the English text of the Convention shows that the terms "jurisdiction" and "competence" are used in slightly different ways. Arts. 32(2) and 41(2) speak of the "jurisdiction of the Centre" and of the "competence of the Commission" or "Tribunal" respectively.[7] Arts. 28(3) and 36(3) also refer to the "jurisdiction of the Centre" in the context of the Secretary-General's screening power. Arbitration Rule 41 adopts the same distinction (see Art. 41, paras. 56, 57). ICSID tribunals generally follow this terminology in referring to the "jurisdiction of the Centre" and the "competence of the Tribunal".[8]

18 The term "admissibility" does not appear in the Convention.[9] Some tribunals have questioned the usefulness of the term in the framework of ICSID.[10] Other

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5 See also *Broches, A.*, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law 263, 265/6 (1966).

6 1 ICSID Reports 28.

7 The equally authentic Spanish and French texts use the terms "jurisdicción" and "compétence" in Art. 25(1). The Spanish text, like the English text, in Arts. 32 and 41 distinguishes between "jurisdicción" and "competencia". The French text uses "compétence" for both purposes.

8 See *e.g. Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 6; *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, para. 1.13; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 131; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 161; *CMS* v. *Argentina*, Decision on Annulment, 25 September 2007, para. 68; *Sempra* v. *Argentina*, Award, 28 September 2007, para. 21. Some tribunals have consciously used the terms "jurisdiction" and "competence" interchangeably: *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 54; *ADC* v. *Hungary*, Award, 2 October 2006, para. 294.

9 See *Laird, I.*, A Distinction Without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini* v *Jordan* and *Methanex* v *USA*, *in*: International Investment Law and Arbitration: Leading Cases (*Weiler, T.* ed.) 201 (2005); *Williams, D. A. R.*, Jurisdiction and Admissibility, *in*: The Oxford Handbook of International Investment Law *(Muchlinski, P./Ortino, F./Schreuer, C.* eds.) 868 (2008).

10 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 41; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, para. 33; *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. 2; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 85–87; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 54; *Vivendi* v. *Argentina*, Resubmitted Case: Award, 20 August 2007, para. 7.2.4.

tribunals have used the term in various contexts,[11] including the effect of domestic forum selection clauses in contracts.[12]

2. Scope of Jurisdiction

a) Conciliation or Arbitration

19 Under the Convention's system, jurisdiction encompasses conciliation and arbitration. Art. 25 does not differentiate between these two methods of dispute settlement. Earlier drafts to the Convention referred to conciliation and arbitration separately but the word "jurisdiction" was used in later versions (History, Vol. I, pp. 110, 112, 116, 118; Vol. II, p. 836). Some delegates felt that arbitration was appropriate only for legal disputes whereas conciliation was useful also for non-legal disputes (History, Vol. II, pp. 322, 396, 467, 508, 699, 702). Another idea was that conciliation should precede arbitration and that this should be reflected in the Convention's text (at pp. 65, 203, 255, 263, 265, 275, 320, 404, 413, 564). Neither suggestion found its way into the Convention's text nor into the Executive Directors' Report.

20 Rule 1 of the Institution Rules states in relevant part:

> The request shall indicate whether it relates to a conciliation or an arbitration proceeding.[13]

It is advisable to make an explicit choice between conciliation or arbitration prior to the request. This can be done in several ways. A consent clause may refer to one method of settlement only, that is either to conciliation or to arbitration. Alternatively, it may provide for conciliation followed by arbitration if the former method turns out to be unsuccessful. In this case a time limit may be included for conciliation.

21 The 1993 ICSID Model Clauses[14] 1 and 2 suggest that the parties specify whether their consent relates to conciliation or to arbitration. Alternatively, they suggest that the parties consent to ". . . conciliation followed, if the dispute remains unresolved within [a stated time limit] of the communication of the report of the Conciliation Commission to the parties, by arbitration . . ." (see paras. 386, 387 *infra*). References to "conciliation or arbitration" or to "conciliation and arbitration" are less clear, although, presumably, the choice between the two methods is left to the party instituting proceedings. Mere references to the "jurisdiction of

11 *Goetz* v. *Burundi*, Award, 10 February 1999, before para. 86; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 7.1, 15.7, 15.8; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 98; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 109; *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 152–161, 166–167; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 150–158; *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, paras. 58, 63–64.

12 *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, paras. 94, 154, 155, 169(4), 170.

13 On conciliation, see *Ziadé, N. G.*, ICSID Conciliation, News from ICSID, vol. 13/2, p. 3 (1996); *Onwuamaegbu, U.*, The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience, News from ICSID, vol. 22/2, p. 12 (2005).

14 4 ICSID Reports 357. For an explanation of the Model Clauses see para. 385 *infra*.

the Centre", to "dispute settlement by the Centre" or to the Convention in general terms are not desirable since they may lead to disagreements between the parties if they insist on different procedures.[15]

22 The practice of ICSID shows a variety of consent clauses dealing with this question with different degrees of precision. Some investment agreements specify that consent refers to arbitration only.[16] Another model provides for conciliation, failing which the dispute is to be settled by arbitration.[17] In other cases, the agreements provide for "conciliation and arbitration" or "conciliation or arbitration".[18] In yet other agreements between the parties the dispute settlement clause merely provides for submission to the Centre without any reference to conciliation or arbitration.[19] In none of these cases did the choice of arbitration rather than conciliation lead to any difficulties.

23 Clauses in treaties referring to the jurisdiction of ICSID are similarly diverse.[20] Some of these clauses refer to arbitration only.[21] Other clauses provide for settlement by "conciliation or arbitration" under the Convention.[22] Another type refers to "conciliation or arbitration", adding that "[i]n the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure, the national or company affected shall have the right to choose".[23] Finally, a number of BITs simply provide for the reference of disputes to the Centre without mention of conciliation or arbitration.[24]

24 In *AAPL* v. *Sri Lanka*, the first ICSID case based on a jurisdictional clause in a BIT, the 1980 Treaty between the United Kingdom and Sri Lanka in its Art. 8

15 See also *Amerasinghe*, How to Use the International Centre, p. 533; *Amerasinghe*, Submissions to the Jurisdiction, pp. 216/7.

16 See *e.g.*, *AGIP* v. *Congo*, Award, 30 November 1979, para. 18; *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, para. 1.15.

17 *MINE* v. *Guinea*, Award, 6 January 1988, 4 ICSID Reports 67; Decision on Annulment, 22 December 1989, para. 1.04. It appears that the original clause was seriously flawed. It was replaced subsequently by a clause referring to arbitration only. *Loc. cit.* See also *Nurick, L./Schnably, S. J.*, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, 1 ICSID Review – FILJ 340, 344 (1986).

18 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 12; *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 350.

19 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 10.

20 *Parra, A. R.*, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 ICSID Review – FILJ 287, 323 (1997); *Reif, L. C.*, Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes, 14 Fordham International Law Journal 578, 607 *et seq.* (1991).

21 See *e.g.*, NAFTA Arts. 1116, 1120; France Model BIT 2006 Art. 8; Germany Model BIT 2005 Art. 11(2); UK Model BIT 2005 Art. 8 (Alternative II); US Model BIT 2004 Art. 25; Denmark-Turkey BIT (1990) Art. 8; Bangladesh-Italy BIT (1990) Art. 9(2); US-Argentina BIT (1991) Art. 7(3).

22 See *e.g.*, Energy Charter Treaty, Art. 26(3)(a); Netherlands-Nigeria BIT (1992) Art. 9; Brazil-Netherlands BIT (1998) Art. 9(2); Denmark-Hungary BIT (1988) Art. 9(2).

23 UK Model BIT 2005 Art. 8 (Alternative I); United Kingdom-Bangladesh BIT (1980) Art. 8.

24 See *e.g.*, China Model BIT 2003 Art. 9(2)(b); Lithuania-Poland BIT (1992) Art. 7; Denmark-Estonia BIT (1991) Art. 9(2).

provided for ". . . settlement by conciliation or arbitration under the Convention . . .".[25] There is no indication that AAPL's right to choose arbitration was ever challenged.

25 Provisions in national investment legislation, referring to the settlement of investment disputes by ICSID, also show a certain range of variation. Some refer to arbitration under the Convention,[26] others to "conciliation or arbitration",[27] and some to arbitration preceded by conciliation.[28]

26 In *SPP* v. *Egypt*, jurisdiction was based on Art. 8 of Egypt's Law No. 43 of 1974, which provided, in relevant part, for the settlement of disputes "within the framework of the Convention".[29] Egypt argued that this phrase was insufficient to express consent to arbitration since it did not refer expressly to arbitration but embraced both arbitration and conciliation. The Tribunal rejected this argument:

> Nowhere . . . does the Washington Convention say that consent to the Centre's jurisdiction must specify whether the consent is for purposes of arbitration or conciliation. Once consent has been given "to the jurisdiction of the Centre", the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings.[30]

27 The position taken by the Tribunal is convincing and is supported by a considerable number of consent clauses that fail to distinguish between conciliation and arbitration. Any other solution would deprive general references to dispute settlement under the ICSID Convention of their value as bases for consent to arbitration.

28 Therefore, undifferentiated references to the Centre's jurisdiction provide the party instituting proceedings with a choice between the two methods. A choice once made can only be changed by agreement between the parties. Nevertheless, it is advisable to specify in advance which of the two methods is to be used, possibly providing for conciliation followed by arbitration, if necessary. If both methods are offered, it is desirable to indicate which party has the choice between them. Failure to clarify these points in advance may lead to surprising results. For instance, a host State that is aware of an investor's intention to institute arbitration may rush to initiate conciliation, thereby blocking access to arbitration.

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25 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, para. 2. See *Ziadé, N. G.*, Some Recent Decisions in ICSID Cases, 6 ICSID Review – FILJ 515 (1991). See also *AMT* v. *Zaire*, Award, 21 February 1997, paras. 5.19, 5.22.

26 See *e.g.*, Uganda, Investment Code, 1991, Art. 30(2). For a collection of national investment legislation see: Investment Laws of the World, loose-leaf collection (OUP, since 1973).

27 See *e.g.*, Central African Republic, Code of Investments, 1988, Art. 30.

28 See *e.g.*, Madagascar, Investment Code, 1989, Art. 34.

29 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 70.

30 *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 102. The Dissenting Opinion to this decision takes the opposite position: 3 ICSID Reports 168–170, 171/2, 185/6.

b) Fact-Finding

29 Unlike conciliation and arbitration, fact-finding is not specifically mentioned in the Convention although Art. 43 refers to several methods of gathering factual information. During the Convention's preparation, there was some concern whether the reference to a "dispute of a legal character" in the Preliminary Draft might not exclude questions of fact that are essential to the dispute's resolution (History, Vol. II, pp. 399, 411, 565). As a result, it was suggested to mention questions of fact explicitly in the Convention (at pp. 493, 502). These suggestions found their expression in the First Draft. Its definition of "legal dispute" included disputes "concerning a fact relevant to the determination of a legal right or obligation" (History, Vol. I, p. 116). This raised concerns that the establishment of facts might become an independent issue in conciliation or arbitration proceedings (History, Vol. II, pp. 655, 700, 703, 709). The reference to questions of fact was dropped in the Revised Draft and does not appear in the Convention. No independent fact-finding function in addition to conciliation and arbitration was ever suggested in the course of the Convention's drafting. But it is clear that points of fact that are incidental to the legal questions to be decided must be clarified by the commission or tribunal (see paras. 74, 75 *infra*).

30 While fact-finding does not have an independent role under the Convention, a separate fact-finding function was introduced in 1978 by way of the Additional Facility (paras. 9–13 *supra*). The Introductory Notes to the Additional Facility Rules point out that fact-finding was seen as a process of preventing rather than settling legal disputes and that this procedure is therefore fundamentally different from conciliation and arbitration. It is designed for the "pre-dispute" stage and aims to prevent diverging views on factual issues from escalating to legal disputes. The Introductory Notes point out that this may be useful in a contractual framework as well as in contexts such as national or international guidelines or codes of conduct relating to foreign investment.[31]

31 This purpose may explain, in part, why the provision on fact-finding in Art. 2(c) of the Additional Facility Rules is devoid of any jurisdictional requirements except that it take place between a State and a national of another State (see paras. 10, 11 *supra*). Paragraphs (a) and (b) repeat or modify the jurisdictional requirements *ratione personae* and *ratione materiae* of Art. 25 of the Convention by providing that conciliation and arbitration may be available even where only one side is a Contracting State or a national of a Contracting State or where the dispute does not arise directly out of an investment. These requirements are to be monitored by the Secretary-General who, moreover, must ensure that the dispute does not arise from an ordinary commercial transaction (see paras. 202–210 *infra*).[32] By contrast, paragraph (c) of Art. 2 of the Additional Facility Rules, dealing with

31 See ICSID Additional Facility, Introductory Notes, 1 ICSID Reports 215. See also *Broches*, The "Additional Facility", p. 379.

32 Art. 4(3) Additional Facility Rules.

fact-finding, contains none of these limitations. There is no requirement *ratione personae*, nor any indication of the types of facts that may be clarified. Neither do the Fact-Finding (Additional Facility) Rules, which are attached to the Additional Facility Rules as Schedule A, provide for any jurisdictional requirements other than consent.

32 It follows that any State and a national of any other State, irrespective of whether these are Contracting States, may utilize fact-finding under the Additional Facility. An agreement to do so does not require the Secretary-General's approval.[33] This means that fact-finding under the Additional Facility is available regardless of either party's link to the Convention.[34]

33 The scope of fact-finding *ratione materiae* under the Additional Facility is less obvious. But it is reasonable to assume that the facts to be investigated must be of a nature that may lead to a dispute that is subject to settlement under the Convention or the Additional Facility (see para. 210 *infra*).

34 Clause 21 of the 1993 Model Clauses offers the following formula for an agreement to resort to fact-finding under the Additional Facility:

> **Clause 21**
>
> The parties hereto hereby agree to submit to the International Centre for Settlement of Investment Disputes (hereinafter "the Centre") for an inquiry under the Additional Facility (Fact-Finding) Rules of the Centre [the following questions of fact: . . .]/[any questions of fact related to the following matters: . . .].[35]

3. The Relevant Date for the Determination of Jurisdiction

35 The Convention designates certain critical dates at which requirements, such as the nationality requirements contained in Art. 25(2), must be fulfilled. In other contexts, the Convention itself does not specify the temporal requirements: e.g. the time of the investment (see para. 117 *infra*), the date of consent (see paras. 468–469 *infra*), the date at which the State party must have become a Contracting State (see paras. 214–219 *infra*), the date at which a Contracting State's constituent subdivision or agency must have been designated to the Centre (see paras. 258–267 *infra*), the date at which the State of the investor's nationality must have become a Contracting State (see paras. 287–288 *infra*), and the date at which the approval or notification under Art. 25(3) relating to the consent of a constituent subdivision or agency must have been given (see paras. 913–915 *infra*). Institution Rule 2 attempts to clarify some of these questions to some extent.

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33 See introductory comment to Clause 21 of the 1993 ICSID Model Clauses, 4 ICSID Reports 369.

34 *Rambaud, P.*, Note sur l'extension du système CIRDI, 29 Annuaire Français de Droit International 290, 297 (1983). For a different view see *Toriello*, The Additional Facility, pp. 77/8, who holds that at least one side must be either a Contracting State or a national of a Contracting State.

35 4 ICSID Reports 369.

36 Apart from specific rules about critical dates, the date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction.

37 The International Court of Justice (ICJ) has developed a *jurisprudence constante* to this effect.[36] In the *Arrest Warrant Case*[37] the ICJ said:

> The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.[38]

38 ICSID Tribunals have applied this principle consistently.[39] In some cases the claimants had divested themselves of or had transferred the rights that had given rise to the dispute after the institution of proceedings. Tribunals have rejected the argument that, as a consequence, the claimants in the proceedings were no longer the real parties in interest.[40]

39 In *CSOB* v. *Slovakia*, the Claimant had agreed to assign its claims against the Respondent to the Czech Republic. The Respondent argued that these assignments had transformed the Czech Republic into the real party in interest and that the Tribunal should dismiss the case for lack of jurisdiction because the Claimant no longer had the requisite standing under Article 25(1) of the ICSID Convention. The Tribunal rejected this argument since the assignments had taken place after the institution of the ICSID proceedings:

> 31. In assessing the effect of the June 25, 1998 assignment (and of the April 24, 1998 assignment it superseded) on the Centre's jurisdiction to hear this dispute, the Tribunal notes, in the first place, that the Request for Arbitration in the instant case was filed on April 17, 1997 and that the case was registered on April 25, 1997. Hence, at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on

36 International Court of Justice, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United States of America*), Preliminary Objections, Judgment, 27 February 1998, I.C.J. Reports 1998, p. 115, at para. 37, referring back to *Nottebohm*, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; *Right of Passage over Indian Territory*, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142.

37 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), Judgment, 14 February 2002, I.C.J. Reports 2002, p. 1.

38 At para. 26.

39 See also *Goetz* v. *Burundi*, Award, 10 February 1999, para. 72; *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 407; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 178.

40 *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 135, 136; *Enron* v. *Argentina*, Award, 22 May 2007, paras. 196–198, 396.

> which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.[41]

40 In *Vivendi* v. *Argentina* the original claimant had been CGE which subsequently changed its name to Vivendi S.A. while the ICSID proceedings were pending. Vivendi S.A. then merged with several other companies to form the company Vivendi Universal. Vivendi Universal continued to hold the majority stake in CAA, the company incorporated in Argentina. Argentina's allegation that there had been a change in CAA's corporate ownership was rejected by the Tribunal.[42] One of the reasons for this decision was as follows:

> . . . it is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this Rule. . . . The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings . . . cannot withdraw the Tribunal's jurisdiction over the dispute.[43]

B. ". . . shall extend to any legal dispute . . ."

1. The Existence of a Dispute

41 The existence of a dispute may be in doubt in several ways. An open question may not have matured into a dispute between the parties. Or a difference of opinion may not be sufficiently concrete to amount to a dispute that is susceptible of conciliation or arbitration. There may have been a dispute that has since become moot.

42 The International Court of Justice has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties".[44] ICSID Tribunals have adopted similar descriptions of "disputes", often relying on the ICJ's definition.[45]

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41 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 31.

42 *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, para. 82. See also the Award of 20 August 2007, para. 2.6.8. FN 24.

43 At paras. 60, 63. Footnotes omitted.

44 See *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11; *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania* (first phase), I.C.J. Reports 1950, pp. 65, 74; *South West Africa*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; *Northern Cameroons*, Judgment, I.C.J. Reports 1963, p. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 27, para. 35; *Case concerning East Timor*, I.C.J. Reports 1995, pp. 89, 99.

45 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 93, 94; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 106, 107; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, para. 159; *Lucchetti* v. *Peru*, Award, 7 February 2005,

43 The existence of a dispute presupposes a minimum of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly. Thus, failure to respond to a specific demand within a reasonable time would be sufficient to establish the existence of a dispute. In *AAPL* v. *Sri Lanka*, the Tribunal noted that the claim remained outstanding without a reply for more than the three months' negotiation period provided for in the Bilateral Investment Treaty and that hence AAPL had become entitled to institute the proceedings.[46] On the other hand, it is not necessary that other means of settlement, notably negotiations, have been utilized unsuccessfully before the Centre is seized of a dispute unless the terms of the consent provide for the prior use of other means of settlement (see paras. 540–550 *infra*).[47]

44 The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions *in abstracto*. The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.[48]

45 In some cases the respondents contended that the claims were hypothetical and hence there was no dispute.[49] In *Enron* v. *Argentina*[50] some provinces of Argentina had assessed taxes that the Claimants described as exorbitant and enough to wipe out the entire value of their investment. Argentina argued that the claim was hypothetical since the taxes had been assessed but not collected. Claimants pointed out that the taxes had not been collected only because there was a temporary injunction ordered by the Supreme Court. The Tribunal refused to accept that under these circumstances the dispute was merely hypothetical. It said:

> The Tribunal is mindful of the fact that once the taxes have been assessed and the payment ordered there is a liability of the investor irrespective of the actual collection of those amounts. This means that a claim seeking protection under the Treaty is not hypothetical but relates to a very specific dispute between the parties.[51]

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para. 48; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 302, 303; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, para. 43; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 61; *Suez et al*. v. *Argentina*, Decision on Jurisdiction, 16 May 2006, para. 29; *MCI* v. *Ecuador*, Award, 31 July 2007, para. 63.

46 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, para. 3.

47 See *Amerasinghe*, The Jurisdiction of the International Centre, pp. 170–172.

48 See *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, para. 94; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 106; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, para. 43, all referring to the First Edition of this Commentary.

49 *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, paras. 135–141.

50 *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004.

51 At para. 74. See also *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 92.

46 In some cases the allegedly hypothetical nature of the claims related to the quantum of damages. In *Pan American* v. *Argentina*[52] the Respondent complained that the damages claimed were hypothetical, conjectural and speculative. The Tribunal found that a certain degree of uncertainty about the quantum of damages was inevitable at the jurisdictional stage. This did not affect its jurisdiction provided the Claimants were able *prima facie* to demonstrate that some damage had occurred.[53] In several decisions tribunals rejected the argument that negotiations pending between the parties or proceedings pending in domestic courts made their claims premature or hypothetical.[54]

47 A dispute may clearly have existed, but one party may feel that it has taken steps to satisfy any claims that the other party may have had. In *AGIP* v. *Congo*, the Government had expropriated the Claimant's assets without compensation in violation of a prior agreement. Before the ICSID Tribunal, the Government declared that there was no longer any dispute since it had recognized the principle of compensation.[55] The Tribunal found that the declarations made by the Government were so lacking in precision that the continuing existence of the dispute was not in doubt. It noted that the Claimant had not, in fact, received any compensation. In addition, the claim was directed not only at compensation for the nationalization but also at damages for losses resulting from the Government's violations of its contractual obligations.[56]

2. The Time of the Dispute

48 The Convention does not indicate at what time a dispute must have arisen. The answer to this question will ultimately depend on the terms of the consent to the Centre's jurisdiction. Consent may relate to a specific dispute already existing between the parties, it may relate to future disputes only or it may relate to any dispute; that is, embracing existing as well as future disputes (see paras. 382–387 *infra*). The Convention itself does not impose jurisdictional requirements *ratione temporis* relating to the dispute.[57]

49 Some BITs limit consent to arbitration to disputes arising after their entry into force.[58] For instance, the Argentina-Spain BIT of 1991 provides:

> . . . this agreement shall not apply to disputes or claims originating before its entry into force.

52 *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006.
53 At paras. 162–168, 177, 178.
54 *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 158–162; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 62–71; *Camuzzi I* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 92, 94, 97; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 108; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 93.
55 *AGIP* v. *Congo*, Award, 30 November 1979, paras. 38, 39.
56 At paras. 42, 95–97.
57 See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 171.
58 The Tribunal in *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, para. 170, found that the phrase "any dispute which may arise" did not cover disputes that had arisen before the BIT's entry into force. See also *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 297–304.

50 Under a provision of this kind the time at which the dispute has arisen will be of decisive importance for the applicability of the consent to arbitration. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date should not be read as excluding jurisdiction over events occurring before that date.[59] A dispute requires not only that the events have developed to a degree where a difference of legal positions can become apparent but also communication between the parties demonstrating that difference.

51 In *Maffezini* v. *Spain*, the Respondent challenged ICSID's jurisdiction alleging that the dispute originated before the entry into force of the Argentina-Spain BIT. 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. This, according to the Claimant, had occurred only after the BIT's entry into force.[60] The Tribunal distinguished between the events giving rise to the dispute and the dispute itself. After noting that the events on which the parties disagreed began years before the BIT's entry into force it said:

> But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.[61]

52 The Tribunal described the development towards a dispute in the following terms:

> . . . 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. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.[62]

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.[63]

It followed that ICSID had jurisdiction and that the Tribunal was competent to consider the dispute.

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59 *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, paras. 153–157. For a case that fails to make this distinction see *MCI* v. *Ecuador*, Award, 31 July 2007.
60 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 92, 93.
61 At para. 95.
62 Para. 96. Footnote omitted.
63 At para. 98.

53 In *Lucchetti* v. *Peru*, the BIT between Chile and Peru similarly provided that it would not apply to disputes that arose prior to its entry into force. A series of administrative measures by local authorities had denied or withdrawn construction and operating licences from the investors. The investors had successfully challenged the earlier administrative acts through court proceedings that took place entirely before the BIT's entry into force. A few days after the BIT's entry into force, the municipality issued further adverse decrees. The Tribunal found that the dispute had already arisen before the BIT's entry into force and declined jurisdiction.[64]

54 In *Jan de Nul* v. *Egypt*, the BIT between the BLEU[65] and Egypt also provided that it would not apply to disputes that had arisen prior to its entry into force. A dispute already existed 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 . . .[66]

55 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 dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.[67]

It followed that the Tribunal had jurisdiction over the claim.

56 *Helnan* v. *Egypt* 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

64 *Lucchetti* v. *Peru*, Award, 7 February 2005, paras. 48–59. An application for the annulment of the Award was not successful: *Lucchetti* v. *Peru*, Decision on Annulment, 5 September 2007.
65 Belgo-Luxembourg Economic Union.
66 *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 117.
67 At para. 128.

> 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.[68]

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.[69]

3. The Legal Nature of the Dispute

a) Legal and Non-Legal Disputes

57 The requirement that a dispute must be "legal" in order to qualify for settlement by the Centre gave rise to much debate during the Convention's preparation. The Working Paper contained no reference to the dispute's legal nature, but it was pointed out that a clarification should be added to exclude political or commercial disputes (History, Vol. II, pp. 54, 83, 96). The Preliminary Draft referred to a "dispute of a legal character" (Vol. I, p. 112). These words were explained as excluding moral, political or commercial claims (Vol. II, pp. 203, 259, 267, 322, 397) or as expressing the requirement that a legal right or obligation had to be involved (at pp. 267, 285, 322, 565). A number of delegates from capital-exporting countries found the reference to legal disputes too limiting or too confusing and suggested its deletion (at pp. 88, 322, 396, 411, 412, 565) or found a definition unnecessary (at pp. 395, 401). Others asked for more clarification (at pp. 376, 395, 493, 495). The subsequent First Draft not only retained the reference to legal disputes but added the following definition:

> "legal dispute" means any dispute concerning a legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation;[70]

58 In reaction to this draft, some delegates stated that they did not find this definition useful and that it should be deleted (at pp. 701, 707). Others offered alternative definitions (at pp. 707, 833, 835). Yet another group suggested the deletion of the limitation to legal disputes altogether (at pp. 702, 831). Eventually, it was decided by a large majority to retain the qualification "of a legal character" but without any further definition (at p. 826). The change from "dispute of a legal character" to "legal dispute" in the Convention's final version appears to be one of pure drafting convenience.

59 The Report of the Executive Directors adds the following clarification:

> 26. . . . The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of

68 *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 52.
69 At paras. 53–57. 70 History, Vol. I, p. 116.

> interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.[71]

60 Commentators on the ICSID Convention have endeavoured to come to terms with the concept of legal dispute by listing typical factual situations and the questions that they entail.[72] These include expropriation, breach or termination of an agreement or the application of tax and customs provisions. While these descriptions are undoubtedly useful, it must be borne in mind that fact patterns alone do not determine the legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription or policy that is invoked that decides whether a dispute is legal or not. Thus, it is entirely possible to react to a breach of agreement by relying on moral standards, by invoking concepts of justice or by pointing to the lack of political and economic wisdom of such a course of action. The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, contracts, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms.

61 Institution Rule 2(1)(e) makes it incumbent upon the claimant to demonstrate the legal nature of the dispute by directing:

> (1) The request shall: . . .
>
> (e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment.

In accordance with Institution Rule 2(2), no documentation on this point is required at the time of the institution of proceedings and it would appear that a plausible assertion on the part of the claimant suffices for purposes of the Secretary-General's screening power under Arts. 28(3) and 36(3).

62 It has been suggested that the parties should make express advance provision to clarify the legal nature of their dispute.[73] The 1981 Model Clauses for use in agreements between the parties contained the following Clause IV:

> The parties hereto hereby agree that, for the purposes of Article 25(1) of the Convention, [the dispute] [any dispute in relation to or arising out of this Agreement] is a legal dispute arising directly out of an investment.[74]

63 An agreement between the parties on this point is of limited use. It is perfectly feasible for an *ad hoc* submission where the dispute has already arisen and its nature is known, although submission itself would probably imply that the parties see the dispute as legal. But it seems futile to characterize disputes as legal before

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71 1 ICSID Reports 28.

72 See *e.g.*, *Amerasinghe*, The Jurisdiction of the International Centre, p. 173; *Delaume*, How to Draft, p. 181; *Szasz*, The Investment Disputes Convention, p. 37.

73 *Gaillard*, Some Notes on the Drafting, pp. 139/40; *Masood*, Jurisdiction of International Centre, p. 131; *Amerasinghe*, Submissions to the Jurisdiction, p. 220.

74 1 ICSID Reports 201.

they have arisen unless the relevant words are read not as part of a jurisdictional clause but as an undertaking between the parties to refrain from making non-legal claims and from using non-legal arguments. It is for this reason that neither the 1993 Model Clauses nor the old 1968 version contain language purporting to characterize future disputes as legal.

64 Tribunals have at times mentioned in passing that the dispute before them was a legal dispute since it concerned legal rights and obligations.[75] More recently, tribunals addressing the issue of the existence of a legal dispute have pointed out that the claimants had asserted rights, had relied on legal arguments and had sought legal remedies. It followed that the disputes were legal in nature.[76]

65 In *Continental Casualty* v. *Argentina*, the Claimant had invested in the insurance business in Argentina. It claimed that Argentina had enacted a series of decrees and resolutions that destroyed the legal security of the assets held by the investor. Argentina submitted that in order to meet the requirement of a legal dispute, the dispute must concern rights, obligations and legal titles and not some undesirable consequences that have not as the proximate cause the host State's conduct in respect of its investment.[77] The Tribunal found that the Claimant had made legal claims. It said:

> 67. In this case, the Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.[78]

66 In *Suez* v. *Argentina* the Claimants had invested in water distribution and waste water services in Argentina. When the Argentine economy experienced a severe crisis, the government enacted measures that resulted in a significant depreciation of the Argentine Peso. Claiming that these measures injured their investments

75 *Alcoa Minerals* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975 – see: *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90, 98/9 (1976); *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 16; *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 5.03; *AMT* v. *Zaire*, Award, 21 February 1997, para. 5.06; *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, paras. 15, 16; *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 290.

76 *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, para. 47; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 40–47; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 55; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 67, 68; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 20–23; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 125, 126; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 47–62; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 74; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 71–91; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 93–97; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 121–124.

77 *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 37.

78 At para. 67.

in violation of the commitments made to them, the Claimants sought to obtain adjustments in the tariffs as well as modifications in their operating conditions.[79] Argentina argued that there was no legal dispute but rather a business or commercial dispute. The dispute over the effects of the devaluation measures was one over policy and fairness and hence not legal in nature. The Tribunal rejected this objection and said:

> A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. . . . In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. . . the dispute as presented by the Claimants is legal in nature.[80]

67 It follows from the practice of tribunals that the legal nature of a dispute is determined by the way the claimant presents its claim. If the claim is couched in terms of violation of legal rights, is based on legal arguments and seeks legal remedies there is a legal dispute.

b) The Justiciability of Disputes

68 Even a dispute that gives rise to legal questions is sometimes said to be inappropriate for arbitration if it affects sovereign powers or questions of political significance. In fact, in the course of the Convention's drafting, most of the discussion about the types of disputes that should be made subject to the Centre's jurisdiction did not turn on their legal or non-legal nature but on whether it was acceptable to expose a State to arbitration in respect of activities within its sovereign prerogative.[81] Especially delegates from capital-importing countries expressed the opinion that questions of a political nature that affected governmental functions, vital interests, security, national policy or sovereign powers were non-justiciable (History, Vol. II, pp. 257, 466, 468, 470, 500/1, 548, 565, 699/700, 708, 830). In particular, it was argued that questions arising from the validity and application of domestic legislation should be excluded from the Centre's jurisdiction (at pp. 498, 504, 550, 703, 706, 708, 838). A similar demand was that the legality of expropriations should be excluded from the Centre's jurisdiction (at pp. 258, 267, 550, 709, 829) or at least confined to matters of compensation (at pp. 259, 498, 504, 669, 703).

69 Conversely, it was suggested that only disputes in connection with a specific contract between the host State and the investor and, possibly, in connection with the host State's investment legislation should be considered arbitrable disputes (at pp. 471, 494, 497, 498, 504, 505, 514, 543, 653, 702, 707, 708, 830, 832). These ideas were opposed by Mr. *Broches* (at pp. 495, 540, 707). He pointed out

79 *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, para. 24.
80 At paras. 34, 37.
81 See also *Amerasinghe*, The Jurisdiction of the International Centre, pp. 173/4, 176.

that it was always open to the parties to define the disputes that they regarded as justiciable in their consent agreement (at p. 566).[82] Eventually, none of the proposed limitations relating to justiciability found entry into the Convention and there is nothing to suggest that they are included by implication.

70 The question of justiciability and sovereign prerogative has not posed any major problems in the practice of ICSID tribunals. Tribunals have examined the legality of expropriations and of other typical governmental actions without hesitation.[83] For instance, in *Benvenuti & Bonfant* v. *Congo*, the Tribunal saw no difficulty in examining the legality of government action that consisted in the dissolution of a local company set up by the Claimant followed by the seizure of its assets. Likewise, the Tribunal examined the legality of the military occupation and nationalization of another company jointly owned by the Claimant and the Respondent.[84] In *AAPL* v. *Sri Lanka*, the Tribunal saw no difficulty in examining the conduct of the host State's security forces resulting in the destruction of the investment.[85] In the cases involving the state of emergency that unfolded in Argentina in the late 1990s, the issue of justiciability was not an issue.[86]

71 In *Amco* v. *Indonesia*, the Claimants' complaint arose from the forcible seizure of a hotel, involving the army and the police, and the revocation of an investment authorization. In the annulment proceedings, Indonesia argued that the Tribunal had manifestly exceeded its powers by assuming jurisdiction over the legality of the acts of the army and police personnel. Indonesia did not rely on sovereign prerogative and justiciability but argued that the acts of the army and police personnel, if illegal under international law, constituted an international tort which was quite different from an investment dispute. The argument was rejected:

> 68. The *ad hoc* Committee is unable to accept the above submission of Indonesia's counsel for it does not think of "international tort" and "investment dispute" as comprising mutually exclusive categories . . . the Tribunal did not manifestly exceed its powers when it considered the question of the legality of the acts of the army and police personnel as an integral part of the investment dispute between Amco and Indonesia. The jurisdiction of the Tribunal is not successfully avoided by applying a different formal characterization to the operative facts of the dispute.[87]

72 In *CSOB* v. *Slovakia* the Respondent did not question the legal nature of the dispute. But it stressed its political nature and its close link with the dissolution

82 See also *Amerasinghe*, Submissions to the Jurisdiction, pp. 221/2.

83 See *e.g.*, *SPP* v. *Egypt*, Award, 20 May 1992; *Goetz* v. *Burundi*, Award, 10 February 1999; *Santa Elena* v. *Costa Rica*, Award, 17 February 2000; *Wena Hotels* v. *Egypt*, Award, 8 December 2000, and Decision on Interpretation, 31 October 2005; *Middle East Cement* v. *Egypt*, Award, 12 April 2002; *ADC* v. *Hungary*, Award, 2 October 2006; *Siemens* v. *Argentina*, Award, 6 February 2007; *Vivendi* v. *Argentina*, Resubmitted Case: Award, 20 August 2007.

84 *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, paras. 4.47–4.65.

85 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, paras. 79–86.

86 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005.

87 *Amco* v. *Indonesia*, Decision on Annulment, 16 May 1986, para. 68.

of the former Czech and Slovak Federal Republic (see also paras. 100, 272 *infra*). The Tribunal pointed out that the claim was based on an agreement between the parties to the dispute. It said:

> While it is true that investment disputes to which a State is a party frequently have political elements or involve governmental actions, such disputes do not lose their legal character as long as they concern legal rights or obligations or the consequences of their breach.[88]

73 It is open to States to exclude categories of disputes that they consider inappropriate for arbitration from the terms of their consent (see paras. 513–539 *infra*). In addition, under Art. 25(4) States may notify the Centre of categories of disputes which they would or would not consider submitting to ICSID's jurisdiction (see paras. 921–941 *infra*).

c) Questions of Fact

74 There was some argument in the course of the Convention's drafting about the role of fact-finding (see para. 29 *supra*). Fact-finding has no independent role under the Convention but was added by means of the Additional Facility (see paras. 30–31 *supra*). Nevertheless, it is clear from the Convention's history (see para. 29 *supra*) and its general context that issues of fact that are incidental to the legal questions to be decided must be ascertained by the tribunal or commission.[89] This conclusion is warranted not only by the *travaux préparatoires* and the practical requirements of arbitration but also by the Convention's wording. Art. 43 refers to several methods of obtaining evidence such as relevant documents, visits to the scene connected with the dispute or appropriate enquiries. It is obvious that all this is designed to equip the tribunal with the required factual information to make a rational decision.

75 There has been some debate as to whether pure questions of fact would qualify as legal disputes for purposes of the Convention.[90] It would seem that where the existence or not of these facts results in legal consequences between the parties, the answer must be in the affirmative. The nature of the dispute is determined not by the facts leading to it but by the legal claims they trigger. Claims for damages or other legal remedies are sufficient to establish jurisdiction even if both parties accept that the alleged facts, if proven, would justify the claims. In *AGIP* v. *Congo* (see para. 47 *supra*)[91] and in *Santa Elena* v. *Costa Rica*[92] the parties were agreed, in principle, on the legal duty to pay compensation for the expropriations. But the claimants had not received any compensation and the amount of compensation due

88 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 60.
89 *Amerasinghe*, The Jurisdiction of the International Centre, p. 174; *Szasz*, The Investment Disputes Convention, p. 37.
90 *Delaume, G. R.*, La Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, 93 Journal du Droit International 26, 35 (1966); *Kovar*, La compétence du Centre, p. 29.
91 *AGIP* v. *Congo*, Award, 30 November 1979.
92 *Santa Elena* v. *Costa Rica*, Award, 17 February 2000.

had not been determined. This was sufficient ground for the Tribunals to entertain the claims.

d) Non-Legal Means of Dispute Settlement

76 The Convention provides not only for arbitration but also for conciliation (Chapter III, Arts. 28–35). Conciliation, by definition, is not judicial but is directed towards an agreed settlement. Art. 34 provides that it is the conciliation commission's duty "to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms". By contrast, Art. 42 directs that an arbitral tribunal shall decide a dispute in accordance with "rules of law". But even in arbitration proceedings, Art. 42(3) gives the parties the possibility to authorize the tribunal "to decide a dispute *ex aequo et bono*" rather than in accordance with legal rules (see Art. 42, paras. 249–279).

77 It may, therefore, seem odd that Art. 25 requires that there must be a legal dispute even if the parties wish to utilize conciliation or agree that the tribunal may decide in accordance with equitable principles. Mr. *Broches* has explained para. 26 of the Executive Directors' Report, which emphasizes that conflicts of rights are within the jurisdiction of the Centre while mere conflicts of interests are not (see para. 59 *supra*), in the following terms:

> The purpose of this sentence was to dispel the fears of some developing countries that investors might request a host State to consent to *conciliation* proceedings with respect to disputes in which the investor did not even claim that any of his legal rights had been impaired. This fear was based on another fear, namely that a refusal to consent to conciliation proceedings would lead to what these delegations called "adverse inferences" as to their treatment of foreign investment. It was for that reason that even for conciliation proceedings, the Convention requires that the dispute be a legal one and the quoted sentence was addressed to that point.[93]

78 The problem has been discussed most frequently in the context of a wish by one or both parties to re-negotiate a long-standing agreement because it no longer appears equitable or because the underlying circumstances have changed. Renegotiation of investment agreements is useful and common.[94] Yet, the limitation to legal disputes would seem to bar access to conciliation under the ICSID Convention for the purpose of facilitating renegotiation (see also History, Vol. II, p. 701). Where the agreement between the parties itself provides for its adjustment under

93 *Broches*, The Convention, p. 363. Emphasis original, footnote omitted. See also *Szasz*, The Investment Disputes Convention, pp. 36/7.

94 *Peter, W.*, Arbitration and Renegotiation of International Investment Agreements, 2nd ed., esp. 231–258 (1995); *Rodley, N. S.*, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 Canadian Yearbook of International Law 43, 55–57 (1966); *Bernardini, P.*, The Renegotiation of the Investment Contract, 13 ICSID Review – FILJ 411 (1998); *Kröll, S.*, The Renegotiation and Adaptation of Investment Contracts, *in*: Arbitrating Foreign Investment Disputes (*Horn, N./Kröll, S.* eds.) 425 (2004).

certain circumstances, either in the form of a hardship clause or of a clause for its equitable modification in specific situations,[95] the problem can be overcome. A claim would have to be presented as arising from the original agreement and in terms of whether the conditions for renegotiation have been met.[96]

79 Even without a clause in the agreement providing for modification, a demand for renegotiation may be supported by legal arguments. A party may claim that a fundamental change of circumstance gives it a right to renegotiation.[97] What matters in this context is not whether such a claim will be upheld ultimately. For purposes of jurisdiction, it is sufficient that a claim phrased in legal terms can be put forward in good faith. The nature of the claim and not its ultimate success determines whether the dispute is of a legal nature.

80 Much will depend on whether the parties agree to seek help in revising their agreement through conciliation or an award *ex aequo et bono*. Where they agree, it would appear rather unlikely that the Secretary-General in his or her screening capacity (Arts. 28(3) and 36(3)), the conciliation commission (Art. 32(1)) or the arbitral tribunal (Art. 41(1)) will find that there is no jurisdiction. Nevertheless, the objective requirement of a legal dispute remains. The parties' agreement cannot replace the limitation as contained in the Convention entirely (see paras. 5–7 *supra*). Where the parties do not agree on the wish to revise the agreement, the claimant would have to present a convincing claim, couched in legal terms, that it has a right to *bona fide* negotiations and that the conditions for such renegotiations have been met.[98]

81 Even if no right to renegotiation can be established, conciliation and arbitration *ex aequo et bono* are by no means ruled out. A claimant who has characterized its claim in legal terms and has invoked legal rules may still choose a method of settlement resulting in "mutually acceptable terms" (Art. 34(1)) or may agree that not only rules of law but also principles of equity are to be applied. In other words, the utilization of non-judicial methods of settlement, as in conciliation and the application of standards other than legal rules, does not necessarily deprive the dispute of its legal nature. All that is necessary is that the claimant convincingly presents a legal claim at the outset. The method of settlement chosen and the remedy sought will not affect the requirement under the ICSID Convention that there must be a legal dispute.

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95 *Peter*, Arbitration and Renegotiation, pp. 231 *et seq.*

96 See *Delaume*, Le Centre International, pp. 799/800; *Delaume, G. R.*, ICSID and the Transnational Financial Community, 1 ICSID Review – FILJ 237, 242 (1986); *Lauterpacht, E.*, The World Bank Convention on the Settlement of International Investment Disputes, *in*: Recueil d'études de droit international en hommage à Paul Guggenheim 642, 644 (1968).

97 *Kovar*, La compétence du Centre, p. 31.

98 See *Rodley*, p. 57. In *Adriano Gardella* v. *Ivory Coast*, Award, 29 August 1977, para. 4.7, there was some discussion on whether a clause in the agreement providing for its "updating" could justify an essential modification of the fundamental basis of the agreement. But the question did not arise as a jurisdictional issue and was not presented in terms of the legal nature of the dispute.

82 This conclusion is supported by Arbitration Rule 43:

> **Rule 43**
> *Settlement and Discontinuance*
>
> (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.
>
> (2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Thus, even in the course of arbitration proceedings it is always open to the parties to resort to non-judicial methods to settle their legal dispute. If the tribunal records the settlement in its award, the parties' agreement will acquire the full authority of an ICSID award for purposes of recognition and enforcement. It follows that the existence of a legal dispute and the employment of a judicial or non-judicial method for its settlement are two distinct questions.

C. ". . . arising directly . . ."

1. General Meaning under the Convention

83 The First Draft foresaw the Centre's jurisdiction for all legal disputes "arising out of or in connection with any investment" (History, Vol. I, p. 116). These words were criticized as giving a tribunal wide and indefinite authority (History, Vol. II, p. 700), and it was suggested that only disputes directly relating to an investment should be included (at pp. 707, 708, 830). A motion to insert the word "directly" as an additional qualification to the word "investment" was adopted by 26 to 8 votes (at p. 826). No definition or explanation of the word "directly" was ever offered.

84 Art. 46 of the Convention provides for the tribunal's competence to determine incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute. But under the terms of Art. 46, these claims too must be within the scope of the parties' consent and otherwise within the Centre's jurisdiction. Therefore, Art. 46 does not add to the scope of ICSID's jurisdiction but adopts the "arising directly" requirement by reference.

85 The requirement of directness is one of the objective criteria for jurisdiction and is, therefore, independent of the parties' consent. This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected. In practical terms, the objective and the subjective elements may be related. Disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment and that they are not covered by the consent agreement. Nevertheless, the two objections are analytically distinct.[99]

99 The question of the scope of consent is examined below at paras. 513–539.

A stipulation by the parties that an existing dispute has arisen directly out of an investment would be strong authority for a commission or a tribunal but would not pre-empt its power to determine its own competence in this respect. On the other hand, a stipulation between the parties, such as the one suggested by the 1981 Model Clause IV[100] (see para. 62 *supra*), that any future dispute relating to their agreement arises directly out of an investment does not appear meaningful. Not only is it futile to characterize disputes that may arise in the future, but in addition the commission or tribunal would not be bound by such a clause since it relates to the Convention's objective requirements for jurisdiction.

86 Institution Rule 2(1)(e) indicates that a request to institute conciliation or arbitration proceedings should also contain information on the directness of the dispute in relation to an investment (see para. 61 *supra*). No documentation on this point is required at the time of instituting proceedings[101] (see Art. 36, paras. 24–27).

87 Art. 2(b) of the Additional Facility Rules authorizes proceedings for the settlement of disputes that are not within the Centre's jurisdiction because they do not arise directly out of an investment (see para. 10 *supra*). This is usually read to refer to disputes that arise from transactions other than investments (see paras. 202–209 *infra*).[102] But a dispute that arises from an investment, though only indirectly, would also be covered by the wording of this provision. Therefore, where the connection between the investment and the dispute appears too remote to satisfy the Convention's requirement of directness, the Additional Facility could serve as an alternative method of dispute settlement.[103] The ICSID Secretariat has suggested yet another way to deal with arrangements that are related to investments covered by an ICSID consent clause yet fall outside the scope of the Convention. The parties are advised to provide for *ad hoc* arbitration, incorporating the ICSID Rules by reference and designating the Secretary-General as appointing authority. This might lead to parallel ICSID and non-ICSID proceedings, possibly administered by the same arbitrators.[104]

2. Direct Disputes or Direct Investments

88 The requirement of directness refers to the relation of the dispute to the investment. It does not refer to the investment as such. In *Fedax* v. *Venezuela*, the Respondent argued that the disputed transaction involving debt instruments issued by the Republic of Venezuela was not a "direct foreign investment" and therefore could not qualify as an investment under the Convention. The Tribunal rejected this argument:

> It is apparent that the term "directly" relates in this Article to the "dispute" and not to the "investment". It follows that jurisdiction can exist even in respect of

100 1 ICSID Reports 201. This clause was omitted from the 1993 Model Clauses.
101 Institution Rule 2(2).
102 *Broches*, The "Additional Facility", p. 377; *Toriello*, The Additional Facility, pp. 73/4.
103 See *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 28.
104 *Delaume, G. R.*, ICSID Arbitration, *in*: Contemporary Problems in International Arbitration (*Lew, J.* ed.) 23, 37 (1987). See also News from ICSID, Vol. 1/2, p. 14 (1984).

> investments that are not direct, so long as the dispute arises directly from such transaction.[105]

89 Other tribunals have taken the same position and have quoted the above passage from *Fedax*.[106]

90 In a number of cases Argentina argued that the dispute did not arise directly from an investment since the investor had made its investment by way of a company incorporated in Argentina.[107] Tribunals have rejected this argument.[108]

91 In *CMS* v. *Argentina*,[109] the Respondent argued that neither TGN, a company incorporated in Argentina in which the Claimant held shares, nor the licence held by TGN, qualified as an investment. Since these assets did not constitute an investment under the applicable BIT, CMS's claims, based on the alleged breach of TGN's rights under the licence, could not be considered as arising directly from an investment.[110] The Tribunal rejected that argument. It said:

> . . . the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty [the BIT] in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count.[111]

92 In *Siemens* v. *Argentina*, the Tribunal said in response to a similar argument:

> There is no doubt that the dispute with Argentina under the Treaty is a dispute which arises directly from the investment as defined by Siemens. The quality of a direct dispute is not affected by Siemens not being the direct shareholder of the local company. This is a separate question. For purposes of Article 25(1), a dispute may arise directly out of an investment made directly or indirectly by an investor. Whether in that situation the investor qualifies as such will depend on the definition of investor in the treaty or the terms of the investment contract. The direct requirement under the ICSID Convention is related to the investment dispute, not to whether the investor [investment] is direct or indirect.[112]

3. The General Unity of an Investment Operation

93 An investment operation typically involves a number of ancillary transactions. They may include financing, the acquisition of property, purchase of various goods, marketing of produced goods and tax liabilities. In economic terms, these

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105 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 24.

106 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 71, 72; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 52. See, however, *ADC* v. *Hungary*, Award, 2 October 2006, para. 331, which is ambivalent on this point.

107 See also *Alexandrov, S. A.*, The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*, 4 The Law and Practice of International Courts and Tribunals 19, 40–45 (2005).

108 *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, paras. 58–60; *Enron* v. *Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para. 22; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 40.

109 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003.

110 At para. 66.

111 At para. 68.

112 *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, para. 150.

transactions and contacts are all more or less linked to the investment. But whether these peripheral activities and disputes relating to them arise directly out of the investment for purposes of ICSID's jurisdiction may be subject to doubt.

94 An examination of ICSID practice on the directness of disputes in relation to the investment is complicated by several factors. Transactions that are ancillary to the investment operation are often carried out by means of separate contracts (see paras. 551–566 *infra*) and through distinct juridical persons both on the side of the Contracting State[113] (see paras. 230–267 *infra*) and on the side of the investor (see paras. 319–335 *infra*). These separate contracts, though clearly related to the investment, may even contain their own dispute settlement provisions, usually referring to domestic courts (see Art. 26, paras. 44–54, 109). These questions of legal form may obfuscate the issue of directness in relation to ICSID jurisdiction.

95 In *Holiday Inns* v. *Morocco*, the agreement for the establishment and operation of hotels had also provided for financing by the Government. This was done by means of separate loan contracts between C.I.H., a Moroccan specialized agency, and four wholly owned subsidiaries created by the Claimants (the H.M.S. companies). The contracts contained choice of forum clauses in favour of the Moroccan courts.[114] These facts led the Respondent to object to the jurisdiction of ICSID over the claims connected with the loan contracts. The Tribunal rejected these contentions and asserted its jurisdiction over the loan contracts. It emphasized "the general unity of an investment operation". The Tribunal said:

> It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.[115]

96 In *SOABI* v. *Senegal*, the Government was found liable for the termination of an investment operation committed to the construction of housing units. Among the claims for compensation were architects' fees under a contract between the investor and a firm of architects. As a consequence of the project's termination, the Claimant was unable to fulfil the contract with the architects. The Tribunal found that only the Senegalese courts had jurisdiction to rule on the dispute between the investor and the architects. But the Tribunal did have jurisdiction over the dispute between the Claimant and the Government concerning the latter's obligation to indemnify the former for its losses arising from the architectural contract.[116]

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113 See *e.g.*, *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 35–40; *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 58–59.

114 *Lalive*, The First "World Bank" Arbitration, p. 156.

115 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974; *Lalive*, The First "World Bank" Arbitration, p. 159.

116 *SOABI* v. *Senegal*, Award, 25 February 1988, paras. 8.01–8.23. See also the Dissenting Opinion at paras. 281–288.

97 In the resubmitted case in *Amco* v. *Indonesia*, Indonesia alleged tax fraud and sought to recover unpaid corporate taxes by way of a counterclaim.[117] Amco contended that tax fraud was beyond the jurisdiction *ratione materiae* of the new Tribunal. Amco argued that the tax dispute was only related in the most indirect way to the investment. The Tribunal noted that tax claims may well be within ICSID's jurisdiction. But it found that in the particular case the issue of tax fraud did not arise directly out of the investment:

> . . . it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.
>
> The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.
>
> For these reasons the Tribunal finds the claim of tax fraud beyond its competence *ratione materiae*.[118]

98 The Tribunal's distinction between rights and obligations of general application and those applicable to an investor as a consequence of the special investment relationship is a useful criterion. However, the description of the investment relationship in terms of an investment agreement between the investor and the host State appears too narrow. This special relationship may also be grounded on the host State's investment legislation or on a bilateral investment treaty.

99 The Tribunal's observation in *Amco* that tax matters may well be covered by ICSID's jurisdiction is important. This is illustrated by *Kaiser Bauxite* v. *Jamaica*, where the Government had made a "no further tax" commitment to the investor. There, the Tribunal had no doubt that a dispute arising from the imposition of additional taxes in violation of the agreement between the parties arose directly from the investment and was within the Centre's jurisdiction.[119] Unlike in *Amco*, in *Kaiser Bauxite* the tax issue was a central element of the investment relationship between the parties.

100 In *CSOB* v. *Slovakia*, the Claimant had granted a loan to a Slovak Collection Company that was secured by a guarantee of the Slovak Ministry of Finance.[120]

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117 *Amco* v. *Indonesia*, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 543, 562–565.

118 At p. 565.

119 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, paras. 15–25. See also *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90, 93–95, 98/9 (1976).

120 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 1–3.

When the Slovak Collection Company defaulted in its payment, CSOB instituted ICSID proceedings against Slovakia. Slovakia argued that the claims against it did not arise directly out of the loan and were, therefore, outside the Tribunal's jurisdiction. The Tribunal rejected this argument. After citing from the *Fedax* case it said:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[121]

The Tribunal added that the term "directly" in Art. 25(1) should not lead to a restrictive interpretation merely because the claim was based on an obligation which, standing alone, did not qualify as an investment. The Slovak Republic's obligation was closely related to the loan made by CSOB. The loan, in turn, was part of the overall operation of consolidating CSOB and developing its banking activity in the Slovak Republic. Therefore, the dispute arose directly out of the investment.[122]

101 In *Tokios Tokelės* v. *Ukraine*, the Respondent argued that the dispute did not arise directly out of an investment because the allegedly wrongful acts by Ukrainian governmental authorities were not directed against the Claimant's physical assets.[123] The Tribunal rejected this argument:

> For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case.[124]

102 Other tribunals have also adopted the doctrine of the general unity of the investment operation. They have accepted that disputes arising from activities that would not necessarily constitute investments by themselves, but that were linked to an investment, were covered by the requirement of "arising directly".[125]

103 *Joy Mining* v. *Egypt* seems to be at variance with this principle. The Claimant had delivered and installed mining equipment. The transaction was secured by a bank guarantee. The claim before the Tribunal was for the return of the guarantee. The Tribunal did refer to the unity of the investment operation, saying that "a given element of a complex operation should not be examined in isolation because what

121 At para. 72 (footnote omitted).
122 At paras. 12, 70–75, 82, 91.
123 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 90.
124 At para. 91.
125 *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, para. 70; *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 106–124; *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 54 (but see the apparent contradiction with the Tribunal's statement at paras. 42, 44); *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 92, 100–102; *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, para. 38; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 112–114.

matters is to assess the operation globally or as a whole".[126] Yet elsewhere the Tribunal denied the existence of an investment "as a bank guarantee is simply a contingent liability".[127] In other words, the Tribunal, rather than examining the entire transaction, looked at the bank guarantee, which was but one aspect of the operation, and examined whether it was an investment.[128]

104 It is impossible to draw a precise line in general terms between disputes arising directly and those arising only indirectly out of investments. Nevertheless, ICSID practice yields certain indications for the distinction: the fact that transactions that are ancillary but vital to the investment are made in separate form and even through separate entities does not deprive a dispute relating to them of its direct character. The fact that a dispute with the government has important repercussions on relationships with private entities in the host State does not negate its character as arising directly out of an investment. In order to be "arising directly", disputes must have distinctive features linking them to the investment that are not shared by disputes unrelated to investments.

105 One State party to the Convention is evidently of the opinion that the "arising directly" clause in the Convention is not sufficiently rigorous. Papua New Guinea has made a notification under Art. 25(4) of the Convention to the effect that "it will only consider submitting those disputes to the Centre which are fundamental to the investment itself".[129] It is unclear what, if anything, the words "fundamental to" add to "arising directly". Possibly, "fundamental to" refers to all the conditions and circumstances without which the investment would not have been made.

4. General Measures affecting Investments

106 In a number of cases Argentina argued that the measures it had taken were of a general nature, were designed to serve the national welfare and were not specifically directed at the particular investment. Therefore, in Argentina's view, the dispute about these measures did not arise directly out of the investment. The tribunals did not accept this argument.

107 In *CMS* v. *Argentina*, the Respondent argued that general measures dealing with a public economic emergency that are not directed towards investors but affect the country and its population as a whole cannot be said to lead to a dispute arising directly out of an investment. The Tribunal distinguished between measures of a general economic nature and measures specifically directed to the investment's operation.[130] The Tribunal found that questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, would normally fall outside ICSID's jurisdiction. The Tribunal added that a direct relationship can, however, be

126 *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 54.
127 At para. 44.
128 The Tribunal also found that the overall transaction was an ordinary sales contract rather than an investment.
129 http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-d.htm (see also para. 926 *infra*).
130 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 25.

established if the general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is then brought under ICSID's jurisdiction is not the general measures in themselves but the extent to which they may violate those specific commitments.[131] The Tribunal said:

> . . . the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.[132]

108 The Tribunal found it sufficient that the Claimant had demonstrated *prima facie* that it had been adversely affected by Argentina's measures to consider the claim admissible and within its jurisdiction.[133]

109 In *AES* v. *Argentina*, the Respondent similarly argued that the measures under dispute were not specifically related to or targeted at the Claimant's investment. Rather, they were measures of general bearing aimed at restoring the economy. Therefore, the dispute did not arise directly out of the investment.[134] The Tribunal did not accept this argument. It said:

> What is at stake in the present case, as it was in the *CMS* one, are not the measures of a general economic nature taken by Argentina in 2001 and 2002 but their specific negative impact on the investments made by AES. As a sovereign State, the Argentine Republic had a right to adopt its economic policies; but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these guarantees and protection. . . . Under this provision, directness has to do with the relationship between the dispute and the investment rather than between the measure and the investment.[135]

110 In *Continental Casualty* v. *Argentina*, the Respondent based its objection on the argument that "arising directly" meant that the measure had to be specifically addressed to the particular investment. This would exclude general measures taken in case of emergency and affecting all sectors of the economy.[136] The Tribunal did not accept that "specific" was a synonym of "directly". A breach of international standards may well arise from general measures. The Tribunal said:

> International practice indeed shows that many, if not most, disputes based on an alleged breach of international standards concerning the treatment of the property of aliens, settled either by means of diplomatic protection or of direct arbitration, have arisen from general measures taken by host States, that affected directly those investments, without necessarily being specifically aimed at them.

131 At para. 27.
132 At para. 33.
133 At para. 35.
134 *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 48, 49.
135 At paras. 57, 60.
136 *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, paras. 38, 39, 46, 47, 70–75.

> Were this not the case, nationalization measures, either aimed at the property of both nationals and foreigners, or just at foreign property, which have been the subject matter of a substantial portion of those disputes, would have escaped any international litigation and dispute settlement mechanisms.[137]

111 Other tribunals have followed this line of argument.[138] It follows that a host State cannot rely on the general policy nature of measures taken by it if these measures had a concrete effect on the investment and violated specific commitments and obligations. These commitments may arise from legislation, a treaty or a contract.

112 Article 1101(1) of the NAFTA refers to "measures . . . relating to" investors and investments. In a number of ICSID cases Argentina relied on the interpretation of that provision in *Methanex* v. *United States*.[139] The *Methanex* Tribunal had decided that the phrase "relating to" required a legally significant connection. ICSID tribunals have pointed to the difference between "relating to" in the NAFTA and "arising directly" in the ICSID Convention and have distinguished *Methanex*.[140]

D. ". . . out of an investment, . . ."

1. General Meaning under the Convention

113 The concept of investment is central to the Convention. Yet, the Convention does not offer any definition or even description of this basic term. The Working Paper's draft on jurisdiction did not even contain a reference to "investments" (History, Vol. II, p. 22). Mr. *Broches* advised against limiting or defining disputes since it would be difficult to find a satisfactory definition and since any definition was likely to lead to jurisdictional controversies (at pp. 22, 54, 59). On the other hand, a number of delegates found more precision desirable (at pp. 57, 66, 67). The Preliminary Draft included the requirement of the existence of an investment dispute but failed to offer a definition (at pp. 202–204). The subsequent discussions showed a widely held opinion that a definition of the term "investment" was necessary (at pp. 182, 261, 293, 297, 450, 468, 470, 474, 492, 493, 496, 499/500, 501, 502, 504). At the same time some suggestions as to possible definitions were put forward (at pp. 285, 493, 537, 564). But Mr. *Broches* continued to oppose a definition (at pp. 203/4, 395, 451, 497).

114 The First Draft introduced a definition in the following terms:

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137 At para. 72.

138 *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, paras. 67, 68; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 71; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 59; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 21, 37–40; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, at paras. 89–100; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 27–30; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 55–70.

139 *Methanex* v. *United States*, Preliminary Award on Jurisdiction, 7 August 2002, paras. 127–147. *Methanex* is not an ICSID case but was conducted under the UNCITRAL Arbitration Rules.

140 *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 58, 59; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 75; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 92–97; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 27–30; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 58–63.

Article 30

> For the purposes of this Chapter (i) "investment" means any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years;[141]

This draft led to a broad critical discussion and a flurry of counterproposals. Some delegates found the draft unsatisfactory (at pp. 661, 699), especially since it was too imprecise (at pp. 652, 668, 700, 703, 707). There was considerable opposition to the word "contribution" (at pp. 702, 703, 708, 709, 710) but also to the introduction of a specific time element (at pp. 705, 707). Some alternative proposals emphasized aspects of money and profit (at pp. 704, 837), property rights (at p. 704) or the host State's interest in development (at pp. 705, 839). The various suggested definitions of "investment" prompted Mr. *Broches* to remark that they were, in fact, definitions of what the delegates believed their governments would wish to submit to the Centre (at pp. 704, 707). Some definitions in bilateral investment treaties (at p. 843) and domestic statutes (at pp. 843/4) were also quoted but were not acceptable (at p. 972). An attempted definition by the Secretariat was presented in the following terms:

> The term "investment" means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities.[142]

Mr. *Broches* insisted that the precise delimitation of the Centre's jurisdiction **115**
was best left to the parties (at pp. 707, 710). He found support with the United Kingdom delegate who agreed that a definition would only create jurisdictional difficulties (at pp. 668, 702, 822). This view was endorsed by a number of other delegates (at pp. 703, 706/7, 823, 844). Yet another group advocated the inclusion of a descriptive list only (at pp. 707, 709, 824, 825). Eventually, a British proposal that omitted any definition of the term "investment" (at p. 821) was adopted by a large majority in the Legal Committee (at p. 826). Consequently, neither the Revised Draft nor the Convention itself contains a definition.

A number of specific points were discussed during the debate on the term **116**
investment but were either not adopted or left open. It was felt by many that the Centre should only be concerned with investments of a certain magnitude. In fact, the Working Paper provided that, subject to special agreement by the parties, the Centre would not exercise jurisdiction in respect of disputes involving claims of less than US $100,000 (History, Vol. II, p. 34). Although this clause was eliminated from the Preliminary Draft, it continued to attract the delegates' attention. There was considerable support for introducing a minimum limit in order to exclude insignificant claims (at pp. 257/8, 260, 498, 502, 547, 660, 669, 710). In objection

141 History, Vol. I, p. 116.
142 History, Vol. II, p. 844.

to these various suggestions it was argued that not all claims would be presented in terms of money and that smaller claims could lead to important test cases (at pp. 204, 260, 432, 497, 567, 660). Some delegates felt that the total value of the investment and not the claim under dispute should be determinative (at pp. 497, 706). Yet another proposal envisaged the involvement of the investor's Government (at pp. 498, 503) or the Secretary-General's screening power (at p. 258) to shield the Centre from insignificant claims. Mr. *Broches* opposed inflexible limits and pointed to the parties' autonomy also in this matter (at pp. 497, 499). No quantitative limit was included in any of the subsequent drafts or in the Convention.

117 Another topic of discussion was the exclusion of "old investments" from the Convention's application. The aim was to limit the Centre's jurisdiction to disputes arising from investments made after the Convention's entry into force: since the Convention's purpose was to create a favourable investment climate in the future, it should not be applied to older investments, especially those made when the countries concerned had not yet gained control over the conditions for admission (History, Vol. II, pp. 320, 468, 500, 503, 504, 548, 565, 669). Mr. *Broches* opposed this suggestion, pointing out that the desired exclusion could be achieved by a refusal of consent in respect of old investments (at p. 566). The idea was not pursued further.

118 Other questions that were left open concerned jurisdiction over loans (History, Vol. II, pp. 261, 474, 668, 709), suppliers' credits (at p. 451), outstanding payments (at p. 542), ownership of shares (at p. 661) and construction contracts (at p. 500).

119 In the debate over the draft for the Executive Directors' Report, Mr. *Broches* recalled that none of the suggested definitions for the word "investment" had proved acceptable. He suggested that while it might be difficult to define the term, an investment was in fact readily recognizable. He proposed that the Report should say that the Executive Directors did not think it necessary or desirable to attempt a definition (History, Vol. II, pp. 957, 972). After some further debate about the desirability of a definition, the more neutral statement was adopted that no attempt had been made to define the term "investment" (at pp. 972, 1027). Historically, this is, of course, incorrect. There were a number of attempts but they all failed.

120 The relevant portion of the Report of the Executive Directors, as adopted, says:

> 27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).[143]

121 Therefore, the Convention offers no explanation of the concept of investment. It is left to the parties what kinds of investments they wish to bring to ICSID. The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence, which speaks of

143 1 ICSID Reports 28.

"the need for international co-operation for economic development and the role of private international investment therein". This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development".[144] Therefore, it is arguable that the Convention's object and purpose indicate that there should be some positive impact on development.[145] But it does not necessarily follow that an activity that does not contribute to the host State's development cannot be an investment in the sense of Art. 25 and is hence outside the Centre's jurisdiction (see also paras. 164–170 *infra*).

2. The Dual Test for the Existence of an Investment

122 The reference to the essential requirement of consent in the Report of the Executive Directors (see para. 120 *supra*) does not imply unlimited freedom for the parties. The drafting history leaves no doubt that the Centre's services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be. This interpretation is supported by subsequent practice (see paras. 129–133 *infra*) and by the terms of the Additional Facility (see paras. 9–13 *supra* and 202–209 *infra*).

123 The conclusion that the term "investment" has an objective meaning independent of the parties' disposition is confirmed by Rule 2 of the Institution Rules. It mandates that a request for conciliation or arbitration must indicate not only particulars concerning the parties' consent (Rule 2(1)(c)) but also, as a separate requirement, information concerning the issue in dispute indicating that there is a legal dispute arising directly out of an investment (Rule 2(1)(e)). Therefore, while it is clear that the parties have much freedom in describing their transaction as an investment, they cannot designate an activity as an investment that is squarely outside the objective meaning of that concept.

124 In examining whether the requirements for an "investment" have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties' consent and whether it meets the Convention's requirements.[146] If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of investment will be relevant. In addition, the tribunal will have to establish that the activity is an investment in the sense of the Convention. This dual test has at times been referred to as the "double keyhole" approach[147] or as a "double barrelled" test.[148]

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144 Para. 9.

145 In this sense: *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 64, 73, 76, 88; *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, paras. 28–33; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, paras. 66–68.

146 *Rubins*, The Notion of "Investment", pp. 289–290.

147 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 278.

148 *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 55.

125 Tribunals have generally followed this methodology.[149] In *CSOB* v. *Slovakia*, the existence of an investment was disputed. The agreement between the parties referred to the BIT, thereby incorporating the BIT's reference to ICSID arbitration.[150] This, in the Tribunal's view, created a strong presumption that the parties considered their transaction as an investment within the meaning of the Convention.[151] But the Tribunal did not accept that this disposed of the question whether there was an investment. It said:

> 68. The Slovak Republic is correct in pointing out, however, that an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.[152]

126 In *Joy Mining* v. *Egypt*, the Claimant argued that the transaction in question, a bank guarantee, fell within the broad definition of "investment" contained in the BIT between Egypt and the United Kingdom.[153] The Tribunal found that there is a limit to the freedom with which the parties may define an investment for purposes of ICSID's jurisdiction. It said:

> 50. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.[154]

127 Other tribunals have endorsed this approach[155] or have simply undertaken separate examinations of the existence of an investment under the parties' consent to jurisdiction and under Art. 25(1).[156]

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149 For examples to the contrary see *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, para. 48; *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 157–160.
150 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 55.
151 At para. 66.
152 At para. 68.
153 *Joy Mining* v. *Egypt*, Award, 6 August 2004, paras. 42–50.
154 At para. 50.
155 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 36, 44; *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 278; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 90; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 80; *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, para. 31; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 55; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 113.
156 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, paras. 20, 21–30; *Genin* v. *Estonia*, Award, 25 June 2001, para. 324; *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001,

Strictly speaking, the meaning of "investment" as reflected in the parties' consent agreement is a matter of the scope of consent and ought to be discussed in that context (see paras. 513–539 *infra*). For the sake of convenience it is discussed here in the context of the concept of "investment". Consent may be given in three ways: through a contract between the host State and the investor, through a provision in the host State's investment legislation that has been accepted by the investor, or through a clause in a treaty that has been accepted by the investor (see paras. 382–463 *infra*). Indications of the meaning of "investment" may be contained in any of these bases of consent. **128**

3. Contracts Relating to Investments

A clause in an agreement by which the parties consent to submit disputes to the Centre is a strong indication that they consider their transaction an investment. The classification of the proposed operation as an investment arises by necessary implication from the ICSID clause.[157] Nevertheless, the 1993 ICSID Model Clauses suggest a specific clarification on this point: **129**

Clause 3

> It is hereby stipulated that the transaction to which this agreement relates is an investment.[158]

The earlier versions of the Model Clauses offered formulae to the same effect.[159] The comment to the 1993 Model Clause 3 states that it is designed to strengthen the presumption in favour of the existence of an investment which arises from the parties' consent to submit a dispute to the Centre.

A specific statement in an investment agreement containing an ICSID clause that the planned transaction is an investment may not be necessary but is advisable. It precludes a party from later challenging ICSID's jurisdiction on the ground that the dispute did not really arise from an investment. It demonstrates that the parties have given careful thought to the nature of the project and that, when adopting the ICSID clause, they were aware of the Convention's jurisdictional requirements. *Delaume* has recommended that such a specific statement be supplemented with a description of the particular features of the transaction such as its nature, size and **130**

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paras. 50–66; *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 133 FN 113, 140; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 73–86; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 98, 119.

157 See also *Amerasinghe*, Submissions to the Jurisdiction, p. 223; *Broches, A.*, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law 263, 268 (1966); *Golsong, H.*, A Guide to Procedural Issues in International Arbitration, 18 The International Lawyer 633, 634/5 (1984).

158 4 ICSID Reports 360.

159 See the 1981 Model Clauses, Clause IV, 1 ICSID Reports 201; 1968 Model Clauses, Clause IX, 7 ILM 1169 (1968).

duration.[160] This is particularly advisable in order to strengthen the credibility of the transaction's classification as an investment in borderline situations.

131 Parties to agreements containing ICSID clauses have sometimes specified that the intended transaction is indeed an investment[161] or to describe the features that would make this characterization plausible. In most contract-based cases before ICSID the question whether the dispute at hand did, in fact, arise from an investment did not create problems.[162] The facts appeared to squarely fit the concept of investment, and this classification was not challenged.[163] In *CSOB* v. *Slovakia*, the Tribunal concluded that a reference in a contract between the parties to a bilateral investment treaty containing an ICSID arbitration clause expressed their view that their transaction was an investment within the meaning of the Convention.[164]

132 In a number of cases, the Tribunals examined the question of the existence of an investment on their own motion but reached affirmative results. In *Kaiser Bauxite* v. *Jamaica*, the Tribunal noted the essential requirement of consent as mentioned in para. 27 of the Executive Directors' Report (see para. 120 *supra*) and concluded that the consent of the parties should be entitled to great weight in any determination of the Centre's jurisdiction. Turning to the objective requirement of an investment it said:

> Moreover, it seems clear to the Tribunal that a case like the present, in which a mining company has invested substantial amounts in a foreign State in reliance upon an agreement with that State, is among those contemplated by the Convention.[165]

133 In *LETCO* v. *Liberia*, the Tribunal took it upon itself to examine all requirements for jurisdiction under Art. 25(1).[166] It gave a brief description of the activities under the Concession Agreement, the harvesting and processing of forest products in Liberia, putting special emphasis on the extensive amounts that LETCO had paid out for the development of the concession. It concluded:

> There is, therefore, no doubt that, based on the Concession Agreement, amounts paid out to develop the concession, as well as other undertakings, this legal dispute has arisen directly from an "investment" as that term is used in the Convention.[167]

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160 *Delaume*, How to Draft, p. 182; see also Comment 9 to the 1981 Model Clauses, 1 ICSID Reports 201.

161 *World Duty Free* v. *Kenya*, Award, 4 October 2006, para. 6. The contractual clause containing consent to ICSID arbitration contained the following proviso: "It is hereby stipulated . . . (b) that the transaction to which this Agreement relates is an 'investment' within the meaning of the Convention;" See also *Semos* v. *Mali*, Award, 25 February 2003, 10 ICSID Reports 117.

162 But see the somewhat unclear treatment of a contractual clause expressing consent to ICSID's jurisdiction in *Zhinvali* v. *Georgia*, Award, 24 January 2003, paras. 171, 172, 407.

163 *Broches*, Convention, Explanatory Notes and Survey, p. 643.

164 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, at paras. 66, 67, 89.

165 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 17. See also *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90, 99/100 (1976).

166 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, reproduced in the Award, 31 March 1986, 2 ICSID Reports 349.

167 At p. 350.

4. Definitions of Investment in National Legislation

National legislation offering consent to ICSID's jurisdiction[168] often contains definitions or descriptions of investments to which it relates.[169] Some of these definitions are quite terse. The definition in Art. 3 of the Tanzania Investment Act 1997 is typical of this: **134**

> "investment" means the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise;

Other definitions are more elaborate and follow the pattern of modern BITs. Art. 1 of the Albania Law on Foreign Investments of 1993 provides:

> "Foreign investment" means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of:
> (a) moveable and immoveable, tangible and intangible property and any other property rights;
> (b) a company, shares in stock of a company and any form of participation in a company;
> (c) loans, claim to money or claim to performance having economic value;
> (d) intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and
> (e) any right conferred by law or contract, and any license or permit pursuant to law.[170]

In *Tradex* v. *Albania*, the Tribunal undertook a detailed interpretation of this provision.[171] It held, *inter alia*, that the sources from which the investor financed the foreign investment in Albania were not relevant.[172] It also held that even without ownership by the Claimant of the land in question its right to use the land could have been expropriated.[173] **135**

The Georgia Investment Law of 1996, which offers ICSID arbitration, contains the following definition of "investment": **136**

> *Article 1. Investment*
> (1) Investment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia for earning of possible income.
> (2) Such value or right may be:

168 For a collection of national investment legislation see: Investment Laws of the World, loose-leaf collection (OUP, since 1973).
169 *Delaume*, Le Centre International, pp. 802/3; *Parra, A. R.*, The Scope of New Investment Laws and International Investments, *in*: Economic Development, Foreign Investment and the Law (*Pritchard, R.* ed.) 27 (1996); *Rubins*, The Notion of "Investment", pp. 295–296.
170 See *Tradex* v. *Albania*, Award, 29 April 1999, para. 105.
171 At paras. 88, 106, 126–128.
172 At paras. 108–111.
173 At paras. 126–131.

(a) funds, shares, stocks and other securities;
(b) movable and immovable property – land, buildings, equipment and wealth;
(c) land tenure or right to use other natural resources (concessions, as well), patent, license, "know-how", experience and other intellectual value;
(d) other legally recognized property and intellectual value or right.[174]

137 In *Zhinvali* v. *Georgia*, the Claimant had conducted lengthy negotiations with the authorities of Georgia. These negotiations ultimately failed. Zhinvali claimed "development costs" and damages. The Tribunal found that there had been no investment in the sense of the Investment Law.[175] It said:

> . . . the law of Georgia contemplates the core expenditures to be "realized" as an "investment" on the "territory" of Georgia. To conclude that a given "legal person" can qualify as an "investor" for purposes of . . . the Georgia Investment Law, without having realized investments on the territory of Georgia, is, in the Tribunal's opinion, *not* in keeping with the definition of that term.[176]

138 Some codes exclude investment from certain areas of economic activity such as banking or insurance and subject foreign investment to conditions and admission procedures (see paras. 411, 422, 423, 425, 524 *infra*). It is clear that the diverse definitions of investment and the various restrictions contained in national legislation do not necessarily reflect the term as used in Art. 25(1) of the Convention. But they form part of the conditions of consent and should be respected in a particular case.

5. Definitions of Investment in Treaties

139 In recent years the vast majority of cases have been brought to ICSID under the provisions of investment treaties containing consent to jurisdiction. In most cases jurisdiction is based on a bilateral investment treaty (BIT). The treaty clauses providing for ICSID's jurisdiction are drafted in general terms referring to future investment disputes. Consent is normally completed by the investor's acceptance of such an offer (see paras. 427–455 *infra*). In such a case, no inferences can be drawn as to the existence of an investment in a particular case from the mere existence of the parties' consent. An ICSID conciliation commission or arbitral tribunal will have to carefully examine whether the transaction out of which the dispute arises meets the criteria of an investment under the Convention and under the BIT.

140 Almost all BITs contain definitions of the term investment. In most modern BITs these definitions have similar features.[177] They are usually introduced by a broad, general description followed by a non-exhaustive list of typical rights. The

174 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 377.
175 At paras. 1–4. 176 At para. 381. Italics original.
177 For a more thorough analysis of definitions of the term "investment" in treaties see *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 25–31; *Delaume, G. R.*, ICSID and Bilateral Investment Treaties, News from ICSID, Vol. 2/1, pp. 12, 19/20 (1985); *Rubins*, The Notion of "Investment", pp. 292–295; *Dolzer*, The Notion of Investment, pp. 263–266; *Legum*, Defining Investment and Investor, pp. 522–524.

general description frequently refers to "every kind of asset". The list of typical rights usually includes:

- traditional property rights;
- participation in companies;
- money claims and rights to performance;
- intellectual and industrial property rights;
- concession or similar rights.

Art. 1 of the United Kingdom's Model Agreement is typical in this regard. It provides: **141**

> For the purposes of this Agreement:
> (a) "investment" means every kind of asset and in particular, though not exclusively, includes:
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
> (iii) claims to money or to any performance under contract having a financial value;
> (iv) intellectual property rights, goodwill, technical processes and know-how;
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[178]

The definition in the United States Model BIT of 2004 is as follows: **142**

> **"investment"** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
> (a) an enterprise;
> (b) shares, stock, and other forms of equity participation in an enterprise;
> (c) bonds, debentures, other debt instruments, and loans;
> (d) futures, options, and other derivatives;
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
> (f) intellectual property rights;
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[179]

178 The Model BIT of the People's Republic of China of 2003, the Model BIT of Germany of 2005 and the Model BIT of France of 2006 contain similar but not identical definitions.

179 Footnotes omitted. The full text of the 2004 US Model BIT is available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

143 BIT practice is far too extensive to permit a fuller analysis in the framework of this Commentary.[180] By and large definitions of "investment" in actual BITs are along the lines described above.

144 The broad similarity of definitions in BITs does not mean that they reflect a general definition for the Convention's concept of investment. Rather, these definitions are part of the specific conditions of consent governing individual relationships. Generalizations drawn from these definitions should be treated with caution especially where jurisdiction is not based on a BIT. In a case not based on a BIT, jurisdiction should not be denied just because the dispute arises from an operation that does not fit the typical definition of investments adopted by BITs. Conversely, if a BIT's definition of investment goes beyond the requirements of the ICSID Convention there will be no jurisdiction. For instance, clauses in BITs that cover disputes concerning the admission or establishment of investments cannot create a basis for ICSID's jurisdiction since there is no investment[181] (see paras. 175–181 *infra*).

145 ICSID tribunals have examined whether the activities underlying the claims before them were covered by the definitions of "investment" in the applicable treaties. In the vast majority of cases they found that the disputes before them did indeed concern investments as defined in the respective BITs.[182] Participation in locally incorporated companies is a particularly important part of this practice[183] (see para. 150 *infra*). In a much smaller number of cases the tribunals found that the claimants' activities fell outside the definitions contained in BITs.[184] A number of

180 For a broad survey of BITs and their definitions of "investment" see UNCTAD's searchable database at: http://www.unctadxi.org/templates/DocSearch_779.aspx. See also: UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking 7–13 (2007); UNCTAD, Investment Provisions in Economic Integration Agreements 59–64 (2006).

181 *Parra*, Provisions on the Settlement, pp. 291, 325, 329.

182 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, paras. 19, 30–38; *Goetz* v. *Burundi*, Award, 10 February 1999, para. 83; *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 77, 91; *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000, para. 28; *Genin* v. *Estonia*, Award, 25 June 2001, paras. 324, 325; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 36–49; *Middle East Cement* v. *Egypt*, Award, 12 April 2002, paras. 97–103, 134–138; *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 133–140; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 74–78; *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 66–105; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 97–106; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, paras. 78, 79; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 118–128; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 136–142.

183 *AMT* v. *Zaire*, Award, 21 February 1997, paras. 3.13–3.15, 4.05, 5.07–5.16, 5.24, 5.25; *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, paras. 10–16; *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 66–68; *Genin* v. *Estonia*, Award, 25 June 2001, para. 324; *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, paras. 46–50; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 57–65; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, paras. 39–49; *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, paras. 88–94; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 207; *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 152–156, 161, 164.

184 *Gruslin* v. *Malaysia*, Award, 27 November 2000, paras. 25.1–25.7, 26.1; *Mihaly* v. *Sri Lanka*, Award, 15 March 2002, para. 61; *Joy Mining* v. *Egypt*, Award, 6 August 2004, paras. 43–47.

special issues arising from the definition of BITs are described below in separate sections (see paras. 175–201 *infra*).

146 Some multilateral treaties also provide for dispute settlement by ICSID accompanied by a definition of the term "investment" (see paras. 456–463 *infra*). Art. 1139 of the NAFTA[185] (see paras. 457–459 *infra*) contains an elaborate definition of "investment" which is narrower than the typical BIT definition. It covers an enterprise, equity or debt securities of an enterprise, interests that entitle an owner to a share in the income or profits of an enterprise, tangible and intangible assets acquired for business purposes, interests arising from the commitment of capital and other resources such as under turnkey or construction contracts, and contracts where remuneration depends substantially on the production, revenues or profits of an enterprise. The definition specifically excludes claims to money that arise solely from commercial contracts for the sale of goods or services or short-term credit in connection with a commercial transaction such as trade financing.

147 The Energy Charter Treaty of 1994 (see paras. 460, 461 *infra*) in its Art. 1(6)[186] and the MERCOSUR Protocol of 1994 (see para. 462 *infra*) in its Art. 1(1) offer definitions that are closely modelled on the definitions in modern BITs as described in paras. 140–142 above. The Mexico-Colombia-Venezuela Free Trade Agreement of 1994 (see para. 463 *infra*) in its Art. 17–01 offers yet another definition of investment. It covers goods and rights for the purpose of producing economic benefits, share capital, companies owned or effectively controlled by the investor and any other rights considered investments under national legislation. Money claims arising from commercial contracts for the sale of goods or services as well as commercial credits are specifically excluded.

6. Types of Investments

148 A perusal of cases that come before ICSID tribunals demonstrates the diversity of matters covered by the concept of investment.[187] Investment in the sense of Art. 25 of the Convention may cover almost any area of economic activity.[188] Not surprisingly, the concept of investment includes immovable and movable

185 32 ILM 605, 647 (1993).

186 34 ILM 360, 383 (1995).

187 A survey of subject matters in ICSID cases is offered on ICSID's homepage: http://www.worldbank.org/icsid/cases/cases.htm.

188 See also *Delaume, G. R.*, ICSID Clauses: Some Drafting Problems, News from ICSID, Vol. 1/2, pp. 16, 18 (1984); *Koa, C. M.*, The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China through the International Centre for Settlement of Investment Disputes, 24 New York University Journal of International Law and Politics 439, 448–450 (1991); *Shihata, I. F. I.*, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Review – FILJ 1, 7/8 (1986); *Shihata/Parra*, The Experience, p. 318; *Amerasinghe*, The Jurisdiction of the International Centre, p. 181; *Szasz*, The Investment Disputes Convention, p. 36; *Rubins*, The Notion of "Investment", pp. 304–313.

property.[189] It is also well established that rights arising from contracts may amount to investments.[190]

149 Financial instruments such as loans or the purchase of bonds may qualify as investments.[191] In *Fedax* v. *Venezuela*, Venezuela argued that the purchase of promissory notes issued by the government did not qualify as an investment since they involved neither a long-term transfer of financial resources in order to acquire interests in a corporation nor a portfolio investment.[192] The Tribunal concluded that loans and other credit facilities were within the jurisdiction of the Centre and that the purchase of the promissory notes constituted an investment.[193] Similarly, in *CSOB* v. *Slovakia*, the Tribunal held that the broad meaning which must be given to the notion of an investment may include a loan, especially if it contributes substantially to a State's economic development.[194] In *Sempra* v. *Argentina*, the Tribunal also accepted loans as an investment, noting that they were part of the overall investment's continuing financing arrangements.[195] On the other hand, tribunals have found that a bank guarantee[196] and an option[197] were not covered by the concept of an investment.

150 Participation in companies or shareholding constitutes a frequently invoked form of investment. This is important in view of the common requirement that the investment be made through a company incorporated in the host State. The number of cases that have accepted shareholding as a form of investment is considerable.[198] The locally incorporated company is treated not as the foreign investor but as the

189 *Santa Elena* v. *Costa Rica*, Award, 17 February 2000; *Middle East Cement* v. *Egypt*, Award, 12 April 2002, paras. 131–151; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003.

190 *SPP* v. *Egypt*, Award, 20 May 1992, paras. 164, 165; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 90, 92; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 274; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 255.

191 See also *Broches, A.*, Choice-of-Law Provisions in Contracts with Governments, 26 The Record of the Association of the Bar of the City of New York 42, 50 (1971); *Delaume, G. R.*, ICSID and the Transnational Financial Community, 1 ICSID Review – FILJ 237, 241/2 (1986); *Alexandrov*, The "Baby Boom", pp. 45–49; *Wälde, T.*, The Serbian Loans Case – A Precedent for Investment Treaty Protection of Foreign Debt?, *in*: International Investment Law and Arbitration: Leading Cases (*Weiler, T.* ed.) 383 (2005).

192 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 19.

193 At paras. 18–43.

194 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 76–91.

195 *Sempra* v. *Argentina*, Award, 28 September 2007, paras. 214–216. See also *CDC* v. *Seychelles*, Award, 17 December 2003, paras. 6, 8, 18, 21, where the objection against the nature of the loan as an investment had been dropped.

196 *Joy Mining* v. *Egypt*, Award, 6 August 2004, paras. 42–50.

197 *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, para. 189.

198 See Appendix 1 to *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005 listing 18 cases to this effect. In addition see: *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, paras. 44, 48; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, paras. 51–54, 76–89; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 46–51; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 209–222; *Suez and AWG* v. *Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 46–51; *Telenor* v. *Hungary*, Award, 13 September 2006, paras. 19, 27, 60; *Parkerings* v. *Lithuania*, Award, 11 September 2007, paras. 250–254.

investment.[199] This form of investment includes minority shareholding.[200] It also includes indirect shareholding through an intermediate company.[201]

Another sizeable group of cases concerns civil engineering and construction projects. Tribunals have not entertained doubts that these were investments.[202] Similarly, infrastructure projects are the basis of numerous investment disputes.[203] The provision of services has been accepted as an investment in some cases[204] but not in others.[205] Investment operations have extended, *inter alia*, to mining **151**

199 See *Alexandrov*, The "Baby Boom", pp. 27–45; *Schreuer, C.*, Shareholder Protection in International Investment Law, *in*: Common Values in International Law, Essays in Honour of Christian Tomuschat (*Dupuy, P.-M./Fassbender, B./Shaw, M. N./Sommermann, K.-P.* eds.) 601 (2006).

200 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, para. 95; *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, para. 10; *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, para. 50; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 36–65; *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, para. 3.4.2; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, paras. 39, 44, 49; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, paras. 50–63; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 92–94; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 138; *CMS* v. *Argentina*, Decision on Annulment, 25 September 2007, paras. 58–76.

201 *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, paras. 42–57; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 123–144; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 9, 19–44; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 9, 10, 32–35; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 121–124; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 70–83.

202 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, paras. 50–66; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 36–40, 43–49, 52–58; *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 101; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 67, 92; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 111–121, 127–129; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 90–106; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 99–111. But see also *Nathan, K. V. S. K.*, Submissions to the International Centre for the Settlement of Investment Disputes in Breach of the Convention, 12 Journal of International Arbitration 27 (1995).

203 *Tanzania Electric* v. *IPTL*, Decision on Preliminary Issues, 22 May 2000; *Vivendi* v. *Argentina*, Award, 21 November 2000; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004; *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004; *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005; *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005; *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005; *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006; *Suez and AWG* v. *Argentina*, Decision on Jurisdiction, 3 August 2006; *ADC* v. *Hungary*, Award, 2 October 2006; *Fraport* v. *Philippines*, Award, 16 August 2007.

204 *Atlantic Triton* v. *Guinea*, Award, 21 April 1986 (conversion and management of ships); *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 75–78, 123–129, 133–140 (pre-shipment inspection).

205 *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, paras. 34–39 (law firm); *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, paras. 48–148 (marine salvage operation).

operations,[206] the construction and operation of hotels,[207] banking[208] and agriculture.[209]

7. A Test for the Existence of an Investment?

152 There have been repeated attempts to define the concept of investment in general terms.[210] As set out above (paras. 113–121 *supra*), all attempts to reach agreement on a definition to be inserted into the Convention failed.

153 It would not be realistic to attempt yet another definition of "investment" on the basis of ICSID's experience. But it seems possible to identify certain features that are typical to most of the operations in question: the first such feature is that the projects have a certain *duration*. Even though some break down at an early stage, the expectation of a long-term relationship is clearly there. The second feature is a certain *regularity of profit and return*. A one-time lump-sum agreement, while not impossible, would be untypical. Even where no profits are ever made, the expectation of return is present. The third feature is the assumption of *risk* usually by both sides. Risk is in part a function of duration and expectation of profit. The fourth typical feature is that the commitment is *substantial*. This aspect was very much on the drafters' minds although it did not find entry into the Convention (see para. 116 *supra*). A contract with an individual consultant would be untypical. The fifth feature is the operation's significance for the host State's *development*. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors' Report (see para. 121 *supra*) suggest that development is part of the Convention's object and purpose.[211] These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.[212]

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206 *Alcoa Minerals* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975; *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975; *Vacuum Salt* v. *Ghana*, Award, 16 February 1994; *Goetz* v. *Burundi*, Award, 10 February 1999; *SIREXM* v. *Burkina Faso*, Award, 19 January 2000; *Semos* v. *Mali*, Award, 25 February 2003; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006. But see *Joy Mining* v. *Egypt*, Award, 6 August 2004, paras. 41–63, where the delivery and installation of mining equipment was found not to be an investment.

207 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983; *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007.

208 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999; *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000; *Genin* v. *Estonia*, Award, 25 June 2001.

209 *AAPL* v. *Sri Lanka*, Award, 27 June 1990; *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996.

210 For a survey of definitions see *Amerasinghe*, The Jurisdiction of the International Centre, pp. 177–181.

211 *Delaume*, Le Centre International, pp. 801, 805.

212 This paragraph is substantively identical with para. 122 at p. 140 of the First Edition of this Commentary.

Starting with *Fedax*,[213] Tribunals have used these criteria, subject to variations, to determine the existence of an investment in cases before them.[214] In *Salini* v. *Morocco*, the Respondent contended that the contract for the construction of a road did not constitute an investment in the sense of the Convention.[215] The Tribunal noted that the existence of an investment under the Convention was an objective condition of jurisdiction in addition to consent. It said: **154**

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, . . .*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.[216]

The Tribunal proceeded to examine the existence of contributions by the investors, the risks incurred by them and the contribution to Morocco's development. On that basis it concluded that the contract constituted an investment.[217] **155**

The use of these criteria to determine whether the activities under dispute constitute an investment has since become known as the "*Salini* test". **156**

The element of regularity of profits and return has found little attention.[218] It has not been adopted by most tribunals.[219] The Tribunal in *Malaysian Historical Salvors* v. *Malaysia* said: **157**

> the Tribunal agrees that this criterion [regularity of profits and return] is not always critical. Further, this has not been held to be an essential characteristic or criterion in any other case cited in this Award, and its presence or otherwise may therefore not be determinative of the question of "investment".[220]

This leaves the following four criteria: **158**

- a (substantial) contribution;
- a certain duration of the operation;
- risk;
- contribution to the host State's development.

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213 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 43. The Tribunal adopted these criteria from the preliminary publication of this Commentary in 11 ICSID Review – FILJ 372 (1996).

214 *Rubins*, The Notion of "Investment", pp. 297–300; *Dolzer*, The Notion of Investment, pp. 267–270.

215 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 39.

216 At para. 52.

217 At paras. 53–58.

218 Whether the activity must be profitable or at least designed to yield profit has not been clarified. Some authors have argued that activities of charitable NGOs are investments in the sense of Art. 25. See *MacKenzie, G. W.*, ICSID Arbitration as a Strategy for Levelling the Playing Field between International Non-Governmental Organizations and Host States, 19 Syracuse Journal of International Law and Commerce 197, 223 *et seq*. (1993); *Gallus, N./Peterson, L. E.*, International Investment Treaty Protection of NGOs, 22 Arbitration International 527, 538 (2006).

219 But see *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 133 FN 113, citing *Fedax*; *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 53; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 59.

220 *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 108.

159 Tribunals have applied these criteria in a number of cases.[221] In the majority of cases tribunals were satisfied that the facts before them actually met these criteria.[222] In these cases it is not entirely clear whether the tribunals regarded the criteria as essential requirements for the existence of investments or merely as typical characteristics or indicators. It would seem that the repeated application of these criteria has strengthened the perception of tribunals that they were not merely features indicative of investments but mandatory standards.

160 In a smaller group of cases tribunals found that the facts before them did not pass the test. In *Joy Mining* v. *Egypt*, this result is based on the Tribunal's overall impression of the facts.[223] In two other cases the non-fulfilment of one of the requirements (contribution to the host State's development) led to the conclusion that there was no investment in the sense of the Convention.[224]

161 The available case law makes it possible to look at the four criteria in more detail. The requirement of a *substantial contribution* did not, in general, pose any problems.[225] In some cases, the tribunals pointed out that the contribution or commitment should not only be looked at in financial terms but also in terms of know-how, equipment, personnel and services.[226]

162 The *duration* of the project has led to some discussion. Tribunals seem to have regarded a period of two to five years as sufficient.[227] In some cases this criterion was met easily.[228] Tribunals pointed out that the element of duration referred not

221 But see some cases in which tribunals have resisted generalized definitions of investment: *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 78, 90; *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 138, 139, 150, 165.

222 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, paras. 58–66; *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, paras. 13, 14; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, para. 88; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 130–138; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 91–96; *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, paras. 72, 73; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 77; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 99–102, 109–111; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 116; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 125–135.

223 *Joy Mining* v. *Egypt*, Award, 6 August 2004, paras. 53–63.

224 *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, paras. 23–48; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, paras. 44, 48–148.

225 *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 57; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 92; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 77.

226 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, para. 61; *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. 14(i); *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 131; *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 73(i); *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 109.

227 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, para. 62; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 54; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 93; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, paras. 110, 111.

228 *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 77; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 117.

merely to the actual period of the core activity but also to the time taken for tender, work interruption, renegotiation, extension and contractor's guarantee.[229]

163 The existence of a *risk* was always confirmed by tribunals. The very existence of the dispute was seen as an indication of risk.[230] Also, tribunals found that risk was inherent in any long-term commercial contract.[231] The host State's political and economic climate[232] and the need to rely on national courts were also seen as risk factors.[233]

164 Contribution to the host State's *development* has turned out to be the most controversial indicator of an investment. In *CSOB* v. *Slovakia*, the Tribunal pointed to the Convention's Preamble and its reference to economic development. It concluded that this permitted an inference that an international transaction that is designed to promote a State's economic development may be deemed to be an investment in the sense of the Convention.[234]

165 In some cases tribunals examined and confirmed the project's contribution to the host State's development as part of their application of the test.[235] In *Bayindir* v. *Pakistan*, the Tribunal added that this condition was often already included in the other three conditions of the "*Salini* test".[236] In the two closely related *LESI* cases the Tribunals rejected the relevance of a contribution to the host State's development as a separate criterion. The Tribunals said:

> . . . it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.[237]

166 In *Mitchell* v. *DR Congo*, the Claimant had obtained an award[238] in his favour. The Award had found that action against the Claimant's law firm in the DR Congo

229 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. 14(ii); *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 132, 133; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 94, 95; *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 73(ii); *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 101, 102.

230 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 40.

231 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, paras. 63, 64; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 55, 56; *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 57; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 134–136; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 109; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 112.

232 *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 117.

233 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. 14(iii); *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 73(iii).

234 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 64. See also paras. 88, 91.

235 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 43; *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, paras. 65, 66; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 57; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 77; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 117. Unclear: *Joy Mining* v. *Egypt*, Award, 6 August 2004, para. 57.

236 *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 137.

237 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. II. 13(iv) *in fine*.; *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 72(iv) *in fine*.

238 *Mitchell* v. *DR Congo*, Award, 9 February 2004. Unpublished.

amounted to an expropriation. In annulment proceedings against this Award, the DR Congo argued that the law firm was no investment since it did not contribute to the host State's economic and social development.[239] The *ad hoc* Committee accepted this contention.[240] It relied on the Convention's Preamble with its reference to economic development, on previous cases and on the First Edition of this Commentary.[241] In the *ad hoc* Committee's view, in order to show a contribution to the host State's development:

> it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors.[242]

In addition, the *ad hoc* Committee noted that returns collected by the investor were not reinvested in the host State but transferred to the United States.[243] The Committee found that the Award's reasoning was incoherent since:

> . . . it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.[244]

It followed that the Tribunal's acceptance of jurisdiction on the basis of an investment within the meaning of the Convention had to be annulled on the grounds of manifest excess of powers and failure to state reasons.[245]

167 In *Malaysian Historical Salvors* v. *Malaysia*, the dispute arose from a contract for the salvage of historical objects from an ancient shipwreck. The Tribunal quoted the paragraph setting out the list of typical features of investment from the First Edition of this Commentary[246] (see para. 153 *supra*). It also quoted from the Convention's Preamble and the Executive Directors' Report, both of which refer to economic development.

168 The Tribunal distinguished between a typical characteristics approach and a jurisdictional approach. Under the former an investment may be present even if one or more of the typical characteristics is missing. Under the latter all hallmarks must be present otherwise there is no investment.[247] After examining the decisions in *Salini*, *Joy Mining*, *LESI-DIPENTA*, *Mitchell*, *CSOB*, *Bayindir* and *Jan de Nul* in some detail, the Tribunal concluded:

> The classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an "investment". If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of "investment". However, even if they are all present,

239 *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, para. 23.
240 For commentary on the annulment decision see *Ben Hamida, W.*, Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control. *Ad Hoc* Committee's Decision in *Patrick Mitchell* v. *Democratic Republic of Congo*, 24 Journal of International Arbitration 287 (2007).
241 At paras. 28–31.
242 At para. 39.
243 At paras. 42–46.
244 At para. 40.
245 At para. 67.
246 *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, para. 44.
247 At paras. 70–72.

> a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID "investment".[248]

169 The Tribunal found that the weight of authorities was in favour of requiring a significant contribution to the host State's economy.[249] Upon the facts it found that this was not the case:

> . . . the Tribunal finds that the Contract did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant. . . . The benefits which the Contract brought to the Respondent are largely cultural and historical. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to significant contributions to the Respondent's economy in the sense envisaged in ICSID jurisprudence.[250]

170 The Tribunal specifically rejected any "perceived political or cultural benefits" except where these would have a significant impact on the State's economic development.[251] A possible contribution of the salvage contract to the tourism industry was dismissed as speculative.[252] It followed that in the absence of an investment in the sense of Art. 25(1) of the Convention there was no jurisdiction.

171 The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of this Commentary cannot serve as authority for this development. To the extent that the "*Salini* test" is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately. In fact, tribunals have pointed out repeatedly that the criteria that they applied were interrelated and should be looked at not in isolation but in conjunction.[253] The *Salini* Tribunal said:

> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.[254]

172 A rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable. The individual criteria

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248 At para. 106 (e). In a similar sense see: *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, paras. 310–318.

249 At para. 123. The Tribunal says at para. 125: "As stated by *Schreuer*, there must be positive impact on a host State's development." In fact, the First Edition of this Commentary stated more tentatively at para. 88: ". . . it may be argued that the Convention's object and purpose indicate that there should be some positive impact on development."

250 At paras. 131, 132.

251 At para. 138.

252 At para. 144.

253 *RFCC* v. *Morocco*, Decision on Jurisdiction, 16 July 2001, para. 60; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 130; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 91; *Malaysian Historical Salvors* v. *Malaysia*, Award, 17 May 2007, paras. 72, 106, 124, 130; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 116.

254 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 52.

carry a considerable margin of appreciation that may be applied at the tribunal's discretion.

173 A test that turns on the contribution to the host State's development should be treated with particular care. The reference in the Convention's Preamble indicates that economic development is among the Convention's object and purpose. This would support the proposition that an international transaction that is designed to promote the host State's development enjoys the presumption of being an investment. But it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection.

174 Any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection under ICSID, should be treated with some flexibility.[255] It should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and the protection of the local and the global environment.

8. Investments: Special Issues

a) Pre-Investment Activities

175 The Convention states that the dispute must arise out of an investment. Tribunals have interpreted this to mean that an existing investment is a requirement for jurisdiction *ratione materiae*. Steps preparatory to an investment will not by themselves be accepted as an investment.

176 In *Mihaly* v. *Sri Lanka*, the parties had engaged in extensive negotiations on the construction and operation of a power station. They had exchanged various documents but never reached the stage of signing a contract. The Claimant sought to recover its development costs. The Tribunal rejected the claim in the absence of an investment. It found that the documents did not contain any binding obligations[256] and said:

> The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as "investment" in the absence of the consent of the host State to the implementation of the project. . . . The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.[257]

255 For further detail see *Ben Hamida, W.*, Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control. *Ad Hoc* Committee's Decision in *Patrick Mitchell* v. *Democratic Republic of Congo*, 24 Journal of International Arbitration 287, 296–297 (2007).
256 *Mihaly* v. *Sri Lanka*, Award, 15 March 2002, paras. 47, 59.
257 At paras. 60, 61.

177 The Tribunal added that if the negotiations had come to fruition, the preparatory expenses might have become part of the costs of the project and thereby part of the investment.[258]

178 In *Zhinvali* v. *Georgia*, the parties had engaged in negotiations about the rehabilitation of a power plant. The negotiations failed. The claim was directed at the recovery of development costs in the form of expenses incurred during the negotiations. Jurisdiction was based on Georgia's Investment Law which referred to "entrepreneurial activity carried out on the territory of Georgia".[259] The Tribunal, relying heavily on *Mihaly*, rejected the claim and said:

> . . . the Claimant's "investment" case then rises or falls depending on whether the category of "development costs" in a failed transaction is eligible for "investment" treatment under the 1996 Georgia Investment Law.[260]

The Tribunal concluded that there was no "investment" under the Georgia Investment Law or under Art. 25(1) of the ICSID Convention.[261]

179 By contrast, in *PSEG* v. *Turkey* the parties had signed a concession contract for a power plant but the project was not carried out. The Respondent argued that there was no investment since the project had never moved beyond the drawing board and essential terms were still missing from the contract.[262] The Tribunal noted that the concession contract existed, was valid and legally binding. Therefore there was jurisdiction on the basis of an investment made in the form of a concession contract.[263] The Tribunal said:

> An investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures, particularly when, like in this case, there is a valid and binding Contract duly executed between the parties.[264]

180 These cases suggest that costs incurred in the course of preparing or developing a project will not, by themselves, amount to an investment for purposes of ICSID's jurisdiction.[265] If the project materializes, development costs may well become part of the overall investment, and will hence be protected. The material step at which a project moves beyond the stage of preparation and becomes an actual investment is the conclusion of a binding contract. In certain circumstances the contract itself constitutes the investment. Where investments are made without a contract with the host State or one of its authorized entities, the decisive stage will usually be the making of definite commitments with partners, suppliers, subcontractors or similar legally binding steps.

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258 At para. 50. See also *Hornick, R. N.*, The *Mihaly* Arbitration: Pre-Investment Expenditure as a Basis for ICSID Jurisdiction, 20 Journal of International Arbitration 189 (2003); *Rubins*, The Notion of "Investment", pp. 300–304; *Dolzer*, The Notion of Investment, pp. 270–271.

259 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 377.

260 At para. 388.

261 At paras. 415, 417.

262 *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 66–73.

263 At paras. 79–104.

264 *PSEG* v. *Turkey*, Award, 19 January 2007, para. 304.

265 See also *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 8.6, 18.5–18.9.

181 The requirement of an existing investment under Art. 25(1) of the Convention applies even if another treaty, such as a BIT, grants rights at the pre-investment stage, for instance in the form of a right to be admitted.[266] The wording of Art. 25(1) suggests that the Convention requires an actual investment. Therefore, disputes arising from investments that are merely planned, intended or attempted will not be covered.

b) Origin of the Investment

182 At times respondents have argued that there was no foreign investment in the absence of fresh capital imported into the host country. This issue played a role during the Convention's drafting. One delegate pointed out that the nationality of the investment was more important than that of the investor. Since the Convention's aim was to encourage the international flow of capital, the Convention should apply to cases where the funds invested came from outside rather than from foreigners. In response, Mr. *Broches* said that he did not see how the Convention could make a distinction based on the origin of funds (History, Vol. II, pp. 261, 397/8). The idea was not pursued.

183 The host State may impose the requirement that a certain amount of fresh capital in foreign currency be imported into the country.[267] In the absence of such a requirement, investments may be made by foreign investors with capital raised locally. In the same vein, the origin of capital from persons who are not entitled to benefit from the ICSID Convention or from an applicable BIT is not decisive.

184 Tribunals have generally found the origin of capital used in investments immaterial.[268] In *Wena Hotels* v. *Egypt*, both the Tribunal and the *ad hoc* Committee found the alleged origin of the funds from other investors who were not entitled to benefit from the applicable BIT irrelevant.[269]

185 In *Tokios Tokelės* v. *Ukraine*, the Claimant company had its registered seat in Lithuania. The Respondent argued that there was no protected investment, since the capital invested did not originate outside the Ukraine. The Tribunal noted that neither the ICSID Convention nor the Ukraine-Lithuania BIT contained a requirement that capital used by an investor should originate in its State of nationality or indeed originate outside the host State.[270] The Tribunal said:

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266 See *e.g.* Arts. 3 and 4 of the US Model BIT 2004 granting national treatment and most-favoured-nation treatment also with respect to the establishment and acquisition of investments. Similar provisions are contained in Arts. 1102 and 1103 of the NAFTA. For detailed treatment see *Pollan, T.*, Legal Framework for the Admission of FDI (2006).

267 See *Amco* v. *Indonesia*, Award, 20 November 1984, paras. 220–242.

268 See also *Tradex* v. *Albania*, Award, 29 April 1999, paras. 108–111; *Olguín* v. *Paraguay*, Award, 26 July 2001, para. 66, FN 9; *ADC* v. *Hungary*, Award, 2 October 2006, paras. 310–325, 342, 343, 346, 347, 355, 356, 358, 360; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, paras. 37–40, 62–66, 86, 100, 110, 122, 208–210. But see an ambivalent statement in *SOABI* v. *Senegal*, Award, 25 February 1988, at para. 4.50.

269 *Wena Hotels* v. *Egypt*, Award, 8 December 2000, at para. 126; Decision on Annulment, 5 February 2002, at para. 54.

270 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 74–82.

> The Respondent alleges that the Claimant has not proved that the capital used to invest in Ukraine originated from non-Ukrainian sources, and, thus, the Claimant has not made a direct, or cross-border, investment. Even assuming, *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment. . . . The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.[271]

186 In *Saipem* v. *Bangladesh*, the Claimant had entered into a contract to build a pipeline. The Respondent disputed the existence of an investment on the ground that the Claimant had not put its own money into the project.[272] The Tribunal rejected this argument and said:

> . . . it is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant. This results from the drafting history of the ICSID Convention and is confirmed by several arbitral decisions relating to BITs.[273]

187 It follows that the origin of the funds is irrelevant for purposes of jurisdiction. Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally makes no difference to the degree of protection enjoyed. The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of foreignness for the investment in terms of its origin. In the same way, the origin of capital from persons who are foreigners but do not enjoy protection under the Convention because they do not meet the nationality requirements is immaterial.

c) Investment in the Host State's Territory

188 The Convention does not contain an indication that the investment must be located physically in the host State. But the Report of the Executive Directors refers to a larger flow of private international investment into the territories of participating countries as the Convention's primary purpose.[274]

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271 At paras. 80, 81. But see also the reasoning to the contrary in the Dissenting Opinion by arbitrator Prosper Weil at paras. 19, 20.
272 *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 103.
273 At para. 106. Footnote omitted.
274 Report of the Executive Directors, 1 ICSID Reports 25, para. 12.

189 Some treaties, in their definitions of "investment", refer to the territory of the parties. For instance, the Argentina-US BIT states that

> "investment" means every kind of investment *in the territory* of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, . . .[275]

190 Similarly, Article 1101(1) of the NAFTA speaks of "investments in the territory" of a Party. Article 26(1) of the Energy Charter Treaty refers to investments "in the Area" of a Party.

191 In some cases respondents have argued that the requirement of territoriality for investments was not met since the would-be investor had not established a significant physical presence in the host State. In *Fedax* v. *Venezuela*, the investor had acquired promissory notes issued by the host country. The Tribunal rejected the Respondent's argument that the Claimant had not invested "in the territory" of Venezuela. It said:

> While it is true that in some kinds of investments . . . such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. . . . The important question is whether the funds made available are utilized by the beneficiary of the credit, . . .[276]

192 In *CSOB* v. *Slovakia*, the Claimant bank had transferred non-performing receivables to a Collection Company (CC) in Slovakia. The CC was to pay CSOB for the assigned receivables. To enable the CC to do so it received the necessary funds from CSOB under the terms of a loan agreement. The repayment of the loan was secured by a guarantee of the Slovak Ministry of Finance. The Respondent argued that there was no expenditure of resources in the territory of a foreign country. The Tribunal noted that the loan did not involve any spending or outlay of resources in the territory of the Slovak Republic.[277] Nevertheless, it held:

> The Tribunal notes, in this connection, that while it is undisputed that CSOB's loan did not cause any funds to be moved or transferred from CSOB to the Slovak Collection Company in the territory of the Slovak Republic, a transaction can qualify as an investment even in the absence of a physical transfer of funds.[278]

193 The two *SGS* cases concerned pre-shipment inspections that were essentially carried out outside the territory of the host country. The Tribunal in *SGS* v. *Pakistan* relied on the fact that expenditures had been made, even though in a relatively

275 Argentina-US BIT, 1991, Art. I(1)(a). Emphasis added.
276 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 41.
277 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 78, 79.
278 At para. 78.

small amount, by the investor in connexion with its activity in the territory of Pakistan.[279]

194 In *SGS* v. *Philippines*, the Respondent objected that the pre-shipment inspection services were not performed "in the territory" of the Philippines as required by the BIT.[280] The Tribunal dealt with this issue in some detail.[281] It found that:

> In accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT.[282]

The Tribunal rejected a subdivision of activities inside and outside the host country. It found that a substantial and non-severable aspect of the overall service was provided in the Philippines.[283] This and the location of a liaison office in Manila were sufficient to support the finding that there had been an investment in the territory of the Philippines.[284]

195 Other cases have addressed this issue only peripherally.[285] In *LESI-DIPENTA* v. *Algeria* and in *LESI & Astaldi* v. *Algeria* the Tribunals discussed the issue in the context of its discussion of a contribution in the host country. The Tribunals said:

> It is often the case that these investments are made in the country concerned, but that again is not an absolute condition. Nothing prevents investments from being committed, in part at least, from the contractor's home country, as long as they are allocated to the project to be carried out abroad.[286]

196 In *Bayview* v. *Mexico*, a case that was decided not under the ICSID Convention but under the Additional Facility, the Tribunal found that farmers in Texas who claimed water from Mexico were not investors in the territory of Mexico for purposes of Art. 1101(1) NAFTA.[287]

197 These case authorities do not yield an entirely clear picture concerning a requirement of territoriality. No such additional requirement should be read into the ICSID Convention. Where the document providing the basis of consent refers to investment in the territory of the State, a certain degree of flexibility is appropriate. Not all investment activities are physically located on the host State. This is particularly true of financial instruments (see para. 149 *supra*). If a treaty includes loans and claims to money in its definition of investment, it would be unrealistic to require

279 *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, at paras. 46, 136.
280 *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, at paras. 57, 70, 80–82, 89.
281 At paras. 99–112.
282 At para. 99. Footnotes omitted. The Tribunal mentioned the construction of an embassy in a third State as an example.
283 At para. 102. 284 At paras. 104, 111, 112.
285 In *Gruslin* v. *Malaysia*, Award, 27 November 2000, paras. 10.3, 13.1–15.9, the issue was discussed extensively but not decided – see para. 26.2; see also *Zhinvali* v. *Georgia*, Award, 24 January 2003, paras. 377, 381.
286 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. II. 14(i); *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 73(i).
287 *Bayview* v. *Mexico* (AF), Award, 19 June 2007, paras. 105–124.

a physical presence in or a transfer of funds into the host State. Similar considerations apply to intellectual property which is typically included in definitions of investment.

198 Therefore, the interpretation of a territorial requirement will to a large extent depend on the type of investment. Investment in movable and particularly immovable property will require a territorial nexus. In cases involving financial obligations the *locus* of the investment can often be determined by reference to the debtor and its location. In this way financial instruments issued by States have their *situs* in that State. Investment through shareholding may be seen to take place at the company's place of registration or main place of activity. Services may be seen to be located in a State if their chief impact is in that State.

d) Investment and Host State Law

199 Some treaties require that in order to qualify as an investment, the operation must be in accordance with the host State's law. BITs frequently include the formula "in accordance with host State law" or a similar phrase in their definitions of the term "investment".[288]

200 Host States have sometimes argued that this meant that the concept of "investment", and hence the reach of the protection under the treaty, had to be determined by reference to their own domestic law. Tribunals have rejected this approach. In *Salini* v. *Morocco*, the Tribunal said in response to this argument:

> The Tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of Article 1 [of the BIT] refers to the law of the host State for the definition of "investment". In focusing on "*the categories of invested assets (. . .) in accordance with the laws and regulations of the aforementioned party*", this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[289]

201 Other tribunals have also held consistently that the reference to the host State's domestic law concerned not the definition of the term "investment" but solely the legality of the investment.[290] In a number of cases tribunals examined whether investments complied with host State law including whether they constituted an "approved project".[291] In the majority of cases they concluded that the investments

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288 For detailed discussion see *Knahr, C.*, Investments "in Accordance with Host State Law", 4 TDM No. 5.

289 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 46.

290 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. II. 24(iii); *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 33, 34; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 105–110; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 79–82, 120–124. In *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 139–155, the reference to host State law was not contained in the BIT's definition of "investment" but in its provision on admission.

291 *Gruslin* v. *Malaysia*, Award, 27 November 2000, paras. 9.2, 10.7, 17.1, 21.1–25.7.

were legal under host State law.[292] In other cases they found that the investment was in violation of host State law and declined jurisdiction.[293]

9. Use of the Additional Facility in the Absence of an Investment

a) Conciliation and Arbitration

202 The Additional Facility offers conciliation and arbitration proceedings for the settlement of legal disputes that are not within the jurisdiction of the Centre because they do not arise directly out of an investment[294] (see paras. 9–13 *supra*). It was explained:

> . . . among the reasons for the proposal to establish the Additional Facility was the concern that a conciliation or arbitration agreement might be frustrated if a Commission or Tribunal declared itself incompetent on the ground that it considered the underlying transaction not to be an "investment".[295]

Therefore, the Additional Facility may be used if a transaction does not meet the requirements of an "investment" under the Convention. This does not mean that proceedings under the Additional Facility are open for any type of dispute. An agreement providing for conciliation or arbitration proceedings under the Additional Facility requires the approval of the Secretary-General.[296] The Secretary-General may give approval only if he or she is satisfied that the underlying transaction has features that distinguish it from an ordinary commercial transaction.[297] In other words, the transaction, even if it falls short of the requirement of an investment, must still be more than an ordinary commercial transaction.

203 The Administrative Council in approving these provisions attempted to describe the concept of a transaction that is distinguishable from an ordinary commercial transaction:

> Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial

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292 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 83–86; *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 109, 116–120; *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras. 126–131; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 174–184; *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, para. 97. See also the non-ICSID case *Saluka* v. *Czech Republic*, Partial Award, 17 March 2006, paras. 183, 202–221.

293 *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 184–244; *Fraport* v. *Philippines*, Award, 16 August 2007, paras. 300, 306–307, 319, 323, 332, 335, 350, 383, 385, 396–398, 401–404. See also *World Duty Free* v. *Kenya*, Award, 4 October 2006 and *Plama* v. *Bulgaria*, Award, 27 August 2008, paras. 130–146, where the Tribunals dismissed the claims on the ground of illegality not as a matter of jurisdiction but on the merits.

294 Art. 2(b) Additional Facility Rules. The Additional Facility Rules are available at: http://www.worldbank.org/icsid/facility/facility.htm.

295 Comment (iv) to Art. 4 of the Additional Facility Rules, 1 ICSID Reports 220. See also *Broches*, The "Additional Facility", pp. 377/8.

296 Art. 4(1) Additional Facility Rules.

297 Art. 4(3) Additional Facility Rules. See also *Shihata/Parra*, The Experience, pp. 344 *et seq.*

> transactions. Examples of such transactions may be found in various forms of industrial cooperation agreements and major civil works contracts.[298]

204 This description makes the classification independent of whether the parties thought their transaction was an investment. It presents a long-term relationship or the commitment of substantial resources as possible alternatives. A commitment of substantial resources need not be made by the investor but may be made by the host State. Most significant is the element that the transaction is of special importance to the economy of the host State. This description has certain similarities to the "*Salini*-test" discussed above (see paras. 152–174 *supra*) but appears to be somewhat wider.

205 The Additional Facility is not designed as a means to avoid the application of the Convention where access to the Centre is available. Also, there may be genuine borderline cases where it is unclear whether the transaction meets the requirements of an "investment" under the Convention or has to be brought under the Additional Facility. In a situation of this kind, proceedings under the Convention must be tried first. If the Secretary-General is of the opinion that it is likely that an ICSID conciliation commission or arbitral tribunal will hold that the dispute arises directly out of an investment, he or she may make approval of the agreement providing for proceedings under the Additional Facility conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the Centre.[299]

206 In actual practice, submissions to the Additional Facility are made to overcome non-participation in the Convention of either the host State or the investor's State of nationality. The Model Clauses offer ways to submit to the Additional Facility where the jurisdictional requirements *ratione personae* have not been met (paras. 224–226, 300–301 *infra*) and for fact-finding (para. 34 *supra*) but not for disputes that do not arise directly out of an investment.

207 Decisions in some cases, in which tribunals decided that there was no investment and that hence there was no jurisdiction, underscore the potential of the Additional Facility for this type of situation. If the parties have doubts as to whether their transaction amounts to an investment, they may draft a combined submission clause, which after submitting to the jurisdiction of the Centre makes the following addition:

> In case the [Conciliation Commission]/[Arbitral Tribunal] decides that the jurisdictional requirements *ratione materiae* of Art. 25 of the Convention are not fulfilled because the dispute does not arise directly out of an investment, the Parties hereby consent to [conciliation]/[arbitration] under the Additional Facility [Conciliation]/[Arbitration] Rules of the Centre.

208 Many bilateral investment treaties provide for proceedings under the Additional Facility. But they also contemplate the lack of participation in the Convention by either of the parties (see paras. 226, 301 *infra*) and not the submission of disputes that do not arise directly out of investments. Nevertheless, even where

298 Comment (iii) to Art. 4 of the Additional Facility Rules, 1 ICSID Reports 220.
299 Art. 4(4) Additional Facility Rules.

the Additional Facility is used to remedy the lack of participation by one side in the Convention, it also opens the door for the settlement of disputes that are covered by the BIT but excluded from the Convention *ratione materiae*.[300] A possible example would be disputes relating not to an existing investment but to pre-investment activities.[301]

Where the parties to an agreement entertain doubts as to whether their transaction qualifies as an investment and whether a submission clause to ICSID would therefore be appropriate, they have several possibilities. They may make a special statement in their contract designating their project as an investment, possibly adding a brief description of those features that support this characterization (see paras. 129, 130 *supra*). They may draft a combined jurisdictional clause submitting to the Additional Facility in case the competent ICSID organs determine that the Convention's requirements *ratione materiae* have not been met (see para. 206 *supra*). Finally, they may combine such an ICSID/Additional Facility Clause with a clause referring to another arbitral institution or submitting to *ad hoc* arbitration. **209**

b) Fact-Finding

Unlike conciliation and arbitration, fact-finding under the Additional Facility[302] is not subject to any jurisdictional requirements *ratione materiae*. The requirement that the underlying transaction have features distinguishing it from an ordinary commercial transaction (see para. 202 *supra*) does not apply to fact-finding. The Secretary-General has no power to approve or disapprove arrangements for fact-finding proceedings.[303] The omission of any indication of the type of facts to be clarified is somewhat surprising at first sight. It may be due to the circumstance that both in the Convention and in the Additional Facility, jurisdiction *ratione materiae* is always described in terms of a dispute. Fact-finding is designed to be preventive and hence, by definition, does not require a dispute. The Introductory Notes to the Fact-Finding (Additional Facility) Rules contain a reference to a long-term relationship and to national or international guidelines or codes of conduct relating to foreign investment.[304] This would indicate that there must be some relationship to an investment. A contextual reading of the relevant provisions would also suggest that there should be at least some connection with the Centre's or the ICSID Convention's general scope of activities. But it is also arguable that the lack of restrictions *ratione materiae* should be taken at face value and that, hence, fact-finding under the Additional Facility is available for any question in proceedings between a State and a national of another State. **210**

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300 See also *Golsong, H.*, Dispute Settlement in Recently Negotiated Bilateral Investment Treaties – The Reference to the ICSID Additional Facility, *in*: Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen 35 (1986); *Shihata/Parra*, The Experience, p. 358.

301 See *Parra*, Provisions on the Settlement, pp. 325, 329.

302 Generally see *Shihata/Parra*, The Experience, p. 357.

303 Art. 4(1) of the Additional Facility Rules.

304 1 ICSID Reports 215.

E. ". . . between a Contracting State . . ."

1. Participation in the Convention

211 The concept of a Contracting State is clearly determined by the Convention. Contracting States are States that have deposited their instrument of ratification, acceptance or approval. In accordance with Art. 68 they become Contracting States 30 days after such deposit. The status as a Contracting State may be terminated by a written notice whereby the State denounces the Convention (Art. 71). Such a denunciation is subject to two limitations: it only becomes effective after six months and it does not affect consent to the jurisdiction of the Centre given prior to the denunciation (Arts. 71, 72).

212 The requirement that the State party to ICSID proceedings must be a Contracting State was contained in all drafts leading to what eventually became Art. 25 of the Convention (History, Vol. I, pp. 110–118). This was explained by reference to the principle of reciprocity (History, Vol. II, pp. 22, 150, 204). At an early stage of the Convention's drafting the idea to open the machinery of the Centre to non-Contracting States on an *ad hoc* basis was aired (at pp. 82, 95, 96, 255, 294). It was treated with scepticism by Mr. *Broches*, who pointed out that the Convention contained a number of rules of law binding only the States parties to the Convention (at p. 255). The idea was not pursued.

213 Participation in the Convention of the State party to proceedings is an absolute requirement, which is not subject to waiver by agreement between the parties. Therefore, *ad hoc* use of the Convention procedures by States that have not ratified the ICSID Convention is not possible.[305] A List of Contracting States and Other Signatories of the Convention is maintained and regularly updated by the Centre. It is readily available as document ICSID/3 and on the Centre's website: http://icsid.worldbank.org. Mere signatories are not Contracting States.

214 Arts. 28(2) and 36(2) provide that a request for conciliation or arbitration must contain information concerning the identity of the parties. Institution Rule 2(1)(a) requires that the request designate precisely each party to the dispute. The Secretary-General, in the exercise of his or her screening powers under Arts. 28(3) and 36(3), will determine whether the condition that the State party is a Contracting State is fulfilled. If the State party named in the request is not a Contracting State, he or she will refuse to register the request since the dispute is manifestly outside the jurisdiction of the Centre. It follows that the critical time for the status of a Contracting State is the date the Secretary-General takes up the request for consideration. Presumably if by that time an instrument of ratification has been deposited but the 30-day period under Art. 68(2) has not yet been completed, the Secretary-General will not refuse registration but will wait for the completion of the period.

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305 See also *Szasz*, The Investment Disputes Convention, p. 30.

215 Since the critical date for the status of Contracting State is the institution of ICSID proceedings and not the time of consent to jurisdiction, it is possible for a host State to consent to ICSID's jurisdiction before it becomes a Contracting State. If the Convention is in force for the State party by the time proceedings are instituted, the requirement is fulfilled.[306] The converse situation arises in case of a denunciation of the Convention. Under Art. 72 an offer to arbitrate disputes contained in an investment treaty or law, that is not accepted whilst a State is a Contracting State thus perfecting consent, may not be accepted after a State has given a notice of denunciation under Article 71.

216 In *Holiday Inns* v. *Morocco*, neither the host State nor Switzerland, the State of which the investor was a national, had ratified the Convention when the agreement containing consent to the Centre's jurisdiction was made. Both States ratified the Convention subsequently before the institution of the proceedings. Before the Tribunal, Morocco argued that the Claimant's consent was defective because Switzerland was not a Contracting State at the time of consent (see para. 288 *infra*) but did not press the argument that by the same logic Morocco would not be a Contracting State for purposes of jurisdiction.[307] The Tribunal noted the dates at which the two States became Contracting Parties and concluded that it was on the last of those dates that the consent to submit the dispute to arbitration became effective and irrevocable.

217 In *Amco* v. *Indonesia*, consent to ICSID arbitration was given in July 1968, but Indonesia only became a party to the Convention on 28 October 1968. The Tribunal simply stated that jurisdiction over the Respondent could not be denied since it was a Contracting State.[308]

218 Similarly, in *LETCO* v. *Liberia*, the submission to ICSID's jurisdiction was made on 12 May 1970 but Liberia only became a party to the Convention on 16 July 1970. This was not raised as a problem and the Tribunal simply noted that "[s]ince Liberia has signed and ratified the Convention, it qualifies as a 'Contracting State'".[309]

219 In *Cable TV* v. *St. Kitts and Nevis* the contract containing an ICSID clause was signed on 18 September 1986 but the Respondent became a party to the ICSID Convention only on 3 September 1995. The Tribunal, relying on *Holiday Inns*, confirmed that:

> the critical date for determining the status of a contracting state is the date of submission of the dispute to ICSID, rather [than] the date of the agreement containing the ICSID Arbitral Clause.[310]

220 In *Generation Ukraine* v. *Ukraine*, the Tribunal rejected Ukraine's argument that its unilateral consent to submit disputes to ICSID in the US-Ukraine BIT was

306 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 182/184; *Broches*, Convention, Explanatory Notes and Survey, p. 642.
307 *Lalive*, The First "World Bank" Arbitration, pp. 142/3.
308 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 34.
309 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 351.
310 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 4.09.

in some way "preliminary" and subject to later confirmation, in part because it was given at a time when Ukraine was yet to ratify the ICSID Convention. The language of the BIT was unequivocal and final, and did not open the door for further modification or refinement.[311]

2. Contingent Submission

221 At times, explicit provision is made for a possible future ratification of the Convention by the host State. This may take place either through an investment agreement with the investor or in a bilateral investment treaty (BIT). The 1968 and 1981 Model Clauses, providing for reference of disputes to ICSID by the parties, contained special clauses in anticipation of subsequent ratification of the Convention by a Non-Contracting State. Under these clauses, the parties prospectively submit to the jurisdiction of ICSID with the proviso that the consent becomes effective when the Convention enters into force for the State. For the intervening period, an arrangement for an alternative mode of dispute settlement was suggested.[312] The 1968 Clauses even provided for an undertaking by the host State to arrange for the Convention's speedy ratification.[313] The 1968 and 1981 Model Clauses contain no reference to the Additional Facility. In 1968 the Additional Facility did not exist. In 1981 it had only been approved on a temporary basis (see para. 9 *supra*). The current 1993 version of the Model Clauses envisages a contingent submission clause in anticipation of the Convention's ratification combined with a submission to the Arbitration (Additional Facility) Rules for as long as the requirements *ratione personae* remain unfulfilled (see para. 225 *infra*).

222 Similarly, BITs may contain ICSID clauses even before one or both of the parties to the BIT become Contracting States to the Convention. In some cases, BITs simply contain ICSID consent clauses without reference to the fact that one of the parties to the BIT is not a Contracting State of the Convention.[314] It is clear that these clauses have no effect until both parties to the BIT are Contracting States of the Convention. In other BITs, the fact that the Convention has not yet been ratified by one or both parties is acknowledged. These provide for submission to the Centre in the event that both parties have become Contracting States of the Convention.[315] Yet another group of BITs combine a contingent submission to jurisdiction under the Convention in anticipation of its ratification by both parties with a submission to the Additional Facility Rules (see para. 226 *infra*).

311 *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, para. 12.4.
312 See Clauses X and XII of the 1968 Model Clauses, 7 ILM 1159, 1170/71 (1968); Clause III of the 1981 Model Clauses, 1 ICSID Reports 197, 200.
313 Clause XI, *loc. cit.*
314 *E.g.*, France-Laos BIT (1989) Art. 8; France-Yemen BIT (1984) Art. 8; US-Turkey BIT (1985) Art. 6(3). See also *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 136–138; *Ziadé, N. G.*, ICSID and Arab Countries, News from ICSID, Vol. 5/2, p. 7 (1988).
315 *E.g.*, Germany-Israel BIT (1976) Art. 10(8); Switzerland-Lithuania BIT (1992) Art. 9(3). See also *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 138/9, 150, 152/3; *Parra*, Provisions on the Settlement, pp. 326 *et seq.*; *Ziadé, N. G., op. cit.*

Consent clauses in national legislation of countries that are not yet Contracting States of the Convention are possible but not likely. They would attain their effect once the State is a party to the Convention. A reference to ICSID arbitration was included in Art. 70 of the Republic of Yemen's Law of 1991 Concerning Investment despite the fact that Yemen was not a Contracting Party in 1991 and did not become one until 2004. **223**

3. The Additional Facility

One of the purposes of the Additional Facility is to fill a jurisdictional gap where either the host State or the State of the investor's nationality is not a Contracting State (see paras. 9–13 *supra*). Even under the Additional Facility, conciliation and arbitration can be undertaken only if either the host State or the investor's State of nationality is a Contracting State. An agreement to submit to conciliation or arbitration under the Additional Facility is subject to approval by the Secretary-General of ICSID. Where the State party is a Non-Contracting State, the Secretary-General may approve the agreement only if satisfied that the State of the investor's nationality is a Contracting State. Since the Additional Facility is not intended as an alternative to the Convention, the Secretary-General will give approval only if the agreement providing for conciliation or arbitration under the Additional Facility also contains a contingent clause by which the parties consent to the jurisdiction of the Centre under Art. 25 of the Convention if by the time proceedings are instituted both the State party and the State of the investor's nationality are Contracting States to the Convention. In other words, conciliation and arbitration under the Additional Facility is not open to parties both of which meet the requirements *ratione personae* under the Convention. One – but only one – of the two States must be a Contracting State. The purpose of this condition is to promote use of the Convention whenever possible.[316] **224**

The 1993 Model Clauses offer a combined contingent submission to settlement under the Convention and to settlement under the Additional Facility in the following terms: **225**

> **Clause 20**
>
> The Government of name of host State (hereinafter the "Host State") and name of investor (hereinafter the "Investor"), a national of name of home State (hereinafter the "Home State"), hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by arbitration pursuant to:
>
> (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention") if the Host State and the Home State have both become parties to the Convention at the time when any proceeding hereunder is instituted, or

316 Additional Facility Rules, Art. 4(1), (2). See also Notes (i) and (ii) at 1 ICSID Reports 220.

(b) the Arbitration (Additional Facility) Rules of the Centre if the jurisdictional requirements *ratione personae* of Article 25 of the Convention remain unfulfilled at the time specified in (a) above.[317]

The decisive criterion for the operation of one of the two alternatives is whether both States have become parties to the Convention at the time the proceedings are instituted.

226 Bilateral, regional or multilateral investment treaties and trade agreements such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) have made similar use of the Additional Facility. If one of the parties to the treaty is not yet a Contracting State of the Convention, the treaty may simply provide for settlement under the Additional Facility.[318] A wiser solution is the combination of a submission to settlement under the Convention contingent upon its ratification by both parties to the treaty together with a reference to the Additional Facility in case one of the parties to the treaty is not yet a Contracting State when the dispute is ready for settlement.[319] The United Kingdom and the United States Model Agreements provide for such combined submission clauses.[320]

4. Ad Hoc *Arbitration*

227 Even if both the host State and the investor's State of nationality are not Contracting States, ICSID may play a role in dispute settlement. The parties may request the Chairman of the Administrative Council of ICSID or the Secretary-General of ICSID to appoint conciliators or arbitrators. The Secretary-General has often undertaken to appoint arbitrators on an *ad hoc* basis but is not obliged to do so.[321] Therefore, it is advisable to obtain his or her consent in advance.[322] The 1993 Model Clauses suggest the combination of such an arrangement with the adoption of the UNCITRAL Arbitration Rules in the following terms:

317 4 ICSID Reports 368/9.

318 *E.g.*, US-Panama BIT (1982) Art. VII(3), 21 ILM 1227, 1234 (1982). After Panama's ratification of the Convention in May 1996 the two governments had to amend this treaty. See also *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 139/40; *Delaume, G. R.*, ICSID and Bilateral Investment Treaties, News from ICSID, Vol. 2/1, pp. 12, 15 (1985); *Golsong, H.*, Dispute Settlement in Recently Negotiated Bilateral Investment Treaties – The Reference to the ICSID Additional Facility, *in*: Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen 35 (1986).

319 *E.g.*, Art. 1120 NAFTA; Art. 26(4) ECT; UK-Santa Lucia BIT (1983) Art. 8(2); US-Bulgaria BIT (1992) Art. VI(3)(b). See also *Dolzer/Stevens*, Bilateral Investment Treaties, p. 140; *Golsong, H.*, Note, 25 ILM 85 (1986); *Shihata/Parra*, The Experience, p. 346.

320 Art. 8(2)(a) UK Model BIT 2005; Art. 24(3)(a),(b) US Model BIT 2004. See *Dolzer/Schreuer*, Principles of International Investment Law at pp. 381, 406.

321 See *Delaume*, Transnational Contracts, pp. 83–88.

322 See introductory note to Model Clause 22. See also: The ICSID Secretary-General as Appointing Authority in Ad Hoc Proceedings, News from ICSID, Vol. 6/2, p. 6 (1989).

Clause 22

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Secretary-General of the International Centre for Settlement of Investment Disputes. [The number of arbitrators shall be [one]/[three]. The place of arbitration shall be name of town or country. The language[s] to be used in the arbitral proceedings shall be name of language(s).][323]

228 The earlier versions of the Model Clauses also suggested the possibility of adopting the Convention and its Rules and Regulations by reference into an *ad hoc* arbitration agreement. The dispute settlement would then take place through procedures similar to those provided by the Convention.[324] This procedure is subject to some of the same limitations as the Additional Facility: while the parties may agree on rules analogous to those under the Convention, the Convention itself is not applicable. This aspect is particularly important in the context of enforcement (Art. 54) but also for the exclusion of other remedies (Art. 26) and of diplomatic protection (Art. 27).[325] Moreover, the parties to such an *ad hoc* arrangement will not have access to the Centre's administrative facilities.

229 Some bilateral investment treaties contain provisions for *ad hoc* arbitration with a reference to the Secretary-General of ICSID as appointing authority.[326]

F. ". . . (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) . . ."

1. General Meaning

230 In many States investment agreements are entered into not by the government itself but by statutory corporations or agencies and public companies that exercise public functions but are legally distinct from the State. Also, in some States it is not the central government but another entity, such as a province or even a municipality, that deals with foreign investors. The words in parentheses in Art. 25(1) open the possibility for such entities to become parties in ICSID proceedings instead of or in addition to the host State itself.[327]

231 Constituent subdivions or agencies may not only be respondent but may also commence ICSID proceedings provided, of course, that the formalities of designation and consent required by Art. 25(1) and (3) are met.[328]

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323 4 ICSID Reports 370.
324 Clause XII of the 1968 Model Clauses, 7 ILM 1159, 1171 (1968); Clause III of the 1981 Model Clauses, 1 ICSID Reports 200.
325 *Gaillard*, Some Notes on the Drafting, p. 142.
326 *Dolzer/Stevens*, Bilateral Investment Treaties, p. 146.
327 This explanation contained in the First Edition of this Commentary is cited in *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 52.
328 *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 13; *cf. East Kalimantan* v. *PT Kaltim Prima Coal* (ARB/07/3).

232 This extension of party status on the host State's side should be read in close conjunction with Art. 25(3), which introduces special formalities for consent by constituent subdivisions or agencies (see paras. 903–920 *infra*). While the two provisions are closely related, they have different functions, which should not be confused. The parenthetical clause in Art. 25(1) relates to jurisdiction *ratione personae*. It gives the entities described *locus standi*, in principle, if the Convention's requirements have been met. Art. 25(3) relates to the modalities of consent. For a conciliation commission or arbitral tribunal to exercise jurisdiction, both conditions must have been met. That both requirements are sometimes addressed in the same document does not alter the fact that they are analytically distinct and must be examined separately.

a) Designation Distinguished from Attribution

233 The mechanism in Art. 25(1) by which constituent subdivisions or agencies may become party to ICSID proceedings must be distinguished from the principles of attribution to a State of the conduct of such entities under the rules of State responsibility. Under certain circumstances States are responsible, in respect of alleged violations of international law, for the conduct of persons or entities beyond the core organs of State or government.[329] The applicable rules are codified in the International Law Commission's Articles on State Responsibility.[330] The rules of attribution, found in Articles 4–11, are generally accepted to be a codification of applicable customary international law rules.[331]

234 ICSID tribunals have recognized that there is a distinction between state responsibility for the conduct of a constituent subdivision or agency, and the possibility that a subdivision or agency may actually be party to proceedings.[332] The issue of attribution of acts of State entities to the respective States has been addressed in numerous decisions.[333]

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329 For an overview see *Dolzer/Schreuer*, Principles of International Investment Law 195–206 (2008).

330 ILC, Annual Report of the International Law Commission on its Fifty-third Session (23 April−1 June and 2 July−10 August 2001), A/56/10, ch. IV, and Resolution 56/83. Adopted by the General Assembly on 12 December 2001, by which the General Assembly took note of the *ILC Articles* and recommended them to the attention of governments. And see *Crawford, J.*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

331 *Bodansky, D./Crook, J. R.*, "Introduction and Overview" to "Symposium: The ILC's State Responsibility Articles", 96 AJIL 773, 783 (2002). Also *Brownlie, I.*, System of the Law of Nations: State Responsibility, Part I, Chapter VII (1983); *Eagleton, C.*, The Responsibility of States in International Law 44–75 (1928).

332 Amongst many possible examples, see *e.g.*, *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, para. 96; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 10.2–10.7; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 107.

333 *E.g.*, *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 71–89; *Maffezini* v. *Spain*, Award, 13 November 2000, paras. 44–64, 72–83; *Wena Hotels* v. *Egypt*, Award, 8 December 2000, paras. 65–69, 82, 84, 110; *Wena Hotels* v. *Egypt*, Decision on Annulment, 5 February 2002, paras. 30, 33, 35; *Genin* v. *Estonia*, Award, 25 June 2001, para. 327; *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 13; *Salini* v. *Morocco*, Decision on Jurisdiction,

235 In *Salini* v. *Morocco*[334] the investor/State dispute settlement provision in Article 8 of the applicable BIT between Italy and Morocco referred to "all disputes or differences . . . concerning an investment". The Tribunal distinguished between breaches of contract committed by the State itself and breaches committed by a distinct entity. It held that ICSID's jurisdiction extended to BIT violations and to breaches of a contract that binds the State directly. ICSID jurisdiction did not extend to breaches of a contract with an entity of the State unless these breaches also amounted to a violation of the BIT. Therefore, contract claims that related to a contract with an entity of the State and which did not amount to violations of the BIT were outside ICSID's jurisdiction.

236 In *Vivendi* v. *Argentina*, the claimants brought a claim against Argentina invoking the Argentina-France bilateral investment treaty. Argentina asserted that the investors' dispute was with the Province of Tucumán, with which the investors had a contractual relationship, and not the Argentine Republic. Argentina added that it had not designated the Province of Tucumán to the Centre, as required by Art. 25(1), or given its consent to it being party to ICSID proceedings, as required by Art. 25(3).[335] The Tribunal properly dismissed this objection to its jurisdiction. Since the claimant had characterized its case as a breach of the BIT, the dispute was indeed between the investors and a Contracting State, albeit that the investors sought to hold Argentina responsible for the conduct of its Province.[336] The Tribunal said:

> 51. Moreover, the Tribunal cannot accept the position of Respondent that its failure to designate or consent to the application of the ICSID Convention to the Province of Tucumán under Article 25 of that treaty deprives the Tribunal of jurisdiction to hear the claims of CGE against the Argentine Republic. The designation and consent provisions of paragraphs (1) and (3) of Article 25 stipulate that a subdivision or agency of a Contracting State may, with the permission of that State, submit itself to the jurisdiction of ICSID for purposes of resolving a legal dispute arising out of an investment dispute between that subdivision or agency and a national of another Contracting State. Those optional provisions do not apply to disputes between the Contracting State itself (in this instance the Argentine Republic) and a national of another Contracting State that may be related to an investment contract between a subdivision or agency of that State and the national. In other words, Article 25(3) does not restrict the subject matter jurisdiction of the Tribunal; rather, it creates potential efficiencies in operations of ICSID by establishing, with approval of the central government, the right

23 July 2001, paras. 28–35; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 8.12, 10.1–10.7; *Autopista* v. *Venezuela*, Award, 23 September 2003, paras. 125–128; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 80–92, 157; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 210; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 83–89; *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, paras. 82–95; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 146–149; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 189–191.

334 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 60–62.

335 *Vivendi* v. *Argentina*, Award, 21 November 2000, paras. 41, 46.

336 At para. 50.

> of such agencies or subdivisions to be parties in their own right to an ICSID proceeding.[337]

237 Therefore, designations of constituent subdivisions or agencies serve procedural convenience but do not affect questions of State responsibility. The State entity's party status is independent of the issue of the attribution of its actions to the State. In some instances the State entity may be the only potential respondent under the rules of State responsibility. In other cases, where attribution can be established, the State is an alternative or additional respondent despite the designation.

b) Negotiating History

238 Neither the Working Paper nor the Preliminary Draft contained any reference to entities of the Contracting State (History, Vol. I, pp. 110, 112). When enquiries were first made whether public and political entities should be included, Mr. *Broches* reacted with reserve in view of "enormous difficulties, constitutional and otherwise" (History, Vol. II, pp. 65/6). Later on, a delegate from Tanganyika pointed out that in many countries investment agreements were concluded by quasi-governmental institutions such as statutory corporations or public companies (at p. 258). After some further discussion (at pp. 297, 321, 366, 393), a new draft provision was circulated, which was designed to give political subdivisions and instrumentalities standing before the Centre (at pp. 288/9, 396, 492). Reactions were mostly positive (at pp. 396, 398, 446, 500, 502, 507, 551, 564) although there was also a critical voice (at pp. 400, 410).

239 The First Draft contained the clause "(or one of its political subdivisions or agencies)" (History, Vol. I, p. 116). At this point, there was a good deal of criticism and a number of delegates suggested the deletion of the clause (History, Vol. II, pp. 657, 701, 702, 705, 708, 709, 838/9). As a result, a Working Group was formed to discuss a number of open questions (at pp. 866/7). After another extensive discussion in the Legal Committee (at pp. 856–860), which clarified a number of issues concerning the definition of the entities (see paras. 240–243 *infra*), the entities' designation to the Centre (see paras. 247 *infra*) and the approval by the Contracting State of their consent (see para. 904 *infra*), the final version was adopted (at p. 879).

2. Constituent Subdivision or Agency

240 During the Convention's drafting, there were lengthy discussions concerning the general description of the entities to be included and the precise meaning of the terms chosen. Two main groups of entities were debated. One group consisted of constituent or component parts of States, such as states, provinces, cantons and municipalities. The other group consisted of public agencies performing governmental functions, such as development corporations or investment boards (History, Vol. II, pp. 288/9, 321, 366, 393, 396/7, 446/7). The wording suggested initially

337 At para. 51.

was "political subdivision or instrumentality" (at pp. 288, 396, 492). Both parts of the phrase came under criticism. It was suggested that the first part did not adequately express the idea of a State's component part (at pp. 502, 507) and that the second might include mere government-owned companies (at p. 507). Mr. *Broches* explained that the word "instrumentality" was only intended to include governmental agencies. While these were normally part of and indistinguishable from the government, they were legally separate entities in some countries, although entrusted with government functions (at p. 507).

241 The First Draft adopted "political subdivisions" but replaced "instrumentality" by "agencies" (History, Vol. I, p. 116). The United States representative wanted the re-introduction of "instrumentalities" (History, Vol. II, pp. 703, 837). The British delegate thought that "political subdivisions or agencies" really meant parts of a State and that these would be acting on behalf and in the name of the State (at p. 702). In the Working Group (see para. 239 *supra*) the suggestion was made simply to refer to "any body" (at p. 867) but this raised questions whether constituent subdivisions of States were still included and whether the phrase "such as a State, Republic or Province" should be added (at p. 856). Eventually, the phrase "or any constituent subdivision or agency of a Contracting State" was adopted (at p. 879).

242 The precise domestic status of the entities in question was not clarified. There was no agreement whether they needed to have juridical personality distinct from the Contracting State (History, Vol. II, p. 867). On the other hand, it was emphasized that an agency would be acting on behalf of the Contracting State though acting in its own name (at pp. 857, 858). There was some disagreement as to whether subdivisions of a lower level, such as municipalities, would be included (at pp. 856, 857). Another point that was left open was the question whether agencies of political subdivisions should be included. The idea of including them expressly was dropped "for the sake of simplicity" (at pp. 859/60).[338]

243 The clause as adopted was designed to cover a very wide range of entities. It is intended to create maximum flexibility in order to take account of national peculiarities. Therefore, it may be concluded that "constituent subdivision" covers any territorial entity below the level of the State itself. The concept of "agency" should be read not in structural terms but functionally. This means that whether the "agency" is a corporation, whether and to what extent it is government-owned and whether it has separate legal personality are of secondary importance. What matters is that it performs public functions on behalf of the Contracting State or one of its constituent subdivisions.[339] This interpretation would lend support to extending the concept to agencies of constituent subdivisions.[340]

338 This omission has since been perceived as a problem for Australia. See *Buckley, R. P.*, Some Jurisdictional Difficulties with Australia's Ratification of the ICSID Convention, 2 Asia Pacific Law Review 92, 93 (1993); *Moti, J. R.*, Australia to Ratify the ICSID Convention, 17 Australian Construction Law Newsletter 26 (April 1991), 27.

339 *Amerasinghe*, Jurisdiction Ratione Personae, pp. 233/4; *Amerasinghe*, The Jurisdiction of the International Centre, pp. 185/6.

340 See also *Amerasinghe*, *loc. cit.*

244 It has been pointed out that a precise definition of the term "constituent subdivision or agency" is of subordinate importance in view of the requirement that the Contracting State must designate any such entity to the Centre. Designation would create a very strong presumption that the entity in question is indeed a "constituent subdivision or agency". Designation would almost certainly preclude the Contracting State or the designated entity from arguing that the Convention's requirements were not fulfilled because the entity was not a "constituent subdivision or agency".[341] In *Noble Energy* v. *Ecuador*, the Tribunal said:

> Ecuador designated CONELEC to the Centre on 21 August 2002 for purposes of Article 25 of the ICSID Convention and CONELEC is thus to be considered as an agency of the Republic of Ecuador.[342]

245 Nevertheless, the existence of a "constituent subdivision or agency" is ultimately for the conciliation commission or arbitral tribunal to decide. It is part of the Convention's objective criteria and must be determined, if necessary, in the framework of the commission's or tribunal's power to rule on matters of jurisdiction and competence in accordance with Arts. 32 and 41.

246 In practice, the entities in question have included political subdivisions,[343] state corporations having separate legal personality,[344] and agencies of the host State's government.[345]

3. Designation to the Centre

247 In addition to the objective criteria outlined above, there must also be a designation to the Centre. The First Draft, which already contained a reference to political subdivisions or agencies, did not mention any process for their official accreditation. The idea of a designation arose from a British proposal to create some machinery for enabling investors to identify political subdivisions or agencies (History, Vol. II, pp. 667, 702). It was supported by the New Zealand and Australian delegates (at pp. 703, 704) and later incorporated into several working drafts (at p. 867). After some debate on the practicability of the idea (at pp. 856, 857), a vote was taken on whether "the Contracting State must designate a body of a lower order before the latter can be a party to proceedings under the Convention". The proposal was adopted by a large majority (at pp. 859/60). After a short debate as to whether the designation requirement should refer only to agencies

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341 *Broches*, The Convention, p. 354; *Delaume*, ICSID Arbitration, p. 109; *Delaume*, How to Draft, pp. 179/80; *Szasz*, The Investment Disputes Convention, p. 31.

342 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, para. 63.

343 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997; *Government of the Province of East Kalimantan* v. *PT Kaltim Prima Coal* (ARB/07/3).

344 *Klöckner* v. *Cameroon*, Award, 21 October 1983; *Scimitar* v. *Bangladesh*, Award, 4 May 1994; *Tanzania Electric* v. *IPTL*, Award, 12 July 2001; *Repsol* v. *Petroecuador*, Award, 20 February 2004 (unpublished); *City Oriente* v. *Ecuador and Petroecuador*, Award, 20 February 2004; *Burlington Resources and others* v. *Ecuador and Petroecuador* (ARB/08/5); *Perenco Ecuador* v. *Ecuador and Petroecuador* (ARB/08/6); *Repsol* v. *Ecuador and Petroecuador* (ARB/08/10).

345 *Manufacturers Hanover Trust* v. *Arab Republic of Egypt General Authority for Investment and Free Zones* (ARB/89/1); *Noble Energy* v. *Ecuador and Consejo Nacional de Electricidad*, Decision on Jurisdiction, 5 March 2008, para. 63.

or to constituent subdivisions as well, a vote resulted in a decision that it would apply to both (at p. 857). The question was also raised whether the designations should be made for a particular purpose or in general. Mr. *Broches* responded that this should be left to the State concerned (at p. 858). The proposal as adopted (at p. 879) was incorporated into the Revised Draft (at p. 918) and remains unchanged in the Convention.

248 The primary purpose of the requirement to designate entities that might become parties in ICSID proceedings to the Centre is to give an investor an assurance that he or she is dealing with an authorized entity. In other words, investors are given advance notice of with whom they may deal. Curiously, the Convention does not tell investors who may commit the State directly.[346] If a person or office is part of the normal State bureaucracy, the investor may rely on an ostensible power to commit the State (see paras. 627–631 *infra*). If a person or office acts independently of the State's regular administrative hierarchy, it is wise to look into whether one is dealing with an immediate representative of the State or whether a designation has been made to the Centre. A secondary purpose of designation may be a desire on the part of the State to preserve control over semi-autonomous entities in their dealings with foreign investors. But this purpose is more readily achieved by withholding approval of consent to jurisdiction under Art. 25(3) (see paras. 903–920 *infra*).

249 The crucial importance of a designation to the Centre is well illustrated by *Cable TV* v. *St. Kitts and Nevis*.[347] This case arose from an agreement of September 1986 containing an ICSID arbitration clause between the Claimants and the Nevis Island Administration (NIA). Under the Constitution of St. Kitts and Nevis the country is organized as a Federation with the Island of Nevis as an autonomous entity within that Federation.[348] The Request for Arbitration named the Federation as respondent. The Tribunal noted that the Federation was not a party to the agreement containing consent to ICSID jurisdiction and that the NIA had not been designated as a constituent subdivision or agency. The Tribunal held that in the absence of a designation of the NIA under Art. 25(1) it had no jurisdiction. It was not possible to substitute the Federation for the NIA.[349]

250 Other cases have proceeded without difficulty against duly designated subdivisions or agencies. The case of *Repsol* v. *Petroecuador* proceeded against Petroecuador and led to an Award, rendered on 20 February 2004.[350] Ecuador had designated Corporacíon Estatal Petrolera Ecuatoriana, of which Petroecuador is the successor, to the Centre on 19 April 1988.

251 In *Noble Energy* v. *Ecuador*, it was not disputed that the proper Respondents were both Ecuador and the Consejo Nacional de Electricidad ("CONELEC"), the

346 See *Szasz*, The Investment Disputes Convention, p. 39.
347 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review – FILJ 328 (1998). See also *Government of the Province of East Kalimantan* v. *PT Kaltim Prima Coal* (ARB/07/3).
348 At pp. 334–343.
349 At pp. 345–352, 363–365, 391.
350 Unpublished.

latter being an agency designated to the Centre by Ecuador on 21 August 2002.[351] Therefore, claims may be brought simultaneously against both a State and one of its designated constituent subdivisions or state entities.[352]

a) Form of Designation

252 The designation must be made to the Centre. Therefore, designation in an agreement with the investor is not enough. It is clear that the entity concerned cannot designate itself. But even an agreement of the Contracting State with the investor or a promise to make the designation to the Centre will not suffice. There must be some communication by the host State to the Centre.[353] The designation is not subject to any formal requirements. It need not be made in a separate document. The notification to the Centre of an agreement with the investor containing the designation is enough. It has been argued that where there is a clear intention to designate, it does not matter how and through whom the communication reaches the Centre.[354] *Broches* has said that failure of a formal designation should not defeat jurisdiction if the entity concerned is proved or conceded to be a constituent subdivision or agency of a Contracting State.[355] It seems that this goes too far. Designation cannot be dispensed with altogether. But it is submitted that designation by a Contracting State can take any form that gives it general notoriety and comes to the Centre's attention. Legislation by the Contracting State that clearly includes a designation in the sense of Art. 25 should suffice.[356] This would also apply to a designation contained in a bilateral investment treaty.[357] Despite all this, it is advisable that the Contracting State sends a clear and separate notification of the designation to the Centre in order to avoid any misunderstandings and jurisdictional difficulties.

253 The Centre keeps a register of designations. The list is published as document ICSID/8-C. The list is also available on the Centre's website: http://icsid.worldbank.org. An examination of this list shows that the designations fall into two categories. Australia and the United Kingdom have designated territorial entities,

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351 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, para. 6.

352 See also *Occidental* v. *Ecuador II* (ARB/06/11). The ICSID website reports that, on 29 September 2006, the Claimants withdrew all claims advanced against Petroecuador in the request for arbitration.

353 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 187/9.

354 See *Amerasinghe*, *op. cit.*, p. 188. See also *Lamm*, Jurisdiction of the International Centre, p. 469; *Szasz*, The Investment Disputes Convention, p. 31.

355 *Broches*, Convention, Explanatory Notes and Survey, p. 642. *Broches* relies on the unpublished jurisdictional decision in *Manufacturers Hanover Trust* v. *Egypt*.

356 See Sri Lanka, Greater Colombo Economic Commission Law, 1978, sec. 26(2)(a).

357 Many United States BITs contain an Article which provides: "This Treaty shall apply to the political subdivisions of the Parties." It is doubtful whether such a treaty provision could form the basis of a designation under Art. 25 of the Convention. The general reference to political subdivisions is too unspecific. Moreover, it is not specially linked to the Clause providing for ICSID jurisdiction in the BIT. See also Clause VI of the Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Treaties, 8 ILM 1341, 1348 (1969).

in other words constituent subdivisions. Ecuador, Guinea, Kenya, Madagascar, Nigeria, Peru, Portugal, Sudan and Turkey have designated entities of a non-territorial nature, in other words agencies.

254 The designation under Art. 25 should not be confused with the written notice concerning excluded territories under Art. 70 of the Convention. Art. 70 deals with the territorial application of the Convention, which may be varied by special notice. By contrast, the parenthetical clause of Art. 25 deals with a special jurisdictional status that may be granted to territorial entities that are clearly within the Convention's territorial reach.

255 The list of designated constituent subdivisions or agencies has a note attached to it saying that *ad hoc* designations and notifications made by Contracting States pursuant to Art. 25(1) and (3) are excluded from this listing. This means that it is open to States to make designations not only in general terms but also on the occasion of specific investment projects.[358] Such an *ad hoc* designation too must be communicated to the Centre.

256 The designation may also be limited in other ways. Both a general and an *ad hoc* designation may be made subject to conditions, limitations or time limits. The same effect may be achieved by the State by withholding approval of consent under Art. 25(3) selectively.[359]

257 Although the designation itself may only be made directly to the Centre (see para. 252 *supra*), it is useful for an investor to obtain confirmation from the State or the entity that a designation has, in fact, been made. The Model Clauses of 1993 provide the following formula for this purpose:

Clause 5

> The name of constituent subdivision or agency is [a constituent subdivision]/[an agency] of the Host State, which has been designated to the Centre by the Government of that State in accordance with Article 25(1) of the Convention . . .[360]

If no designation has been made at the time the agreement is made, the State or the entity may give an undertaking that the designation will be made in due course.[361] In either case, the entity's consent to ICSID's jurisdiction becomes effective only after the designation has actually been made.

b) Time of Designation

258 There is no particular time limit for the designation of an entity to the Centre. It appears logical and desirable that the designation be in place by the time the entity signs an agreement that contains a consent clause with the investor. But

358 See *Attorney-General* v. *Mobil Oil NZ Ltd.*, High Court Wellington, 1 July 1987, [1989] 2 NZLR 649, 655; 4 ICSID Reports 123/4.

359 *Amerasinghe*, The Jurisdiction of the International Centre, p. 187.

360 4 ICSID Reports 361. See also Clause IV of the 1968 Model Clauses, 7 ILM 1159, 1165 (1968) and Clause VI of the 1981 Model Clauses, 1 ICSID Reports 201/2.

361 See *Delaume*, Le Centre International, pp. 795/6; *Delaume, G. R.*, ICSID Arbitration in Practice, 2 International Tax and Business Lawyer 58, 62 (1984).

it is entirely possible for the designation to be made after consent is given or even after a dispute has arisen. In order to institute proceedings against a constituent subdivision or agency, the designation must have been made. Therefore, the day on which the request for conciliation or arbitration is made is normally the critical date for the existence of a designation. Rule 2 of the Institution Rules provides:

> (1) The request shall:
>
> (a) designate precisely each party to the dispute and state the address of each;
>
> (b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention; . . .[362]

259 A request for conciliation or arbitration against a constituent subdivision or agency that is unsupported by evidence of a designation of that entity may be rejected by the Secretary-General as manifestly outside the jurisdiction of the Centre by virtue of his or her screening power under Arts. 28(3) and 36(3). The same would apply where such a constituent subdivision or agency wishes to initiate proceedings against an investor.[363]

260 The proceedings in *Klöckner* v. *Cameroon* show that in exceptional circumstances a designation may be made after the institution of proceedings before the arbitral tribunal.[364] In this case, the 1971 Protocol of Agreement between the investor and the Government provided for the establishment of a joint venture company, SOCAME. 51% of its shares were held by the European investors, 49% by the Cameroonian Government. The agreement contained an ICSID arbitration clause. Subsequently, a 1972 Supply Contract, also containing an ICSID arbitration clause, was signed between the same parties. Upon the establishment of SOCAME in 1973, the Government transferred all its rights and obligations under the Supply Contract to SOCAME. A third contract, the 1973 Establishment Agreement, was signed by the Government and SOCAME. It also contained an ICSID arbitration clause. After a capital increase in SOCAME, Klöckner and its European partners lost majority control of the company in 1978.[365] In 1981, Klöckner submitted a request for arbitration against Cameroon and against SOCAME accompanied by a copy of the Supply Contract. The Tribunal later stated that this request was in conformity with, *inter alia*, Art. 36 of the Convention and Art. 2 of the Institution Rules.[366] At the Tribunal's first session the procedural status of SOCAME was discussed and the Government promised to make an early decision

362 On the approval of consent by a constituent subdivision or agency see paras. 903–920 *infra*.
363 *Amerasinghe*, Jurisdiction Ratione Personae, pp. 234–236.
364 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9.
365 At p. 58.
366 At p. 10.

> . . . as to whether it would voluntarily make an *ad hoc* designation of SOCAME as a party to the proceedings, as required with respect to state or parastatal entities under Article 25 of the Convention.[367]

On 7 December 1981

> The Government designated SOCAME as a constituent subdivision of the State of Cameroon as understood by Article 25(1) of the Convention, and approved its participation in the arbitration.[368]

261 This part of the case is interesting in more than one respect. There is no indication in the report that the Secretary-General refused to register the request against SOCAME for lack of its designation at the time. Moreover, the case shows that an entity that at one stage was an instrument of the investor, and that was even regarded as capable of contracting an ICSID arbitration clause with the Government, subsequently became an agency of the Government which was capable of being designated to ICSID in that capacity.

262 In *Tanzania Electric* v. *IPTL*, the Claimant was a state-owned Tanzanian corporation and the respondent was also a Tanzanian corporation but owned by foreign, Malaysian, investors. The parties' consent to submit disputes to ICSID was contained in a contract dated 8 June 1995 but the Claimant was only designated by Tanzania as an agency of the State on 24 September 1998. Shortly thereafter, on 25 November 1998, it transmitted its Request for Arbitration to the Centre. The Secretary-General registered the Request on 7 December 1998. No issue of jurisdiction arose in the proceedings.[369]

263 Similarly, in *Noble Energy* v. *Ecuador*, one of the bases of consent was a Concession Contract of 15 October 2001 between the Claimant and the Ecuadorian Government, "represented by CONELEC". Ecuador subsequently designated CONELEC for purposes of Article 25(1) on 21 August 2002. CONELEC was named as a respondent in the Request for Arbitration. No issue arose from the fact that consent had been given before the designation.[370]

264 In other cases, the issue of the designation of a constituent subdivision or agency only arose peripherally. In essence, the Tribunals found that no designation had occurred and that, consequently, the entities in question could not be parties to the proceedings. In *Amco* v. *Indonesia*, the respondent Government argued that the claim really related to a lease agreement with PT Wisma, an entity indirectly controlled by the Indonesian army. Since PT Wisma was not a Contracting State nor an agency designated to the Centre, the Tribunal should have, in Indonesia's opinion, decided that the dispute was outside the jurisdiction of the Centre.[371] The Tribunal refused, finding that the dispute was not on the lease agreement and that the Respondent was not PT Wisma but the Republic of Indonesia.[372]

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367 At p. 11.
368 *Loc. cit.* See also News from ICSID, Vol. 1/2, pp. 9/10 (1984).
369 *Tanzania Electric* v. *IPTL*, Award, 22 June 2001, para. 13.
370 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 6, 11, 55, 63.
371 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 35.
372 At paras. 38/9.

265 In *LETCO* v. *Liberia*, the Tribunal rejected the Claimant's attempt to join a Government agency to the proceedings not on the basis of the absence of its designation to the Centre but for lack of consent.[373]

266 A number of cases involved government entities as parties although there is no evidence of their designation to the Centre. However, these cases did not yield any decision on the issue.[374]

267 The Convention is silent on whether a designation, once made, may be withdrawn. Such a withdrawal is probably possible subject to the last sentence of Art. 25(1). That provision precludes the unilateral withdrawal of consent. Once consent has been given by a constituent subdivision or agency, such consent may not be vitiated by the withdrawal of its *locus standi* (see paras. 612, 613 *infra*). This rule should apply irrespective of whether the entity's designation as a constituent subdivision or agency preceded its consent or not. To date, there are no recorded withdrawals of designations to the Centre.

G. ". . . and a national of another Contracting State, . . ."

1. General Significance

268 The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors. In doing so, it was to fill a particular procedural gap. Disputes between governments may be taken to the International Court of Justice or the Permanent Court of Arbitration. Disputes between individuals or corporations can be settled either by domestic courts or through one of the established institutions for the arbitration of commercial disputes. Disputes between a State and its own nationals are settled by that State's domestic courts. The purpose of the Convention was to deal with the peculiar situation of a dispute between a State and a foreign national arising from an investment relationship (History, Vol. II, pp. 78, 150, 205).[375]

269 The idea of granting direct access to an international forum to a non-State party was one of the Convention's avowed purposes. This was said to be in harmony with the growing recognition of the individual as a subject of international law and was designed to obviate the espousal of individuals' claims by their respective governments (History, Vol. II, pp. 303, 394, 464). Some delegates had difficulties with this departure from accepted concepts and wanted to bring the investor's

373 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 354.

374 In *Scimitar* v. *Bangladesh* the participation of Bangladesh Oil, Gas and Mineral Corporation as party to the proceedings was not tested due to the successful objection that commencement of the proceedings by the Claimant had not been duly authorized: Award, 4 May 1994. In *Manufacturers Hanover Trust* v. *Arab Republic of Egypt General Authority for Investment and Free Zones* (ARB/89/1), the ICSID website reports that a settlement was "agreed by the Claimant and one of the Respondents" and proceeding discontinued at their request. See also *Government of the Province of East Kalimantan* v. *PT Kaltim Prima Coal and others* (ARB/07/3). Neither the Arab Republic of Egypt General Authority for Investment and Free Zones nor the Government of the Province of East Kalimantan are listed as designated constituent subdivisions or agencies in ICSID Document ICSID/8-C.

375 *Szasz*, The Investment Disputes Convention, p. 25.

home State into the picture (at pp. 493, 494, 501). In response, Mr. *Broches* pointed to the advantages of direct dealings between States and investors for both sides (at pp. 495/6, 499, 502). The reference to "a national of another Contracting State" remained unchanged throughout the Convention's drafting history (History, Vol. I, pp. 110–118).

2. The Private Character of the Investor

270 The Convention's Preamble speaks of the role of private international investment. This would indicate that the investor must be a private individual or corporation. Therefore, States acting as investors have no access to the Centre in that capacity. The idea to give party status also to investor States was raised at one point during the Convention's preparation but was quickly put to rest (History, Vol. II, p. 401).[376] At one point during the preparatory work it was suggested that international organizations should be admitted as parties to ICSID proceedings if they acted as investors (at pp. 307, 324, 564). Mr. *Broches* pointed out that there were perfectly satisfactory arbitration arrangements for international bodies (at p. 307). The idea was not pursued.

271 The situation is less clear when it comes to wholly or partly government-controlled companies (or other entities, such as funds responsible for investing sovereign wealth). The Comment to the Preliminary Draft stated:

> It will be noted that the term "national" is not restricted to privately-owned companies, thus permitting a wholly or partially government-owned company to be a party to proceedings brought by or against a foreign State.[377]

This statement was never contradicted in the course of the subsequent deliberations on the Convention (see also History, Vol. II, p. 580). But neither is it repeated in the Executive Directors' Report. The criteria suggested for the admission of government-controlled entities as investors under the Convention have varied somewhat between more structural or more functional tests.[378] The best guideline is probably still the one formulated by *Broches* in 1972:

> [I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function.[379]

376 *Amerasinghe*, Jurisdiction Ratione Personae, p. 241.
377 History, Vol. II, p. 230. See already at p. 170.
378 See *Hirsch*, The Arbitration Mechanism, pp. 64–66.
379 *Broches*, The Convention, pp. 354/5. See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 196; *Sutherland, P. F.*, The World Bank Convention on the Settlement

272 In *CSOB* v. *Slovakia*, the Respondent contested the Tribunal's competence, arguing that the Claimant was a State agency of the Czech Republic rather than an independent commercial entity and that it was discharging essentially governmental activities. The Tribunal rejected this contention. Relying on the Convention's legislative history and on the passage by *Broches* cited above, it held that the concept of "national" under the Convention was not limited to privately owned companies and did not depend upon whether or not the company was partially or wholly owned by the Government. The decisive test was whether the company was discharging an essentially governmental function. CSOB's activities in executing international banking transactions under the State's control had to be judged by their nature and not by their purpose and were hence commercial. With regard to CSOB's activities in the context of its privatization and restructuring, these also had to be judged by their nature and were commercial rather than governmental acts.[380]

273 In *CDC* v. *Seychelles*, the Claimant was a company with a separate legal personality but was 100% owned by the British Government. The Respondent initially raised, but did not pursue, an objection that the Claimant was not a "national of another Contracting State". As the Claimant's investment related to a commercial loan, it could not be said it was fulfilling a governmental function.[381]

274 In *Telenor* v. *Hungary*, the Claimant was 75% owned by the State of Norway. No issue was raised as to whether the Claimant qualified as a "national of another Contracting State".[382]

275 In *Rumeli Telekom* v. *Kazakhstan*, it was held that the Claimants were independent commercial entities and qualified as nationals of another Contracting State. The Respondent's argument that the State of Turkey was the real party in interest was rejected. The extent of any control over the Claimants by the Turkish Government and the possibility that the proceeds of any award might be remitted to the Turkish Treasury did not deprive them of this status.[383]

276 These cases confirm that claimants may have significant State ownership interests, but still qualify as a "national of another Contracting State" for the purposes of Art. 25(1).

3. Multipartite Arbitration

277 The Convention speaks of "a national of another Contracting State" in the singular. But it would be wrong to conclude that only one party may be admitted

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of Investment Disputes, 28 International and Comparative Law Quarterly 367, 385 (1979); *Kovar*, La compétence du Centre, pp. 25, 36; *MacKenzie, G. W.*, ICSID Arbitration as a Strategy for Levelling the Playing Field between International Non-Governmental Organizations and Host States, 19 Syracuse Journal of International Law and Commerce 197, 230 (1993); *Shihata/Parra*, The Experience, pp. 315/6.

380 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 16–27.

381 *CDC* v. *Seychelles*, Award, 17 December 2003, paras. 6, 19, 34.

382 *Telenor* v. *Hungary*, Award, 13 September 2006, paras. 16, 18.

383 *Rumeli Telekom* v. *Kazakhstan*, Award, 29 July 2008, paras. 325–328.

to ICSID proceedings on the investor's side.[384] During the Convention's drafting the British expert mentioned that there might well be more than just two parties to a dispute and that he assumed that this was implicit in the draft (History, Vol. II, pp. 400, 413).

278 There are multiple examples in ICSID's case list of cases involving several or even multiple claimants. Where closely related claims are filed separately, there may be a possibility to consolidate proceedings or to appoint identical tribunals (see Art. 26, paras. 124–131).

279 The argument that the use of the singular for "national" in Art. 25(1) barred multipartite arbitration was raised in *Klöckner* v. *Cameroon* but was not taken up by the Tribunal and was apparently dropped subsequently by the Government.[385] Subsequent cases show that having more than one party on the investor's side in one set of proceedings is perfectly possible. The appearance of more than one party on the investor's side is normally the consequence of companies claiming jointly with their parent companies or their subsidiaries and the assignment, in part, of the investor's rights to an additional investor.

280 In *Goetz and others* v. *Burundi* six shareholders instituted proceedings jointly. The Tribunal saw no problem in the fact that there were multiple claimants.[386]

281 Once the principle of multipartite arbitration is accepted, no question should arise by virtue only of the number of co-claimants. In some pending cases, many thousands of individual investors holding bonds issued by Argentina or Argentine entities have collectively commenced proceedings against Argentina.[387]

282 Future cases might equally involve several host States for large scale or trans-boundary investments.

4. The Nationality of the Investor

283 Art. 25(2) provides a detailed definition of "national of another Contracting State" dealing with the nationality of natural persons and of juridical persons separately. Therefore, the question of the investor's nationality is discussed below at paras. 635–902.

5. Participation of the Investor's State of Nationality in the Convention

284 Much of what has been said about the host State's participation in the Convention (paras. 211–220 *supra*) applies equally to the investor's State of nationality. The rules on ratification, acceptance or approval of the Convention as well as on renunciation are the same (see para. 211 *supra*).

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384 See also *Szasz*, The Investment Disputes Convention, p. 28.

385 See *Delaume, G. R.*, ICSID Arbitration, *in*: Contemporary Problems in International Arbitration (*Lew, J.* ed.) 23, 36, 37 (1987).

386 *Goetz* v. *Burundi*, Award, 10 February 1999, paras. 84–89.

387 *Giovanna A. Beccara and others* v. *Argentine Republic* (ARB/07/5); *Giovanni Alemanni and others* v. *Argentine Republic* (ARB/07/8); and *Giordano Alpi and others* v. *Argentine Republic* (ARB/08/9).

285 The requirement that the investor be a national of a Contracting State was contained in all drafts leading to the Convention (History, Vol. I, pp. 110–118). A suggestion to grant party status to investors whose home States are not parties to the Convention was put forward but not accepted (History, Vol. II, pp. 82, 255, 260, 406). Mr. *Broches* pointed out that there were essential reciprocal obligations between the host State and the investor's home State under the Convention. In particular, the investor's State of nationality would renounce its normal right to diplomatic protection and would assume the obligation to enforce awards against its national (at pp. 22, 82, 150, 204, 406, 495, 564, 579). Since the investor's principal assets were likely to be under his or her national State's jurisdiction, the enforcement of awards against the investor might be frustrated if his or her home State was not a Contracting State.[388] A suggestion to exclude juridical persons that do not have the nationality of any Contracting State was adopted by a large majority (at p. 868).

286 Once the investor's nationality has been established, it is simple to determine whether its state of nationality is a Contracting State by referring to a list regularly updated by the ICSID Secretariat.[389] Complications may arise with regard to the exact territorial application of the Convention. Art. 70 provides that, subject to an explicit exclusion, the Convention shall apply to all territories for whose international relations a Contracting State is responsible. Therefore, corporations having their seat or registration in such territories will be considered nationals of Contracting States[390] (see Art. 70, para. 10).

287 The critical date for the status of Contracting State is the time of the institution of proceedings. This applies to the investor's State of nationality in the same way as for the host State (see paras. 214–220 *supra*). This date should be distinguished clearly from the date at which the investor must possess the nationality of the States in question under Art. 25(2) (see paras. 679–687, 752–759, 871–895 *infra*). It is entirely possible for an investor to give valid consent to the jurisdiction of the Centre even if his or her home State is not yet a Contracting State, provided that this State subsequently ratifies the Convention before the institution of proceedings.[391]

288 In *Holiday Inns* v. *Morocco* (see also para. 216 *supra*), the Parties had signed a Basic Agreement on 5 December 1966 containing an ICSID arbitration clause. Switzerland, the Claimant's State of nationality, became a Contracting State to the Convention only on 14 June 1968. Before the Tribunal, Morocco contended that consent to the jurisdiction of the Centre could be given only by the national

388 See also *Broches*, The Convention, p. 356; *Hirsch*, The Arbitration Mechanism, pp. 73/4; *Gaillard*, Some Notes on the Drafting, p. 140; *Kovar*, La compétence du Centre, pp. 25, 39.

389 ICSID/3. List of Contracting States and Other Signatories of the Convention.

390 *SPP* v. *Egypt*, Decisions on Jurisdiction, 27 November 1985, 14 April 1988, para. 54.

391 *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 75 (1974). In *Duke Energy* v. *Peru*, the Tribunal expressly noted that by the time of the institution of proceedings the State of the claimant's nationality was a party to the ICSID Convention: Decision on Jurisdiction, 1 February 2006, para. 140.

of a State that had previously ratified the Convention. The Claimants contended that the critical date for the status of the "other Contracting State" was the date of filing the request for arbitration. This argument was strengthened by the fact that when contracting the ICSID arbitration clause with the investor, Morocco was fully aware of the fact that Switzerland had not yet ratified the Convention.[392] The Tribunal rejected the Moroccan objection to its jurisdiction and said:

> The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party . . . the only reasonable interpretation of the Basic Agreement is to hold that the Parties when signing the Agreement envisaged that all necessary conditions for jurisdiction of the Centre would be fulfilled and their consent would at that time become fully effective.[393]

6. Identification of the Investor's State of Nationality

289 The Convention provides that to become a party to ICSID proceedings, the investor must be a national of another Contracting State. The exact dates at which this nationality must exist are specified in Art. 25(2) (see paras. 679–687, 752–759 *infra*). But the Convention is silent on whether this other Contracting State must be identified. The fact that the investor is indeed a national of another Contracting State may be uncontested between the parties. Alternatively, there may be doubt which of several possible nationalities the investor has but all States in question are Contracting States.

290 In situations of this kind, is it necessary to identify the "other Contracting State"? Must the investor's nationality be specified either when consent to ICSID's jurisdiction is given or when proceedings are instituted? It would appear that the identification of the "other Contracting State" at the time of consent is a matter of prudence. At the time of the institution of proceedings it becomes a necessity.

291 It is not advisable to ignore the question of the investor's nationality at the time of the consent agreement between the parties. Nor is it advisable simply to agree that "the investor is a national of another Contracting State". Similarly, the parties should not just agree that "because of foreign control the investor shall be treated as a national of another Contracting State". Agreements of this kind are not invalid but are prone to lead to difficulties (see paras. 795–805 *infra*). The assumption or even agreement that the investor is a national of another Contracting State may be challenged later and this may cause problems if the nationality is not specified.[394]

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392 *Lalive*, The First "World Bank" Arbitration, pp. 142–144.

393 At p. 146.

394 *Amerasinghe*, Submissions to the Jurisdiction, p. 227; *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 76 *et seq.* (1974); *Gaillard*, Some Notes on the Drafting, p. 140.

292 Consent to the jurisdiction of the Centre has some effects for the investor's State of nationality even before the institution of proceedings: the suspension of the right to diplomatic protection under Art. 27(1) operates from the moment consent is given. But the specification of the investor's nationality at the time of consent is not necessary for the operation of Art. 27(1). Before a Contracting State can exercise diplomatic protection, it must claim the investor as its national. This, in turn, would lead to the automatic operation of the prohibition of diplomatic protection under Art. 27(1)[395] (see Art. 27, paras. 30–37).

293 The 1993 Model Clauses suggest a clear identification of the other Contracting State:

> **Clause 6**
>
> It is hereby stipulated by the parties that the Investor is a national of name of another Contracting State.[396]

294 At the time of the institution of proceedings, the identification of the "other Contracting State" becomes inevitable. Institution Rule 2(1)(d) provides that the request must indicate the investor's nationality on the day of consent and, if the party is a natural person, also his or her nationality on the date of the request. A mere statement that "the investor is a national of a Contracting State" will not suffice at this stage. Failure to divulge the investor's nationality at the relevant times may lead to a refusal by the Secretary-General to register the request in accordance with Arts. 28(3) and 36(3).

295 There are good reasons for this formal requirement. The Convention attaches certain consequences to the nationality of an investor once he or she becomes a party to ICSID proceedings. There are exclusionary clauses that are linked to the investor's nationality: under Arts. 38, 39 and 52(3) nationals of the same State as the investor may be debarred from appointments as arbitrators or members of an *ad hoc* Committee (see also paras. 896–902 *infra*).

296 The situation is somewhat more complicated where there is an agreement between the parties under Art. 25(2)(b) to treat a host State company as a national of another Contracting State because of foreign control (see paras. 760–902 *infra*). Institution Rule 2(1)(d) does not require the identification of the nationality that was agreed upon (see para. 795 *infra*). ICSID tribunals have confirmed that there is no need to identify the controlling nationality in the arbitration agreement (see paras. 798–805 *infra*).

297 The question may be more difficult in the context of investment treaty arbitration, as noted in *Camuzzi* v. *Argentina I* and *Sempra* v. *Argentina* (see paras. 835–837 *infra*). It is possible to consolidate the interests of two or more entities to establish foreign control. However, if they do not all have the nationality of the same State party to a BIT, it may be in doubt as to whether a claimant having the

395 See also *Szasz*, The Investment Disputes Convention, p. 35.

396 4 ICSID Reports 362. See also Clause V of the 1968 Model Clauses, 7 ILM 1159, 1166 (1968) and Clause VII of the 1981 Model Clauses, 1 ICSID Reports 197, 202.

nationality of the host State qualifies for protection on grounds that it is controlled by one or more nationals of the other State party to the BIT.

298 It may be possible to consolidate the interests of two or more entities to establish foreign control, but if they do not all have the nationality of a Contracting Party to a BIT, it may be in doubt as to whether a claimant having the nationality of the Contracting Party to the dispute qualifies for protection because it is controlled by a national of the other Contracting Party.[397]

7. Contingent Submission

299 If the investor's State of nationality is not a Contracting State, it is still possible to consent to the Centre's jurisdiction in anticipation of the Convention's future ratification. This may be done either through an investment agreement between the host State and the investor or in a bilateral investment treaty. These arrangements are described above at paras. 221–223 in the context of situations where the host State is not yet a Contracting State. They are drafted to apply equally where the investor's state of nationality has not yet become a Contracting State.

8. The Additional Facility

300 One of the purposes of the Additional Facility is to provide for dispute settlement where either the host State or the State of the investor's nationality is not a Contracting State (see paras. 9–13 *supra*). If the Additional Facility is to be used because the investor's home State is not a Contracting State, the host State must be a Contracting State. The situation has been described above at paras. 224–226 with respect to situations where the host State is not a Contracting State but the investor's State of nationality is. The same considerations apply *mutatis mutandis* to the reverse situation where the host State is a Contracting State but the investor's home State is not.

301 Potential host countries that are Contracting States may provide in their national legislation for dispute settlement through ICSID conciliation or arbitration with nationals of other Contracting States (see paras. 392–426 *infra*). The relevant national legislation may also provide for settlement under the Additional Facility if and as long as the investor's State of nationality is not yet another Contracting State (see para. 409 *infra*).[398] Similarly, some treaties provide for a submission to the Additional Facility if and as long as not all parties to the treaty are Contracting States of the ICSID Convention (see paras. 443, 445, 457, 458, 460–463 *infra*). The non-Contracting State may be the host State (see para. 226 *supra*) but it may also be the State of the investor's nationality.

9. Ad Hoc *Arbitration*

302 It is possible that neither the host country nor the investor's home country are Contracting States. In this situation, not even the Additional Facility would be

397 See *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, para. 48.
398 See *e.g.*, Art. 33 of the 1989 Madagascar Investment Code, 5 ICSID Review – FILJ 151 (1990).

available for conciliation or arbitration. But the Secretary-General may act as appointing authority in an *ad hoc* arbitration (see paras. 227–229 *supra*).

H. ". . . which the parties to the dispute . . ."

1. Identity of Consenting and Litigating Parties?

303 The text of the Convention requires that the parties to the dispute themselves must have given consent to the Centre's jurisdiction. This would indeed be the normal case. It cannot be assumed lightly that consent is given on behalf of someone other than the party named in the consent agreement or that consent may be transferred to other parties without the approval of the partner to the original consent agreement. Nevertheless, situations do arise where, due to special circumstances, parties appear before ICSID, either as respondents but more likely as claimants, who were not named in the original consent agreement.

304 This is less likely to occur on the host State's side. But questions of State succession may arise (see paras. 306–310 *infra*). Moreover, a host State's agency (see paras. 230–267 *supra*) may have consented to the Centre's jurisdiction and the investor may later try to institute proceedings against the State itself (paras. 311–317 *infra*). Problems with the identification of the proper party are more likely to occur on the investor's side. Most investors are corporations and not individuals. These corporations frequently work through complicated structures involving parent companies, subsidiaries or affiliates. Consent given in the name of one part in such a corporate structure may or may not extend to other parts. Rights and obligations arising from an investment relationship may subsequently be transferred to other companies either within or outside the same corporate framework. In these situations it will have to be decided whether a consent to the Centre's jurisdiction extends to these entities and whether they are proper parties to the dispute in the sense of Art. 25 (see paras. 319–363 *infra*).

305 A rather special case arises where the investor's home State has provided investment insurance. Once an insurance claim has been settled, the investor may no longer be an injured party and may hence have no claim against the host State. In this situation, the question arises whether the investor's home State, having indemnified the investor, may be subrogated in the investor's position also in ICSID proceedings or whether special arrangements will have to be made to permit or compel the investor to pursue the claim through the Centre (see paras. 364–373 *infra*).

2. The Identification of the Party on the Host State's Side

a) State Succession

306 State succession occurs when changes in the condition of States lead to the replacement of States by other States. This may arise from the creation of a new State as a consequence of secession from another State. Or it may arise from the break-up of an old State and the creation of several new States on its territory.

A State may also become united with another State and lose its identity as a consequence. In situations of this kind, it may be subject to doubt whether a successor State is still a Contracting State to the Convention and whether any consent to the jurisdiction of the Centre given by its predecessor binds the new State.

State succession to treaties has been the object of numerous studies[399] and of a major attempt at codification.[400] There is also a rich practice, but much of it is determined by special circumstances. As regards multilateral treaties, like the ICSID Convention, there is a widespread practice for a new State to make a unilateral declaration indicating its willingness to continue its predecessor's status as a Contracting State.[401] **307**

It is also possible to make a case that a new State emerging from dependent status remains bound by treaties specifically extended to it under a territorial application clause.[402] This would mean succession to Contracting State status for all territories upon their independence for whose international relations a Contracting State was responsible except where notice had been made under Art. 70 that they were excluded. Designation as a constituent subdivision in accordance with Art. 25(1) (see paras. 247–267 *supra*) would further strengthen this argument. **308**

Consent to jurisdiction under the ICSID Convention is intimately linked to the host State's status as a Contracting State. Where the State continues its predecessor's treaty relationships by virtue of a universal succession, any agreements of consent to the Centre's jurisdiction contracted by the predecessor State would seem to become automatically applicable to the successor State. It would be difficult to argue universal succession and continuity with regard to the Convention and other treaties and at the same time discontinuity with regard to agreements under the Convention. If the new State continues its status as a Contracting State under the Convention on the basis of a selective declaration of continuation without universal succession, the situation is not so clear. But the better view would still be that a continuing participation in the Convention also implies continuity with regard to consent agreements. If the investment in question relates to a particular part of the predecessor State's territory, this would only apply if the new State succeeds the old one with respect to that territory.[403] **309**

399 See *e.g.*, Oppenheim's International Law, 9th ed., Vol. I, pp. 208–240 and the literature cited there. See also *Cheng, T.-H.*, State Succession and Commercial Obligations (2006).

400 Vienna Convention on Succession of States in respect of Treaties, 1978, 17 ILM 1488 (1978).

401 Practice under the ICSID Convention is scant. The Soviet Union never was a Contracting State. Czechoslovakia became a Contracting State in August 1992. After its disappearance, both the Czech (1993) and the Slovak Republics (1994) ratified the Convention as new parties. Yugoslavia had been a Contracting State since 1967. Bosnia and Herzegovina (1997), Croatia (1998), the Former Yugoslav Republic of Macedonia (1998) and Slovenia (1994) became parties after their independence. Serbia ratified the Convention in 2007. Indonesia has been a Contracting State since 1968. After its independence from Indonesia Timor-Leste became a Contracting State in 2002.

402 Oppenheim's International Law, 9th ed., p. 229.

403 See also Oppenheim's International Law, 9th ed., pp. 212, 217.

310 The situation is less clear where the new State ratifies the ICSID Convention subsequent to its independence or its merger with another State. Since consent to the Centre's jurisdiction may be given before the host State becomes a Contracting State (see paras. 214–223 *supra*), such a situation would not automatically invalidate consent. Consent to jurisdiction may be passed on to the new State regardless of whether it has succeeded the old State as a Contracting State to the Convention and indeed regardless of whether the predecessor State ever was a Contracting State.[404] It is suggested that in this case too the solution must lie in the question of territorial nexus. If the investment is linked to territory that is part of the new State, the presumption is that rights and duties arising from the investment relationship, including the consent to the Centre's jurisdiction, will pass to the successor State. Even where the agreement containing the consent clause is terminated, the consent clause may be severable from the agreement and may survive (see paras. 620–624 *infra*). This does not protect the investor entirely against the risk of losing access to ICSID. The continuing validity of consent cannot replace the requirement that the successor State be a Contracting State at the time proceedings are instituted.

b) Constituent Subdivisions or Agencies

311 The Convention opens the possibility that a constituent subdivision or agency of the host State rather than the host State itself becomes a party to ICSID proceedings (see paras. 230–267 *supra*). During the Convention's drafting the question was raised whether Contracting States could be made parties to ICSID proceedings if one of their constituent subdivisions or agencies had consented to jurisdiction. In particular, the concern was voiced that the host State might interfere with the investment activity through acts of public authority such as legislation and that the constituent subdivision or agency might then disclaim responsibility in ICSID proceedings. Mr. *Broches* denied that an action could be brought against the host State directly under these circumstances (History, Vol. II, pp. 410, 411, 564, 704, 858).

312 Therefore, consent to the Centre's jurisdiction given by a constituent subdivision or agency cannot simply be extended to the host State.[405] It would seem wise on the part of the investor to secure separate consent to ICSID's jurisdiction from the host State to cover the contingency of State interference in the investment relationship and to guard against the argument of *force majeure* by the constituent subdivision or agency. If this is not possible, the subdivision or agency may be persuaded to assume responsibility for acts of the host State that damage the investor.

313 The argument in favour of obtaining a separate consent to jurisdiction from the host State itself is strengthened by the possibility that the administrative structure, of which the subdivision or agency is a part, may easily be changed. What happens

404 See the *obiter* remark in *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 2.27.
405 See also *Amerasinghe*, Jurisdiction Ratione Personae, p. 238. See also Institut de Droit International, Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, Art. 7, 63 Annuaire II 324, 330 (1989).

if responsibilities are shifted to other entities or if the original subdivision or agency is simply abolished or privatized? The idea that the host State should succeed to the jurisdictional obligations of a designated agency if the latter is abolished was brought up during the Convention's drafting but was not pursued (History, Vol. II, p. 867).

314 One way of dealing with the matter might simply be to leave it to the domestic law of the host State. But questions of the Centre's jurisdiction are not governed by the domestic law that may otherwise be applicable by virtue of Art. 42(1) of the Convention (see Art. 42, paras. 4–8). Even if the investment agreement is otherwise subject to the host State's domestic law, the consent agreement remains to be interpreted in the light of the Convention and of international law in general.[406]

315 Three arguments speak in favour of the assumption of jurisdictional rights and responsibilities by the host State if it abolishes its subdivisions or agencies or otherwise eliminates their procedural capacity under the ICSID Convention.[407] First, the subdivision or agency has acted on behalf of the host State. Designation is a matter of administrative convenience but is not designed to free the host State from its responsibilities. Second, the host State itself has brought about the change that has deprived the entity of its procedural capacity. It is the State that terminated the party status under the Convention to the possible detriment of the investor. Third, the last sentence of Art. 25(1) prohibits the unilateral withdrawal of consent (see paras. 596–634 *infra*). Withdrawal of consent may not be achieved through indirect means by dissolving the entity that has given consent without replacing it (see also para. 267 *supra*; paras. 612, 613 *infra*).

316 Nevertheless, it would be difficult to argue that if the host State abolishes or privatizes a constituent subdivision or agency, it automatically succeeds in that entity's jurisdictional position under the Convention. Therefore, it seems wise to address the problem at the time of drafting the ICSID clause. The Contracting State may be induced to undertake that it would designate any future subdivision or agency that may replace the old one in its capacity as party to the investment agreement.[408] At the same time, provision must be made to transfer consent to the Centre's jurisdiction to the successor constituent subdivision or agency.[409] Better still would be an undertaking that the host State would substitute itself for the entity in case the latter is abolished or otherwise procedurally incapacitated. Ideally, the host State should be nominated in the consent agreement from the outset to avoid any problems of succession.

317 In *Klöckner* v. *Cameroon* (see paras. 260–261 *supra*), an agency of the host State had changed its legal character during the course of the investment. But the situation was entirely different from the one discussed here. The entity in question, SOCAME, had started out as a joint venture company with the majority

406 *Op. cit.*, p. 239.
407 See a similar line of argument by *Amerasinghe*, *op. cit.*, pp. 239/40.
408 *Delaume*, ICSID Arbitration, pp. 109/10; *Delaume*, How to Draft, p. 180.
409 See Clause VII of the 1968 Model Clauses, 7 ILM 1159, 1167/8 (1968).

of its shares in the hands of the investor. Later it came under the majority control of the Government. It was named as a co-respondent in the request for arbitration. Eventually, the Respondent host State agreed to designate it as a government agency in the sense of Art. 25(1) in the course of the proceedings.[410]

318 In *Repsol* v. *Petroecuador* the respondent was the successor of the entity originally designated to the Centre. Ecuador had in 1988 designated Corporacíon Estatal Petrolera Ecuatoriana, of which "Petroecuador" is the successor. The case proceeded against Petroecuador on the basis of that earlier designation.[411]

3. The Identification of the Party on the Investor's Side

a) Designation and Representation

319 As a consequence of the often complicated corporate structure of investors, parties that are not expressly named in an agreement containing the consent to the Centre's jurisdiction may seek access to ICSID proceedings. At times these agreements nominate companies that are subsidiaries of the true investors in the economic sense. In these and similar situations, ICSID tribunals are confronted with the problem of whether to restrict standing to the parties specifically named in the consent agreement or to extend it to companies controlling or associated with the designated parties.[412]

320 In *Holiday Inns* v. *Morocco*, the two American investors, Holiday Inns Inc. and Occidental Petroleum Corporation (O.P.C.), had decided to undertake a joint investment through two separate wholly-owned subsidiaries that were to be created for that purpose. When the Basic Agreement was signed with Morocco in December 1966, one of the subsidiaries was in the process of being established in Switzerland and the other one did not exist at all. The Government was fully aware of this situation. Nevertheless, the formal signatories to the Agreement, which contained the ICSID clause, were named as Holiday Inns S.A., Glarus, Switzerland (H.I. Glarus) and "a subsidiary of O.P.C.".[413] The creation of H.I. Glarus was eventually completed in February 1967.[414] A request for arbitration was brought to ICSID in December 1971, submitted jointly by H.I. Glarus and by O.P.C. According to the terms of the request, the two companies were acting in their own name and in the name and on behalf of several other companies.[415] Before the Tribunal, Morocco contested the jurisdiction with respect to H.I. Glarus

410 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 10, 11, 58.

411 *Repsol* v. *Petroecuador*, Award, 20 February 2004. Unpublished. See also *Burlington Resources, Inc. and others* v. *Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/08/5); *Perenco Ecuador Limited* v. *Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/08/6); *Repsol YPF Ecuador, S.A. and others* v. *Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/08/10); *City Oriente Limited* v. *Republic of Ecuador and Petroecuador* (ICSID Case No. ARB/06/21).

412 See also *Niggemann*, Zuständigkeitsprobleme, pp. 189/90; *Rand/Hornick/Friedland*, ICSID's Emerging Jurisprudence, p. 57.

413 *Lalive, P.*, The First "World Bank" Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, 51 British Year Book of International Law 123 at 128 (1980). Reproduced in 1 ICSID Reports 645.

414 At p. 142.

415 At p. 123.

on the ground that it did not yet exist on the date of the consent agreement.[416] In respect of the parent companies, Holiday Inns Inc. and O.P.C., jurisdiction was contested because they were not named as signatories in the agreement containing the arbitration clause.[417]

321 The Tribunal categorically rejected the Moroccan argument with respect to H.I. Glarus. It found that it is perfectly possible to make the entry into force of an arbitration clause dependent on the subsequent fulfilment of certain conditions such as the incorporation of the company named in the agreement. The date of consent was the day on which the conditions were definitely satisfied (see paras. 288 *supra*, 471, 472 *infra*).[418]

322 The question whether the parent companies enjoyed access to the Centre as unnamed parties to the agreement caused more difficulty and was discussed extensively.[419] The Government simply contended that there had been no consent in writing with regard to the parent companies and that consequently the arbitration clause was *res inter alios acta* for them.[420] The Claimants countered with a variety of arguments including the fact that the parent companies had acted as guarantors for their subsidiaries, that they had, in fact, performed several of their obligations under the Basic Agreement, had been assigned rights and duties under the contract and that the principles of good faith and effective interpretation led to the status of the parent companies as parties to the ICSID proceedings.[421]

323 The Tribunal rejected Morocco's objections and recognized that Holiday Inns Inc. and O.P.C. were parties even though they had not been named as such in the Basic Agreement. The Tribunal relied specifically on the fact that the parent companies had participated in the carrying out of the contract.[422] Therefore, they were entitled to invoke the arbitration clause. It also emphasized the flexibility of the contractual set-up in the designation of the various companies concerned and the need to consider the contractual relations between the parties as a whole.[423] The Tribunal said:

> 27. . . . to the extent that they [O.P.C. and H.I. Inc.] have carried out obligations contemplated by the Basic Agreement they are entitled to invoke the arbitration clause.
>
> 28. This conclusion is perfectly in keeping with the spirit of the Basic Agreement which obviously wanted to give the contracting companies a great amount of flexibility in the designation of the companies which would assume responsibility, . . .
>
> 30. In the opinion of the Tribunal the arbitration clause must be considered an inseparable part of the Basic Agreement. It follows, therefore, that any Party on whom rights and obligations under the Agreement have devolved is entitled to the benefits and subject to the burdens of the arbitration clause.[424]

416 At pp. 142, 144.
417 At pp. 147/8.
418 At p. 146.
419 At pp. 147–155.
420 At pp. 148, 150.
421 At pp. 148–154.
422 At p. 151.
423 At pp. 154/5.
424 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 1 July 1973. *Lalive*, The First "World Bank" Arbitration, pp. 149, 151.

324 In *Amco* v. *Indonesia*, a similar question arose with respect to standing before ICSID of a parent company that was not named in the consent agreement. In April 1968, Amco Asia, a company incorporated in Delaware (USA), signed a Lease and Management Agreement with an Indonesian company relating to the development of a hotel and office block in Indonesia. Indonesia had enacted a Foreign Capital Investment Law in 1967 offering tax concessions to foreign investors operating through corporations organized under Indonesian law and domiciled in Indonesia. In May 1968, Amco Asia applied for permission to establish an Indonesian company, PT Amco. The application contained a clause providing for ICSID arbitration of disputes between PT Amco and the Government of Indonesia. The application was approved in July 1968. The application and its approval constituted an agreement containing consent to the jurisdiction of the Centre. PT Amco was established in January 1969 whereupon Amco Asia's rights under the Lease and Management Contract were transferred to PT Amco.

325 In January 1981, Amco Asia, PT Amco and a third company (see paras. 339, 340 *infra*) filed a request for arbitration with the Centre. The Government argued that it had never consented to ICSID arbitration with respect to Amco Asia.[425] The Claimants contended that the wording of the ICSID clause in the application, which referred to "the company", also covered Amco Asia. The Tribunal did not accept this argument.[426] But it still found that it had jurisdiction with respect to Amco Asia. The Tribunal looked at the arbitration clause's object and purpose and said:

> The foreign investor was Amco Asia; PT Amco was but an instrumentality through which Amco Asia was to realize the investment.
>
> Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?[427]

326 The Tribunal referred to the decision in *Holiday Inns* (paras. 320–323 *supra*) but played down its authority, saying that the facts were largely different. The Tribunal did admit that it was not contrary to that precedent to apply an arbitration clause to a foreign investor who had filed and signed the application for investment containing the arbitration clause, even if in the literal formulation of that clause the foreign investor is not mentioned expressly. Whether Amco Asia itself had taken part in the investment operation was found to be irrelevant.[428]

327 *Klöckner* v. *Cameroon* involved a series of three contracts all containing ICSID clauses (see paras. 260–261, 317 *supra*). The first two were concluded by the foreign investor, *i.e.* Klöckner and the Government. The third, the Establishment Agreement of 1973, was concluded by SOCAME, a joint venture company, and the Government. At the time, Klöckner owned 51% of SOCAME's shares. When the arbitration was instituted in April 1981, control over SOCAME had passed from

425 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 4.
426 At paras. 10, 19/20.
427 At para. 24.
428 At para. 25.

the investor to the host State. In fact, SOCAME was subsequently designated as an agency of the Government and joined the proceedings in that capacity (see paras. 260, 317 *supra*).[429] Before the Tribunal, the question arose whether Klöckner, SOCAME's majority shareholder at the time of consent, could be substituted for SOCAME with respect to the Establishment Agreement. This time, it was the Government that sought to extend the jurisdiction over the investor in order to press its counterclaim.[430] Klöckner contested jurisdiction with respect to the Establishment Agreement arguing that, after all, it was an agreement between the two Respondents.[431] The Tribunal found that it had jurisdiction over Klöckner also in respect of the Establishment Agreement. It said:

> This Agreement, although formally signed by the Government and SOCAME, was in fact negotiated between the Government and Klöckner, . . . Moreover, it is undeniable that it was manifestly concluded in the interest of Klöckner, at a time when Klöckner was SOCAME's majority shareholder. The Establishment Agreement reflected the contractual relationship between a foreign investor, acting through a local company, and the host country of this foreign investment.[432]

Klöckner's request for arbitration was submitted not only on its own behalf but also on behalf of its Belgian and Netherlands subsidiaries.[433] Initially, Cameroon contested the participation of the subsidiaries. Eventually, the Tribunal and the parties agreed that the Applicant could act on behalf of its affiliates if it produced proper powers from them.[434]

328 In *AGIP* v. *Congo*, there was a 1974 agreement between the investor, AGIP SpA of Italy, and the Government governing their joint ownership of a locally incorporated company, AGIP (Brazzaville) SA. Each side was to own 50%. The agreement contained an ICSID arbitration clause. Arbitration was instituted in October 1977 by AGIP SpA. The Claimant purported to act also on behalf of another company, Hydrocarbons of Switzerland, since 10% of the investor's shares belonged to that company. Hydrocarbons was not a party to the 1974 agreement but AGIP SpA invoked a tacit mandate given to it by Hydrocarbons at the time of the agreement of which the Government would have been aware. The Tribunal rejected the idea of a tacit mandate, holding that it could not give rise to a direct obligation owed by the Government towards Hydrocarbons. But the Tribunal found that Hydrocarbons, though not a party to the proceedings, was a third party beneficiary of the agreement in the sense of Art. 1121 of the French Civil Code[435] which was applicable by virtue of a choice of law clause in the agreement[436] (see Art. 42, para. 33). Therefore, AGIP SpA had the capacity "both as a matter of substance and as regards competence to bring an action before the Tribunal in favour of Hydrocarbons".[437]

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429 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9, 11.
430 At p. 14. 431 At p. 15.
432 At p. 17. 433 At p. 10.
434 News from ICSID, Vol. 1/2, p. 9 (1984).
435 *AGIP* v. *Congo*, Award, 30 November 1979, para. 93.
436 At para. 45. 437 At para. 94.

329 These cases show that the tribunals take a realistic attitude when identifying the party on the investor's side.[438] They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary. The operation of ICSID clauses will not be frustrated through a narrow interpretation of the investor's identity. What matters is that the parent company acts in the preparation and possibly the implementation of the investment operation and that the ICSID clause is designed to work for its benefit.[439] This may work to the investor's advantage and detriment. Where companies other than those named in the consent agreement are not necessarily parties but are merely economically associated with the investment or the investor, they will not be given standing in ICSID proceedings. But the parties before the tribunal may be given the right to represent their interests and to claim on their behalf.

330 In *Zhinvali* v. *Georgia* the Tribunal reached a different conclusion. In that case consent to ICSID's jurisdiction was based neither on a direct agreement between the parties nor on an applicable BIT. Rather, jurisdiction rested on Article 16(2) of Georgia's Investment Law of 1996. The Request for Arbitration had been filed solely by the Claimant but it was said to be also "submitted on behalf of" the Claimant's three shareholders. The Claimant described itself as a "consortium" of the three shareholding companies. The Tribunal had to decide whether the Claimant, a corporation established in Ireland, was entitled to assert claims on behalf of its shareholders for the purposes of Art. 25(1) of the Convention. The Respondent objected to the claims on their behalf "without those shareholders assuming the risk of becoming parties to this arbitration". The Tribunal found that there was no consortium agreement. The three companies were just shareholders in the Claimant.[440] Turning to the ICSID case law, the Tribunal distinguished the case before it from the cases discussed in this section above. After listing *Holiday Inns*, *AGIP*, *Amco* and *Klöckner* it said:

> The facts of these cases are different from those before this Tribunal because all four involved more than start-up costs in a failed transaction and because all four involved additional "consent" of the host Contracting State beyond that found in Article 16(2) of the 1996 Georgia Investment Law. Also, in three of the four cases, the question related to what entity or entities were proper *party* claimants under the relevant investment or consent agreement, and, in the fourth (the *AGIP* case), there was a combination of an investment agreement and an internal law provision that are *not* present in this case.[441]

331 The Tribunal found that the case before it did not lend itself to the conclusion expressed in the First Edition of this Commentary (see para. 329 *supra*).[442] The Tribunal said:

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438 The analysis of this issue in *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 6.01–6.34, is unclear and inconclusive.

439 For a critical evaluation of the "group enterprise" theory see *Tupman*, Case Studies, pp. 836–838.

440 *Zhinvali* v. *Georgia*, Award, 24 January 2003, paras. 392–395.

441 At para. 401. Italics original.

442 At para. 402.

> In this case, there is only one "precisely designated" Claimant Party and that is ZDL. There are no "Others" as co-claimant parties as was so in three of the referenced cases cited above in the Schreuer Commentary. And neither the ICSID Convention nor the ICSID Arbitration Rules contain any express provision permitting parties to assert claims on behalf of non-parties. This omission, and the case precedents previously cited, therefore, support the proposition that any such right of a complaining company requires the agreement or "consent" of the respondent Contracting State.[443]

332 The Tribunal found added authority in the fact that two of the three shareholders were incorporated in the United States and were thus covered by the US-Georgia BIT.[444]

333 The position can be different again in investment treaty arbitration. A national of one State party to a BIT generally may not bring claims on behalf of nationals of non-parties.[445]

334 This point was upheld in *Impregilo* v. *Pakistan*. The case was based on the BIT between Italy and Pakistan. The Claimant sought to advance claims also on behalf of its partners in an unincorporated joint venture, who did not have Italian nationality. The Tribunal rejected this attempt.[446] The Claimant was not permitted to bring a claim under the Italy-Pakistan BIT on behalf of its non-Italian partners in the joint venture. The fact that the Claimant was authorized by the joint venture agreement to represent them was irrelevant as "the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party".[447] The Tribunal said:

> The fact that Impregilo may be empowered to advance claims on behalf of its partners is an internal contractual matter between the participants of the Joint Venture. It cannot, of itself, impact upon the scope of Pakistan's consent as expressed in the BIT. . . . If this were not so, any party would be at liberty to conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT.[448]

335 The diverse solutions adopted by tribunals indicate that it may be wise to take the precaution of drafting consent clauses appropriately. Whenever possible, parent companies, holders of controlling interests or partners should be included among those who are granted party status. In doing so, it should be borne in mind that the extension of jurisdiction *ratione personae* will only be effective if the parties in question fulfil the Convention's consent and nationality requirements.

b) Assignment and Succession

336 A somewhat different situation arises where, in the course of the investment operation, parts or all of the investor's rights and duties are transferred to an entity that was not a party to the original agreement with the host State. This new investor

443 At para. 403.
444 At para. 404.
445 See also *Fireman's Fund* v. *Mexico* (AF), Award, 17 July 2006, paras. 138–140.
446 *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 114–155.
447 At para. 136.
448 At para. 151.

may, but need not, be affiliated with the original party. The question arises whether the successor to the original investor's rights and duties will also succeed to the status under an ICSID consent clause and may become a party to proceedings before the Centre.[449]

337 In *Holiday Inns* v. *Morocco*, the problem of identifying the proper parties on the investor's side was not restricted to the parent companies and the subsidiaries at the time of consent (see paras. 320–323 *supra*). The Basic Agreement of December 1966 contained a provision that reserved the right of the foreign partners to assign at any time "to any affiliated corporation they may jointly own or designate" or "to separate corporations or affiliates" their rights and duties under the contract.[450] In order to facilitate the project and upon the Government's specific requests, four local companies (the H.I.S.A. companies) were established and incorporated.[451] No attempt was made to confirm, extend or modify the original consent to ICSID arbitration with respect to the four new companies.[452]

338 The request for arbitration was made also in the name of the four H.I.S.A. companies.[453] The Government objected to the Tribunal's jurisdiction with regard to the H.I.S.A. companies on a number of grounds: it had never agreed to treat them as "nationals of another Contracting State" in the sense of Art. 25(2)(b); at the time of the execution of the Basic Agreement, the four companies were not yet in existence and could, consequently, not rely on its arbitration clause; the rights under the Basic Agreement had never been assigned to them.[454] The Claimants contended that the Government's agreement to treat the four H.I.S.A. companies as nationals of another Contracting State and the extension of the Centre's jurisdiction to them had been given implicitly. The Tribunal held that "the H.I.S.A. companies cannot be parties to the present proceedings before ICSID". It found that the four companies did not meet the Convention's nationality requirements under Art. 25(2)(b) since the Government had not agreed to treat them as nationals of another Contracting State. An implied agreement would only be acceptable in very specific circumstances, which were not present[455] (see also paras. 778, 779 *infra*).

339 In *Amco* v. *Indonesia* too, the problem of identifying the proper parties on the investor's side was not confined to the relationship between parent and subsidiary at the time of consent (see paras. 324–326 *supra*). Some years after the original consent agreement and after the establishment of the local subsidiary, PT Amco, a written application was made in April 1972 by PT Amco to the Indonesian authorities requesting permission for the transfer of a portion of the shares held by Amco Asia to Pan American Development Ltd., a Hong Kong corporation. Written permission was given by the Government but the question of ICSID's

449 See *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 77/8 (1974); *Delaume*, Le Centre International, pp. 796/7; *Delaume*, Transnational Contracts, Ch. XV, pp. 24–26.
450 *Lalive*, The First "World Bank" Arbitration, p. 127.
451 At pp. 129, 140/1.
452 At p. 138.
453 At pp. 123, 137.
454 At p. 139.
455 At pp. 141/2.

jurisdiction was not mentioned at the time. The request for arbitration in January 1981 was also made by Pan American. The Government contested jurisdiction with respect to Pan American arguing that there was no consent to the jurisdiction of the Centre.[456] In the Government's view, the permission to the transfer of shares did not amount to an express consent to ICSID arbitration with Pan American.[457] The Tribunal found otherwise:

> . . . the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in PT Amco, and *may* be transferred with those shares. To be sure, for such a transfer to be effective, the government of the host country must approve it, which approval has as its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision.
>
> Such approval having been given in the instant case, it constitutes, together with Amco Asia's Request to transfer the shares, the agreement in writing to submit to ICSID arbitration the disputes with the transferee, requested by the Convention (Article 25).[458]

340 The Tribunal added that the partial transfer of shares and the consequent acquisition of party status by Pan American did not alter Amco Asia's right to invoke the arbitration clause. Whether or not the block of shares transferred to Pan American was a controlling one was irrelevant:

> . . . the right to invoke the arbitration clause is transferred with the transferred shares, whether or not the same constitute a controlling block, being it understood, once again, that for such transfer of the right to take place, the government's approval is indispensable.[459]

341 The question of jurisdiction over the Claimant re-emerged in *Amco* v. *Indonesia* at a much later stage and under entirely different circumstances. After the first award in the case had been partly annulled,[460] the case was resubmitted to a new Tribunal in May 1987. Before the new Tribunal, Indonesia objected to the jurisdiction *ratione personae* over Amco Asia since the company had been dissolved under the laws of Delaware in December 1984, approximately one month after the rendering of the original Award. A different company, bearing the name Amco Asia Corporation, was then incorporated allegedly "for the sole purpose of creating the semblance of its status on a claimant".[461] Amco responded that it was not suggested that the newly incorporated corporation was a claimant. Rather, the old company, Amco Asia, continued to exist under the law of Delaware for purposes of the arbitration. The Tribunal found that the legal status and capacity

456 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 4.
457 At para. 27. 458 At para. 31. Emphasis original.
459 At para. 32. See also *Delaume*, ICSID Arbitration, pp. 115/6; *Bliesener*, La compétence du CIRDI, pp. 125/6; *Sornarajah, M.*, ICSID Involvement in Asian Foreign Investment Disputes: The AMCO and AAPL Cases, 4 Asian Yearbook of International Law 69, 75/6 (1994).
460 *Amco* v. *Indonesia*, Decision on Annulment, 16 May 1986.
461 *Amco* v. *Indonesia*, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 561.

of a company was determined by the law of the State of incorporation (see Art. 42, para. 158). It determined that Delaware corporation law allows the continuation in existence of a dissolved corporation in respect of a proceeding begun by or against it prior to or within three years of its dissolution. Therefore, the arbitration was within the time limits of Delaware law whether the proceedings were deemed to have started with the original request for arbitration in January 1981 or with the request for resubmission in May 1987.[462]

342 In *LETCO* v. *Liberia*, a 1970 Concession Agreement between LETCO, a Liberian incorporated company controlled by French nationals, and the Government provided for ICSID arbitration. When a request for arbitration was submitted by LETCO in 1983, it was made in its own name and in the name of its subsidiary LLIC. The Tribunal declined jurisdiction over LLIC, noting its separate juridical personality and the absence of an ICSID arbitration agreement between LLIC and Liberia.[463] Nevertheless, the Award on the merits included as damages amounts related to the investment made by LETCO in its subsidiary LLIC. This resulted from the fact that LETCO created and capitalized LLIC pursuant to the requirements of the 1970 Concession Agreement. Whether these requirements were carried out directly by LETCO or by means of the creation of a separate subsidiary was irrelevant.[464] The report fails to indicate whether the Government had played any part in the subsidiary's establishment that could have been interpreted as an implicit extension of consent to jurisdiction. Nor is there any indication as to whether the nationality requirements under Art. 25(2)(b) were satisfied with respect to LLIC.

343 Succession to rights as a consequence of corporate restructuring that does not affect the nationality of the investor has not led to difficulties with the standing of the investor in ICSID proceedings.[465] In *Noble Energy* v. *Ecuador*, an Investment Agreement containing an ICSID arbitration clause was concluded between Samedan and Ecuador. Samedan was a wholly owned subsidiary of Noble Energy. Samedan was subsequently absorbed by Noble Energy which succeeded to all its rights and obligations. Under the terms of the Investment Agreement, it applied to "successors, assigns and designees".[466] The record did not show an authorization, registration or notification of the merger. The Tribunal held that Noble Energy was allowed to rely on the Investment Agreement to establish ICSID's jurisdiction.[467] It said:

462 At pp. 561/2.
463 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 353/4.
464 *LETCO* v. *Liberia*, Award, 31 March 1986, 2 ICSID Reports 346, 348, 374.
465 In *LESI & Astaldi* v. *Algeria*, Decision on Jurisdiction, 12 July 2006, para. 93, the Tribunal found that the absorbing company was entitled to file the claim in its own name even though the host State did not consent to the absorption. In *Tokios Tokelès* v. *Ukraine*, Award, 26 July 2007, para. 111, the Tribunal found that the transfer of assets from one subsidiary of the investor to another did not affect jurisdiction.
466 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 12, 99.
467 At paras. 105, 109.

> When a parent absorbs its subsidiary and thus becomes formally the investor in the latter's place, there is no real change in the "investor" from the State's perspective. No previously unknown entity has entered into the contractual relationship. The only real change is a shortening of the corporate chain of ownership, which should not impact the State in any way. This is especially true here where the nationality of the parent and subsidiary is the same.[468]

344 A contractual solution to the problem of a transfer of consent to an assignee is more difficult in situations where there are no direct contractual arrangements between the investor and the host State. This is likely where consent is based on legislation or on a treaty (see paras. 390–463 *infra*). The institution of ICSID proceedings may well be the investor's first direct contact with the host State.

345 In *SPP* v. *Egypt*, jurisdiction was not based on an agreement between the investor and the host State but on Egyptian legislation (see paras. 400–404 *infra*). Therefore, the question was not whether a party to an agreement containing consent to jurisdiction could be substituted by another party. Rather, the question was whether a subsidiary of the foreign investor enjoyed the status of an authorized investor under the domestic legislation offering consent to the Centre's jurisdiction. In 1974, agreements were drawn up between SPP, a Hong Kong company, and Egypt under which a joint venture company was to be established for the purpose of carrying out the investment project. One of the agreements provided that SPP would incorporate a holding company to own its shareholding in the joint venture and that SPP had the right to assign its rights and obligations to the new company.[469] Thereupon, SPP incorporated a subsidiary company, SPP(ME), which held SPP's shares in the joint venture.

346 In August 1984, SPP(ME) filed a request for arbitration with ICSID. The Tribunal was constituted in December 1984. During the hearings on jurisdiction, the Parties advised the Centre in July 1985 that SPP, the parent of SPP(ME), had been joined as claimant in the proceedings.[470] This notification was accepted by the Tribunal but the Dissenting Opinion criticized it as being at odds with the formalities for the institution of proceedings.[471]

347 In the proceedings on the merits, Egypt raised the objection that SPP(ME) did not have the status of an approved investor under the Egyptian law providing for ICSID arbitration. The authorization granted to the parent company, SPP, was never extended or transferred to SPP(ME). The Claimants argued that the Egyptian authorities had, in fact, approved the substitution of SPP(ME) for SPP and that it was SPP(ME) that made the investment and implemented the joint venture.[472] The Tribunal examined the details of SPP(ME)'s incorporation and the establishment

468 At para. 107. *Cf.* also *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, para. 111, where the Tribunal found that the transfer of assets from one subsidiary of the investor to another did not affect jurisdiction.
469 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 23.
470 At para. 14.
471 Dissenting Opinion, 14 April 1988, para. 3.
472 *SPP* v. *Egypt*, Award, 20 May 1992, paras. 134–136.

of the joint venture and concluded that the substitution of SPP(ME) for SPP was not only known to, but had also been approved by, the Egyptian authorities. Therefore, SPP(ME) was an investor entitled to avail itself of the ICSID clause in the Egyptian law.[473]

348 The Claimants took the view that if SPP(ME)'s status as a party was contested, then SPP could advance the claim in its own name since it had been joined to the proceedings by agreement of the parties (see para. 346 *supra*). This met with another objection: SPP had not presented any claims in its own name in the written memorials. Rule 40(2) of the Arbitration Rules provides that, in principle, an incidental or additional claim may be presented not later than in the reply. Therefore, the Tribunal should find SPP's claims, put forward in subsequent oral arguments, belated and inadmissible. The Tribunal refused to accept this argument. SPP's claim was neither "incidental" nor "additional". There was nothing in the record to suggest that SPP had ever claimed anything different from SPP(ME). Rather, SPP(ME) and SPP had claimed jointly ever since SPP was joined in the proceedings.[474]

349 In *Fedax* v. *Venezuela* (see paras. 88, 149, 191 *supra*), the Government had in 1988 issued promissory notes to a third party. The third party subsequently transferred these promissory notes by way of endorsements to the Claimant. The promissory notes explicitly allowed their endorsement to subsequent holders. The Claimant, a company of Netherlands nationality, instituted proceedings on the basis of the bilateral investment treaty between the Netherlands and Venezuela. The Tribunal, confirming its competence, noted that the promissory notes were negotiable instruments and that the Respondent foresaw the possibility that they would be transferred. The investor would change with every endorsement but the investment itself would remain constant.[475]

350 It is neither illegal nor improper for an investor of one nationality to establish a new entity in a jurisdiction perceived to provide a beneficial regulatory and legal environment, including the availability of an investment treaty, and assign to it the benefit of a foreign investment.[476] It is rather common for investors to structure their investments in ways that benefit from treaty and ICSID protection, thereby making use of the relative flexibility of nationality requirements in the ICSID Convention and the breadth of coverage in investment treaties. But the readiness of tribunals to accept arrangements designed to attract ICSID's jurisdiction is not unlimited. In particular, tribunals have looked with disfavour upon situations in which the investor sought to transfer an existing claim from a claimant that did not fulfil the Convention's nationality requirements to another who did.

351 One example is *Banro* v. *DR Congo*, which arose out of an investment agreement concluded between a Canadian company, Banro Resource, and the Democratic

473 At paras. 138–144. See also the Dissenting Opinion at para. 2.
474 *SPP* v. *Egypt*, Award, 20 May 1992, para. 149.
475 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, paras. 18–19, 37–40.
476 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 330.

Republic of Congo and containing an ICSID consent clause. When a dispute arose, Banro Resource transferred the investment to Banro American, its US affiliate. Banro American was not party to the investment agreement. Nine days after the transfer, Banro American instituted ICSID arbitration. Canada, unlike the United States, was not a party to the Convention either at the date of the consent to arbitration or at the time of the Request for Arbitration. The Tribunal found that Banro Resource was not a "national of another Contracting State". There was therefore never a valid agreement to submit a dispute to ICSID arbitration. As a consequence, the Tribunal held that Banro Resource could not effectively assign its claim to an American subsidiary that had not entered into an arbitration agreement with the respondent State in order to bypass this fundamental defect of jurisdiction.[477]

352 A similar example is *Mihaly* v. *Sri Lanka*, a case brought on the basis of the United States-Sri Lanka BIT. The case concerned, in the words of the Respondent:

> . . . a claim by a Canadian Company, allegedly assigned to this US Claimant but without Sri Lanka's consent, for reimbursement of expenditures made pursuing a possible investment in a proposed power project in Sri Lanka that never happened.[478]

353 The Tribunal noted that the investor behind the project was a Canadian corporation, yet the designated Claimant was a United States corporation to which the former had purported to assign its claim. In the alternative, the Claimant said there was a partnership agreement between it and the Canadian company. The Tribunal did not find any evidence of a legal partnership.

354 The Tribunal held that the Claimant could not bring a claim in respect of a right allegedly assigned to it by its Canadian affiliate. To allow such an assignment to operate in favour of creating ICSID jurisdiction where it would not otherwise exist would defeat the object and purpose of the Convention, as well as the sanctity of the privity of international agreements not intended to create rights and obligations for non-Convention States or their nationals. As the Tribunal explained:

> It follows that as neither Canada nor Mihaly (Canada) could bring any claim under the ICSID Convention, whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment with or without, and especially without, the express consent of Sri Lanka, on the ground that *nemo dat quod non habet* or *nemo potiorem potest transfere quam ipse habet*. That is, no one could transfer a better title than what he really has. Thus, if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)'s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to Mihaly (USA). To allow such an assignment

477 *Banro* v. *DR Congo*, Award, 1 September 2000. Only excerpts of the Award have been published: 17 ICSID Review – FILJ 380 (2002). The case is discussed in *Tokios Tokelès* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 58–61. See also the discussion in *Cremades, B. M./Cairns, D. J. A.*, The Brave New World of Global Arbitration, 3 The Journal of World Investment 173, 200 (2002).

478 *Mihaly* v. *Sri Lanka*, Award, 15 March 2002, para. 11.

> to operate in favour of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-Parties. Accordingly, a Canadian claim which was not recoverable, nor compensable or indeed capable of being invoked before ICSID could not have been admissible or able to be entertained under the guise of its assignment to the US Claimant. A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action . . .[479]

355 *Banro* and *Mihaly* suggest that an investor of a non-Contracting State is not capable of assigning an existing claim to an entity having the nationality of a Contracting State in order to attract ICSID jurisdiction.

356 Changes in the ownership of the investment, with or without a change of nationality, after the institution of proceedings are immaterial for ICSID jurisdiction[480] (see paras. 35–40 *supra*; para. 373 *infra*).

357 In *Vivendi* v. *Argentina*, the original Claimant had been CGE, which subsequently changed its name to Vivendi S.A. during the course of the ICSID proceedings. Vivendi S.A. then merged with several other companies to form Vivendi Universal. Vivendi Universal continued to hold the majority stake in the second named Claimant, CAA. The Tribunal rejected Argentina's argument that there was a change of corporate ownership of CAA, and confirmed Vivendi Universal's standing. The Tribunal also accepted that Vivendi Universal was the successor to CGE and as such a proper Claimant.[481]

358 In *El Paso* v. *Argentina* the Claimant sold its shares in the local companies shortly after the institution of proceedings.[482] Argentina argued that, as a consequence, El Paso had lost its *ius standi*.[483] The Tribunal found that an examination of the BIT, of the ICSID Convention and of the case-law revealed that there is no rule of continuous ownership of the investment. The decisive point was that by the time the claim was registered El Paso still owned the investment.[484]

359 In *Enron* v. *Argentina*, long after the institution of the proceedings, the Claimants sold most of their holding in the local company to another investor together with a right to a further purchase of the balance, thus effectively withdrawing from their investment.[485] The Tribunal held that jurisdictional standing was determined by reference to the date on which the proceedings were instituted and that jurisdiction was not altered by later transactions. It also noted that the sales transaction expressly safeguarded the Claimants' rights in the litigation.[486] The Tribunal said:

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479 At para. 24.
480 See also *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 31; *EnCana* v. *Ecuador* (UNCITRAL), Award, 3 February 2006, 45 ILM 901 (2006), paras. 123, 126; *National Grid* v. *Argentina* (UNCITRAL), Decision on Jurisdiction, 20 June 2006, paras. 95–100.
481 *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, paras. 82, 85, 86.
482 *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 130.
483 *Ibid.*, para. 117.
484 *Ibid.*, paras. 135/6.
485 *Enron* v. *Argentina*, Award, 22 May 2007, para. 192.
486 *Ibid.*, paras. 196–198.

> . . . the Tribunal wishes to recall that the disposal of Enron's participation in TGS does not affect its jurisdiction to decide in this case. As discussed above, ICSID jurisdiction is determined on the date the arbitration is instituted and subsequent changes in their ownership of TGS does not affect jurisdiction.[487]

360 It follows from this consistent line of cases that a disposal or transfer of assets that form the basis of a claim in investment arbitration subsequent to the institution of proceedings does not affect the standing of the original claimant.

361 These cases indicate that ICSID tribunals have been flexible in extending or preserving party status to successors in interest. At the same time there is also a certain caution against an uncontrolled extension of jurisdiction evident in *Banro* v. *DR Congo* and *Mihaly* v. *Sri Lanka*. Opportunistic assignments designed to bring an existing dispute within the scope of ICSID's jurisdiction will not be accepted.

362 If the host State is aware of and agrees to the assignment of rights and duties, the approval of the extension of jurisdiction *ratione personae* to the successor will be assumed. If the host State is unaware of an assignment or has resisted succession, it is less likely that a tribunal will decide that party status under the Convention has been transferred. If the successor to rights and obligations is closely affiliated to the party named in the consent agreement, either as a parent company or as a subsidiary, the standards will be less stringent.

363 It seems wise to make early provision for the contingency of a later succession.[488] In doing so, it should be kept in mind that any successor must satisfy the Convention's nationality requirements if the transfer of standing is to be valid. The 1968 Model Clauses offered a clause for the transfer of jurisdictional rights on both the investor's side and in respect of the host State's constituent subdivisions or agencies.[489] *Delaume* has suggested a simpler clause in the following terms:

> It is hereby agreed that the consent to the jurisdiction of the Centre shall equally bind any assignee to . . . to the extent that the Centre can assume jurisdiction over a dispute between such assignee and the other party, and that neither party to this Agreement shall, without the written consent of the other, transfer its interest in this Agreement to an assignee with respect to whom the Centre could not exercise such jurisdiction.[490]

Even if no advance arrangements for the succession to jurisdictional rights have been made, it is still possible to clarify the situation at the time of the assignment. The authorization by the host State of a transfer of interests arising from the investment should specifically include the arbitration clause. At that point, the assignee's nationality under the Convention can be determined and possibly rectified by way of an agreement under Art. 25(2)(b).

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487 *Ibid.*, para. 396.
488 *Amerasinghe*, Submissions to the Jurisdiction, pp. 230/1.
489 Clause VII, 7 ILM 1159, 1167/8 (1968). The current Model Clauses do not provide for this contingency. See also the 1982 Participation Agreement between New Zealand and Mobil Oil NZ Ltd., Art. 7.4, 4 ICSID Reports 123.
490 *Delaume*, ICSID Arbitration, p. 116.

4. Subrogation

364 A special case of assignment and succession arises where the investor has received an indemnity under an insurance claim. Most industrialized countries and some developing countries operate investment insurance schemes protecting their nationals against political risks such as expropriation, currency exchange restrictions and civil strife. In addition, there are multilateral investment programmes such as the Multilateral Investment Guarantee Agency (MIGA)[491] and the Inter-Arab Investment Guarantee Corporation. Under these national and international investment insurance systems the insured investor's claim against the host State is assigned to the insurer upon payment of the claim arising from the insurance. This process is called subrogation and is an accepted principle of insurance law in general. The insurer succeeds to all the rights of the beneficiary who has received compensation under the insurance contract. This result is achieved either under the terms of the insurance contract or by virtue of the operation of law. In the context of investment, it is important that the host State agrees to the subrogation. This is most readily achieved through a BIT between the host State and the investor's State of nationality. Many BITs contain subrogation clauses of this kind.[492]

365 If the insurer succeeds to all of the investor's rights upon compensating him or her, the question arises whether the succession extends to access to dispute settlement by the Centre. In other words, can a State, a State agency administering the investment programme, or an international investment insurance organization become party to ICSID proceedings after having compensated the investor? The answer is clearly no.[493] There are three main reasons for this denial of party status: 1. The Convention provides for the settlement of disputes between States and nationals of other States. The clear wording of Art. 25(1) cannot be re-interpreted to cover disputes involving States, State agencies or international organizations on the investor's side.[494]

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491 See Convention on the Establishment of the Multilateral Investment Guarantee Agency, 11 October 1985, 1 ICSID Review – FILJ 145 (1986). See also *Shihata, I. F. I.*, MIGA and Foreign Investments: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency (1988); *Ziegler, A. R./Gratton, L.-P.*, Investment Insurance, *in*: The Oxford Handbook of International Investment Law (*Muchlinski, P./Ortino, F./Schreuer, C.* eds.) 524 (2008).

492 See *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 156–160; *Parra*, Provisions on the Settlement, p. 342.

493 See also *Albrecht, W. E.*, Some Legal Questions Concerning the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 12 St. Louis University Law Journal 679, 683 (1968); *Amerasinghe*, The Jurisdiction of the International Centre, pp. 194–196; *Broches, A.*, La Convention et L'Assurance-Investissement: Le Problème dit de la Subrogation, *in*: Investissements Etrangers et Arbitrage entre Etats et Personnes Privées: La Convention B.I.R.D. du 18 Mars 1965 (*Centre de Recherche sur le Droit des Marchés et des Investissements internationaux de la Faculté de Droit* ed.) 161, 166 (1969); *Delaume*, Le Centre International, p. 798; *Rodley, N. S.*, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes, 4 Canadian Yearbook of International Law 43, 53/4 (1966); *Ziadé, N. G.*, ICSID Clauses in the Subrogation Context, News from ICSID, Vol. 7/2, p. 4 (1990).

494 See *Gallus, N./Peterson, L. E.*, International Investment Treaty Protection of NGOs, 22 Arbitration International 527 (2006).

2. One of the Convention's objectives is to depoliticize disputes. This objective is expressed most clearly in Art. 27 prohibiting diplomatic protection in favour of the investor.[495] This purpose would be defeated if the investor's State of nationality were to be given standing before the Centre.
3. The Convention's *travaux préparatoires* show unambiguously that a conscious decision was made to exclude States, State agencies or international organizations from access to ICSID proceedings on the investor's side.

366 The question of whether an investor's State of nationality should be given standing before the Centre after subrogation was discussed extensively in the course of the Convention's preparation. A provision to this effect was deleted at the last stage of the drafting and, consequently, does not appear in the Convention (History, Vol. I, p. 14). Therefore, the history of these discussions may be dealt with rather briefly here.[496] The Preliminary Draft contained a clause after the words "a national of another Contracting State" which added "(or that State when subrogated to the rights of its national)" (at p. 130). The First Draft contained a more elaborate clause that would have included subrogation by a "public international institution" (at pp. 130/2). After much debate and controversy, the Revised Draft offered an even more complicated formula for subrogation requiring the host State's separate consent to the substitution of the investor's home State for the investor and allowing the withdrawal of such consent in principle (at p. 132). After more lively debate, this draft was put before the Executive Directors of the World Bank. There, Mr. *Broches* explained that the deletion of the clause would only make it impossible for the investor's national State to appear before the Centre but would not affect the question of subrogation *per se*. Moreover, it would not prevent the indemnifying State from requiring that the investor pursue his remedies under the Convention even after he had been indemnified (History, Vol. II, p. 1017). Thereupon, a vote was taken. This revealed a large majority in favour of deleting the clause that would have allowed States to succeed in their nationals' procedural rights upon their indemnification under an investment insurance scheme (at p. 1018). All of this shows that the Convention's silence on this point, far from implying procedural standing for a State in case of subrogation, is actually the result of a conscious decision to deny party status to the national's home State.

367 The exclusion of an insurer that has been subrogated to the investor's rights from party status in ICSID proceedings applies only to public entities but not to private insurers. There is nothing to stop a private insurer from succeeding to the investor's procedural rights, provided the host State has consented to the

495 See also *Shihata, I. F. I.*, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Review – FILJ 1 (1986).

496 For detailed accounts of subrogation in the Convention's drafting history see *Amerasinghe*, Jurisdiction Ratione Personae, pp. 241/2; *Broches, A.*, La Convention et L'Assurance-Investissement: Le Problème dit de la Subrogation, *in*: Investissements Etrangers et Arbitrage entre Etats et Personnes Privées: La Convention B.I.R.D. du 18 Mars 1965 (*Centre de Recherche sur le Droit des Marchés et des Investissements internationaux de la Faculté de Droit* ed.) 161, 162–166 (1969); *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 161/2; *Masood*, Jurisdiction of International Centre, pp. 134–136.

assignment[497] (History, Vol. II, p. 404). The decisive criterion for distinguishing public entities from private insurance would not be their separate legal personality but whether they administer a public investment insurance system on behalf of and financially dependent on the investor's home State.

368 The denial of standing to the investor's home State and its agencies does not mean that ICSID is worthless in cases where the investor receives compensation under a national investment insurance scheme. It merely means that the claimant in ICSID proceedings would have to be the investor despite the insurance. One way to achieve this result would be to require the investor first to exhaust the remedies under ICSID before being eligible under the terms of the investment insurance. However, having to undertake lengthy arbitration proceedings first would dramatically reduce the attractiveness of the investment insurance to the investor.

369 A preferable alternative is to make payments under the insurance contract conditional on the subsequent pursuit of the claim before ICSID by the investor. Any proceeds from the proceedings before ICSID would then go towards reimbursing the national investment insurance system.[498] This arrangement may run into the problem that many legal systems will not allow the pursuit of claims by parties who are not the real parties in interest. Much would then depend on whether the question of subrogation and representation of the claim before ICSID is classified as a substantive question, to which the normal choice of law rules under Art. 42 would apply, or whether it is classified as a jurisdictional question, to which the Convention and international law in general would apply[499] (see also Art. 42, paras. 4–8).

370 This problem may be eliminated by an appropriate agreement with the host State permitting the pursuit of the claim by the investor even after he or she has received the indemnity from the insurance.[500] ICSID's Model Clauses suggest a formula for insertion into an agreement between the investor and the host State for this purpose.[501]

371 Since the investor's home State has the primary interest in such an arrangement, BITs are the obvious place for such a clause.[502] Under one version they provide

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497 *Broches, op. cit.* at p. 167; *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 78 (1974); *Ziadé, N. G.*, ICSID Clauses in the Subrogation Context, News from ICSID, Vol. 7/2, p. 4 (1990).

498 This is also the approach taken by MIGA. See *Ziadé, N. G., op. cit.*, p. 6.

499 See also *Broches, A.*, La Convention et L'Assurance-Investissement: Le Problème dit de la Subrogation, *in*: Investissements Etrangers et Arbitrage entre Etats et Personnes Privées: La Convention B.I.R.D. du 18 Mars 1965 (*Centre de Recherche sur le Droit des Marchés et des Investissements internationaux de la Faculté de Droit* ed.) 161, 168 (1969).

500 *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 78 (1974); *Langer, G.*, Das Weltbankübereinkommen zur Beilegung von Investitionsstreitigkeiten, 18 Recht der Internationalen Wirtschaft/Außenwirtschaftsdienst des Betriebs-Beraters 321, 324 (1972).

501 See Clause 8 of the 1993 Model Clauses, 4 ICSID Reports 363. See also Clause VIII of the 1968 Model Clauses, 7 ILM 1159, 1168 (1968); Clause IX of the 1981 Model Clauses, 1 ICSID Reports 203.

502 *Parra*, Provisions on the Settlement, p. 343; *Peters*, Dispute Settlement Arrangements, pp. 142/3.

that payment to the insured investor shall not affect his right to pursue ICSID proceedings.[503] Another version provides that the host State shall not raise the fact that the investor has been compensated as a defence.[504] The United Kingdom Model Agreement contains the following clause in Art. 8(3):

> The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.[505]

372 This is not the only possible approach to the procedural problem arising from subrogation. Some BITs provide for inter-state arbitration.[506] MIGA provides for *ad hoc* arbitration "guided" by the ICSID Arbitration Rules.[507]

373 In *CSOB* v. *Slovakia*, the assignment to the Claimant's home State was not on the basis of an insurance contract but the economic consequences were similar.[508] CSOB had agreed to assign its claims against the Respondent to the Czech Republic against a monetary consideration. Thereupon, the Slovak Republic argued that these assignments had transformed the Czech Republic rather than CSOB into the real party in interest. Since the Czech Republic could not step into the investor's shoes in ICSID arbitration (see para. 270 *supra*), the Respondent moved to have the claim dismissed. The Tribunal noted that the assignments had taken place after the registration of the Request for Arbitration. It rejected the Respondent's argument since standing in an international judicial forum for purposes of jurisdiction is determined by reference to the date on which the proceedings are instituted. The Tribunal added that even if it were to accept the contention that the Czech Republic had become the real party in interest it would not follow that there was no jurisdiction. It said:

> This conclusion is compelled by the consideration that absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party.[509]

In addition, the Claimant had not been deprived of an interest in the outcome of the case since the assignment was to become effective only after the conclusion

503 See *e.g.*, the France-Tunisia BIT (1972) Art. 3; the Benelux-Sri Lanka BIT (1982) Art. 8(2); and the France-Nigeria BIT (1990) Art. 9.

504 See *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 163/4; *Ziadé, N. G.*, ICSID Clauses in the Subrogation Context, News from ICSID, Vol. 7/2, pp. 5/6 (1990).

505 *Dolzer/Schreuer*, Principles of International Investment Law, pp. 380/1. See also Art. 11(3) of the German Model Agreement of 2005, *op. cit.*, p. 373; Art. 28(7) of the US Model Agreement of 2004, *op. cit.*, p. 410. See also the Paraguay-UK BIT (1981) Art. 8(1); the Bangladesh-US BIT (1986) Art. VII(4); the Barbados-UK BIT (1993) Art. 8(3); and the Armenia-US BIT (1992) Art. VI(7).

506 *Ziadé*, *op. cit.* at p. 6.

507 *Loc. cit.*

508 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 28–32.

509 At para. 32.

of the ICSID proceedings and the assignor remained entitled to a portion of the amount received by the assignee.[510]

I. ". . . consent in writing to submit to the Centre."

1. General Significance

374 Consent by both or all parties is an indispensable condition for the jurisdiction of the Centre. The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice. The last paragraph of the Preamble to the Convention makes this quite clear (see Preamble, paras. 35, 36).

375 During the Convention's drafting Mr. *Broches* was tireless in emphasizing that the use of the Centre's facilities would be voluntary and that participation in the Convention would not compel any State to submit disputes to the Centre (History, Vol. II, pp. 68, 69, 74, 77, 79, 82/3, 135/6, 241, 257, 258, 303, 334, 335, 464, 492, 563, 566). He had to overcome apprehensions of some developing countries' representatives who feared that the Convention's mere existence might lead to pressure on host States to give consent or that refusal to give consent might lead to "adverse inferences" (at pp. 259, 261, 470, 499, 501, 540, 541, 566). These fears were accommodated in part through the insertion of Art. 25(4) allowing States to state in advance which classes of disputes they would not consider submitting to the Centre (see paras. 921–941 *infra*).

376 The Report of the Executive Directors to the Convention describes consent as "the cornerstone of the jurisdiction of the Centre". *Delaume* has summarized the situation as follows:

> The scope of such a consent is within the discretion of the parties. In this connection, it should be noted that ratification of the ICSID Convention is, on the part of a Contracting State, only an expression of its willingness to make use of the ICSID machinery. As such, ratification does not constitute an obligation to use that machinery. That obligation can arise only after the State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or classes of disputes. In other words, the decision of a State to consent to ICSID arbitration is a matter of pure policy and it is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID.[511]

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

378 Consent must be obtained from both or all parties. Traditionally this would take place by way of a direct agreement between the host State and the investor (see paras. 382–389 *infra*). Consent may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted

510 *Loc. cit.*
511 *Delaume*, ICSID Arbitration, pp. 104/5.

by the investor (see paras. 392–463 *infra*). Nowadays the vast majority of cases are based on consent given in this indirect way. This phenomenon has been called arbitration without privity.[512] Here too the result is an agreement, although it is achieved indirectly and often without direct contact between the parties prior to the institution of proceedings. A unilateral act is insufficient (see paras. 416–426, 447–455 *infra*). Consent will be valid according to its own terms; that is, to the extent that disputes are covered by its scope (see paras. 513–539 *infra*). Consent to the jurisdiction of the Centre implies a submission to all relevant rules of the Convention, including the obligation to abide by an award, and to the Centre's rules and regulations.

2. Consent in Writing

379 The Convention's only formal requirement for consent is that it must be in writing. This condition was contained in all the Convention's drafts except the Preliminary Draft (History, Vol. I, pp. 110, 112, 116, 118). It was never the object of any controversy and was reiterated a number of times (History, Vol. II, pp. 402, 828, 833, 835, 836, 842, 879). Consent in writing will normally be communicated between the parties but there is no need to notify the Centre at the time of consent. A suggestion to this effect, made during the Convention's drafting (at p. 402), was not pursued. In fact, the Centre has no precise knowledge of the number and the contents of various consent clauses covering investments. But proof of consent in writing will be required at the time a request for conciliation or arbitration is made. Rule 2(2) of the Institution Rules provides that a request must be supported by documentation concerning the instruments recording consent and their dates.

380 The need to put consent into writing has not led to difficulties in practice, though ICSID tribunals have at times noted specifically that consent to the Centre's jurisdiction had been given in writing.[513] In *Holiday Inns* v. *Morocco*, the Government argued that there had been no consent in writing with the mother companies of the parties to the contract containing the consent clause (see paras. 320–323 *supra*). The argument was not accepted. There had been consent in writing, but the investor had not been identified in writing at the outset.[514] Also, in cases of succession, consent would be binding without the need for a renewed consent in writing (see paras. 336–363 *supra*).

381 Consent in writing must be explicit and not merely construed. In *Cable TV* v. *St. Kitts and Nevis*, the Respondent was not a party to the agreement containing the consent clause (see para. 249 *supra*). The Claimant argued that consent by

512 *Paulsson, J.*, Arbitration Without Privity, 10 ICSID Review – FILJ 232 (1995).

513 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 21; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 23; *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 350/1; *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, paras. 98, 100, 101; *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 26.

514 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 671.

the Respondent could be construed from the institution of proceedings by the Attorney-General of St. Kitts and Nevis against the Claimant in a domestic court of the Respondent. The purpose of the domestic court proceedings was to obtain an injunction to restrain the Claimant from raising its rates prior to the resolution of the dispute through ICSID arbitration (see Art. 26, para. 173). The Tribunal held that the references in the court documentation to the ICSID clause in the agreement were merely statements of fact and did not amount to consent by any person to ICSID jurisdiction.[515]

3. Consent through Direct Agreement between the Parties

a) Consent Recorded in a Single Instrument

382 The Convention leaves the parties a large measure of freedom in expressing their consent. An agreement between the parties recorded in a single instrument is the traditional way of expressing consent. More recently, this form of consent has been largely displaced by consent expressed through treaties and legislation. Consent through a direct agreement may be achieved through a compromissory clause in an investment agreement between the host State and the investor submitting future disputes arising from the investment operation to ICSID jurisdiction. It is also 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 (see para. 48 *supra*).

383 This principle was not uncontested during the Convention's drafting. The Working Paper and the Preliminary Draft contained a reference to "any existing or future dispute" (History, Vol. I, pp. 110, 112). The Preliminary Draft also referred to "a prior written undertaking" and "*ad hoc* submission of a dispute" as alternative forms of consent (at p. 112). The First Draft stated that consent "may be given either before or after the dispute has arisen" (at p. 116). Mr. *Broches* maintained throughout the drafting process that both forms of consent should be admissible (History, Vol. II, pp. 59, 77/8, 323, 336, 493, 506, 511, 566, 836) and was supported by some delegations (at pp. 833, 842). However, a number of delegates insisted that the only acceptable form of consent would be in respect of a dispute that had already arisen and that advance consent for future disputes should be excluded (at pp. 69, 334, 499, 501, 541, 829, 834, 836, 838, 839). No formal decision appears to have been taken on this point but the reference to consent before or after the emergence of the dispute disappeared from subsequent drafts (at p. 879) including the Revised Draft (History, Vol. I, p. 118) and does not appear in the Convention.

384 Nevertheless, it is clear that both forms of consent are covered by the Convention. The Report of the Executive Directors mentions both possibilities:

515 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 4.02–4.17.

> 24. . . . Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen . . .[516]

This view is supported by writers on the Convention[517] and by the practice under the Convention.[518] In fact, the majority of cases brought to ICSID arbitration under direct agreements between the parties are based on agreements containing a consent clause for future disputes.[519] Agreements to submit existing disputes to the Centre are rare.[520]

It is obvious that consent by both parties is much easier to obtain before the **385** outbreak of a disagreement. Therefore, it is important to give careful attention to the drafting of consent clauses when negotiating investment agreements. The Centre has developed a set of Model Clauses for the convenience of the parties to facilitate the drafting of consent clauses between them.[521] Apart from two basic submission clauses to cover consent in respect of future and existing disputes, the Model Clauses also offer clauses relating to the subject-matter of the dispute (see para. 129 *supra*; para. 515 *infra*), clauses relating to the parties (see paras. 257, 293 *supra*), clauses concerning the method of the tribunal's constitution, applicable law, other remedies, waiver of immunity from the execution of the

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516 1 ICSID Reports 28. See also *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 21, where the Tribunal explicitly approves this interpretation in the Executive Directors' Report.

517 *Amerasinghe*, The Jurisdiction of the International Centre, p. 171; *Broches*, The Convention, pp. 353/4; *Szasz*, The Investment Disputes Convention, p. 28.

518 For an early example see Art. 50 of the Long Term Convention of Establishment and Implementation between the Islamic Republic of Mauritania and Société des Mines de Mauritanie (S.O.M.I.N.A.) of 19 July 1967, 6 ILM 1085 (1967).

519 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 650; *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, paras. 12, 21; *Alcoa Minerals* v. *Jamaica*, Decision on Jurisdiction and Competence, 6 July 1975 – see: *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90, 93/4, 101 (1976); *Adriano Gardella* v. *Ivory Coast*, Award, 29 August 1977, para. 4.1; *AGIP* v. *Congo*, Award, 30 November 1979, para. 18; *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, para. 1.15; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 10; *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 10, 13; *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 23, Award, 25 February 1988, para. 4.02; *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 347, 350/1; *Atlantic Triton* v. *Guinea*, Award, 21 April 1986, para. 1; *Mobil Oil* v. *New Zealand*, Findings on Liability, Interpretation and Allied Issues, 4 May 1989, paras. 2.1.10, 2.7.6; *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 2; *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 10; *CDC* v. *Seychelles*, Award, 17 December 2003, para. 4; *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 2, 49, 58; *World Duty Free* v. *Kenya*, Award, 4 October 2006, para. 6; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 22, 23, 54, 55, 150.

520 See *Swiss Aluminium* v. *Iceland*, Order taking note of Discontinuance, 6 March 1985; *MINE* v. *Guinea*, Award, 6 January 1988, 4 ICSID Reports 67; *Santa Elena* v. *Costa Rica*, Award, 17 February 2000, para. 26.

521 Doc. ICSID/5/Rev. 2. The Model Clauses can be viewed at: http://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH.

award, procedural questions, division of costs and place of proceedings. There are also model clauses referring to the Additional Facility and to the designation of the Secretary-General as appointing authority of *ad hoc* arbitrators. The Model Clauses, as published, are merely offered as examples and the parties are free to adapt them to the specific circumstances of their relationship. They are useful not only as blueprints for actual contracts but also as a checklist for the various questions to be considered when submitting to ICSID.[522] The Model Clauses have undergone several revisions.[523]

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

> **Clause 1**
>
> The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").

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

> **Clause 2**
>
> The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following dispute arising out of the investment described below: . . .

b) Consent Based on an Investment Application

388 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.

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522 See esp. *Gaillard*, Some Notes on the Drafting; *Delaume*, How to Draft.

523 Earlier versions were published in 7 ILM 1159 (1968) and 1 ICSID Reports 197. The 1993 version is published in 4 ICSID Reports 357.

389 In *Amco* v. *Indonesia*, the investor had submitted an application to the Indonesian Foreign Investment Board to establish a locally incorporated company for the purpose of carrying out the investment operation. The application provided that later disagreements would be put before ICSID. The application was approved. Before the Tribunal, the Government accepted the validity of the consent clause in principle while disputing its applicability to the parties to the dispute and to the subject-matter.[524] The Tribunal said:

> . . . while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them.[525]

c) Consent by Reference to Another Legal Instrument

390 An agreement between the parties may record their consent to ICSID jurisdiction by reference to another legal instrument. In *CSOB* v. *Slovakia*, an agreement entered into between the parties to the dispute contained the clause "this agreement shall be governed by the laws of the Czech Republic and the [BIT between the Czech and Slovak Republics]". The Claimant contended that this constituted an incorporation by reference of consent to ICSID arbitration as provided for in the BIT. The Respondent argued that the clause was merely a choice-of-law provision. Moreover, the BIT had never entered into force (see para. 429 *infra*). The Tribunal carefully examined the drafting history of the agreement between the parties. It noted that the clause in question had replaced a clause in an earlier draft providing for domestic arbitration. In addition, the reference to the BIT had included the words "after it is ratified" in a later draft but these words were deleted in the final agreement. The Tribunal concluded that under these circumstances the parties by referring to the BIT had intended to incorporate the ICSID clause in the BIT into their agreement.[526]

391 In *Inceysa* v. *El Salvador* one of several bases of consent invoked by the Claimant was a clause in the contract between the parties submitting disputes arising under the contract to arbitration "in accordance with Salvadoran Law".[527] The Tribunal examined several pieces of legislation cited by the Claimant. It found that some of these, while referring to arbitration, contained no express reference to ICSID and could consequently not meet the requirement of consent under Article 25 of the Convention.[528] On the other hand, El Salvador's Investment Law provided for ICSID's jurisdiction for "controversies arising between foreign investors and the State regarding their investments in El Salvador". But the Tribunal

524 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 10, 11, 25.
525 At para. 23.
526 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 49–55.
527 *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 266–301.
528 At paras. 309–330.

denied jurisdiction because the Claimant did not enjoy the rights granted by the Investment Law since its "investment" did not meet the condition of legality[529] (see paras. 201 *supra*, 396, 397, 415, 521, 534 *infra*).

4. Consent through Host State Legislation

392 The possibility that a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation or through some other form of unilateral declaration was discussed repeatedly during the Convention's preparation. In response to several questions, Mr. *Broches* pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties (History, Vol. II, pp. 274/5). There was some concern that in view of a State's undisputed right to change its legislation this form of consent would be revocable at any time. Mr. *Broches* responded that this would depend upon the terms of the State's offer (at pp. 405/6). The investor's acceptance could be linked to the granting of an investment licence. But in the absence of a provision to this effect in the national legislation, it was arguable that until the investor had actually availed himself of the offer contained in the law, there would be no agreement to accept the Centre's jurisdiction (at pp. 410, 527). Also, in making a unilateral statement in an investment law, the host State could limit its undertaking to certain specified issues in connection with approved investments (at p. 506).

393 At one point, an Italian proposal was put forward to include a specific provision in the Convention to the effect that a State may make a declaration, contained in its legislation and officially notified to the Centre, whereby it submits to the Centre's jurisdiction (History, Vol. II, at p. 402). Mr. *Broches* was of the opinion that unilateral consent given through investment legislation was covered by the general provision on consent. This form of giving consent should not be singled out in order to avoid the impression that it would be the normal means of dealing with foreign investors (at pp. 405/6). Eventually, it was decided to explicitly mention in the comment to the Convention that a State may give its undertaking to have recourse to the Centre in legislation for the promotion of foreign investment (at p. 406). The Report of the Executive Directors to the Convention, after dealing with consent through a direct agreement between the parties (see para. 384 *supra*), says:

> 24. . . . Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.[530]

529 At paras. 258–264, 332.

530 1 ICSID Reports 28. The 1968 Model Clauses offer a formula for inclusion in national investment legislation and one for acceptance by the investor, 7 ILM 1163/4 (1968).

References to dispute settlement by the Centre in national investment legislation show a considerable measure of diversity.[531] Not all references amount to consent to jurisdiction or an offer to the investor to accept ICSID's jurisdiction. Therefore, the respective provisions in national laws must be studied carefully. Even then, their meaning is not always entirely clear.[532] **394**

a) Binding Offer of Consent by the Host State

Some national investment laws provide unequivocally for dispute settlement by ICSID. For instance, Art. 8(2) of the Albanian Law on Foreign Investment of 1993 states in part: **395**

> . . . 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 . . .[533]

The Tribunal in *Tradex* v. *Albania* found this formulation unambiguous.[534] But the limitation of the consent to matters relating to expropriation turned out to be decisive in that case (see paras. 524, 525, 538 *infra*).

In *Inceysa* v. *El Salvador* the Claimant relied, *inter alia*, on Article 15 of the El Salvador Investment Law which provides in relevant part: **396**

> In the case of controversies arising between foreign investors and the State regarding their investment in El Salvador, the investors may submit the controversy to:
>
> (a) . . . ICSID . . .
>
> (b) . . . the Additional Facility of ICSID; in those cases in which the foreign investor involved in the controversy is a national of a State that is not a contracting party to the ICSID Convention.[535]

The Tribunal concluded that this provision constituted a unilateral offer of consent to submit to the jurisdiction of the Centre to hear disputes regarding investments arising between El Salvador and an investor. However, in the particular case the Claimant was not entitled to the rights granted in the Investment Law because its "investment" did not meet the condition of legality[536] (see paras. 201, 391 *supra*, 415, 521, 534 *infra*). **397**

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531 For a bibliography on national investment codes, see 7 ICSID Review – FILJ 512 (1992). See also *Parra*, Provisions on the Settlement, pp. 290, 314 *et seq*.

532 See also *Delaume*, How to Draft, pp. 172/3; *Delaume*, Transnational Contracts, Ch. XV, pp. 10–12.

533 See *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 54. Similar provisions may be found in the legislation of Guinea, Article 28 of Ordinance No. 001/PRG/87 of 3 January 1987, which sets forth the Investment Code; Botswana, Sec. 11 of The Settlement of Investment Disputes (Convention) Act, 1970; Sri Lanka, Sec. 26(1) of the Greater Colombo Economic Commission Law, 1978; Togo, Art. 4 of Law No. 85–3 of 29 January 1985, which provides for readjustment of the Investment Code – see also News from ICSID, Vol. 3/2, p. 8 (1986); D.R. Congo, Art. 36 of the Investment Code, 2002. See also *Mitchell, P. H./Gittleman, R. M.*, The 1986 Zairian Investment Code: Analysis and Commentary, 2 ICSID Review – FILJ 122, 137 (1987).

534 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 63.

535 *Inceysa* v. *El Salvador*, Award, 2 August 2006, para. 331.

536 At para. 332.

398 A more common method to provide for settlement by the Centre is to include a reference to the Convention as one of several possible means of dispute settlement. The alternatives offered may include procedures expressly agreed to by the parties, procedures provided by bilateral investment treaties, the host State's domestic courts and non-ICSID arbitration. Some laws of this type specifically state that the State consents to ICSID's jurisdiction. Provisions to this effect may be found in the legislation of the Central African Republic[537] and of Côte d'Ivoire.[538]

399 Other provisions are not so clear, but it may still be inferred from them that they express the State's consent to ICSID's jurisdiction. Thus, national laws state that the foreign investor "shall be entitled to request" that the dispute be conclusively settled by one of several methods including the ICSID Convention,[539] or that the dispute "shall be settled" ("sera réglé") by one of these methods.[540]

400 A legislative provision of this kind was at the centre of the discussion on jurisdiction in *SPP* v. *Egypt*.[541] The Request for Arbitration was based on Art. 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone. Art. 8 provided in relevant part:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.[542]

401 Egypt, while admitting the theoretical possibility of advance consent through investment legislation, denied that it had done so in the particular piece of legislation.[543] Specifically, Egypt claimed that the clause referring to ICSID was not self-executing and required a separate implementing agreement with the investor. Also, the law offered several alternative methods of dispute settlement among which the parties had to choose in advance. Moreover, the Convention itself offers conciliation or arbitration as two possible alternatives (see paras. 26, 27 *supra*). Therefore, in Egypt's view, Law No. 43 was too ambiguous and equivocal to establish consent to ICSID arbitration.[544] Rather, it was intended only to

537 Art. 30 of the Investment Code, 1988. See also 4 ICSID Review – FILJ 167 (1989).
538 Art. 24 of the Investment Code, 1995.
539 Art. 45(1) of the Cameroon Investment Code, 1990.
540 Somalia, Art. 19 of the Foreign Investment Law, 1987; Tunisia, Art. 28 of the Law on the Encouragement of Investment in Tourism, 1986; Tunisia, Art. 41 of the Code of Industrial Investment, 1987; Chad, Art. 17(4) of the Décret No. 446/PR/MCI/87 fixant la procédure d'octroi des avantages du Code des Investissements, 1987; Georgia, Art. 16 of the Law on Promotion and Guarantees of Investment Activity, 1996; Kyrgyz Republic, Art. 18(2) of the Law on Investments, 2003; Benin, Art. 74 of the Code of Investments, 1990; Yemen, Art. 61 of the Investment Law, 2002; Burkina Faso, Art. 30 of the Investment Code, 1995.
541 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985.
542 At para. 70. See also 16 ILM 1476, 1479. The provision continues by providing that disputes may also be settled by *ad hoc* arbitration under Egyptian law. Law No. 43 of 1974 has since been replaced. See para. 410 *infra*.
543 At paras. 51, 52.
544 At paras. 70–73.

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.[545]

402 The Tribunal embarked upon a detailed grammatical analysis of the relevant text, including the Arabic original. This led it to conclude that the Arabic text mandated the submission of disputes to the various methods prescribed therein to the extent that such methods were applicable.[546] With respect to the question of priority among the various methods of dispute settlement, the Tribunal agreed with the Claimants' contention that there was a hierarchical relationship indicated by a movement from the more specific to the more general. Settlement under a bilateral investment treaty would be available only in the absence of an agreement between the parties, the most specific method. Settlement under the Convention, the most general method, would be available only in the absence of both other methods.[547]

403 The Tribunal also rejected Egypt's contention that the words "within the framework of the Convention" and "where such Convention applies" reserve the condition of a specific consent. If a special agreement was required, ICSID arbitration would be subsumed under the primary method of settlement listed there, namely "in a manner to be agreed upon with the investor". The Tribunal also rejected the idea that Art. 8 had the consequence only of informing potential investors of Egypt's willingness, in principle, to negotiate a consent agreement. There was nothing in the legislation requiring a further *ad hoc* manifestation of consent to the Centre's jurisdiction.[548] Similarly, the Tribunal was unconvinced by the argument that a State's entry into a bilateral investment treaty containing an ICSID clause implied that the ICSID remedy was not already available under domestic legislation.[549] The mandatory nature of the legislative provision was further confirmed by Egypt's official investment promotion literature.[550]

404 The Tribunal's conclusion was as follows:

> 116. On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law No. 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express "consent in writing" to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty.[551]

Since the parties had not agreed on another method of dispute resolution and since there was no applicable bilateral treaty in force, the Tribunal found "that Article 8 of Law No. 43 operates to confer jurisdiction upon the Centre with respect to the Parties' dispute".[552]

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545 Decision on Jurisdiction II, 14 April 1988, paras. 53, 73.
546 At paras. 74–82. See also the Dissenting Opinion at paras. 22–26.
547 At paras. 83–88.
548 At paras. 89–101. See also the Dissenting Opinion at para. 21.
549 At para. 110.
550 At paras. 112–115. See also the Dissenting Opinion at para. 29.
551 At para. 116.
552 At para. 117.

405 In a subsequent case, *Manufacturers Hanover Trust* v. *Egypt*,[553] jurisdiction was also based on Egypt's Law No. 43 of 1974. Although there is no published decision, it is known that the case had progressed beyond a jurisdictional decision before it was settled. It may be concluded that this Tribunal also found that Law No. 43 amounted to Egypt's consent to ICSID's jurisdiction.[554]

406 In *Zhinvali* v. *Georgia*, the Claimant relied on Article 16(2) of the Georgia Investment Law of 1996 which provides:

> 2. Disputes between a foreign investor and [a] governmental body, if the order of its resolution is not agreed between them, shall be settled at the court of Georgia or at . . . [ICSID]. Should [the] dispute not be considered in the . . . [ICSID] the foreign investor is entitled to refer a dispute to the . . . [Additional Facility] or to any international arbitration established in accordance with regulations provided by . . . UNCITRAL.[555]

407 The Respondent denied the existence of an expression of consent under this provision and relied on an earlier statute, the Concession Law of 1994, which refers disputes to domestic courts.[556]

408 The Tribunal accepted the Claimant's position that "the election between recourse to the Georgia courts or to an ICSID tribunal is solely for the Claimant to make".[557] The Tribunal concluded that the Investment Law, being later in time, took precedence over the Concession Law. Therefore, the reference to ICSID in Article 16(2) of the Investment Law constituted consent in writing by Georgia to the jurisdiction of ICSID.[558]

409 A number of legislative provisions providing for consent to ICSID's jurisdiction contain a separate clause referring to the Additional Facility (see paras. 9–13, 202–210, 224–226, 301 *supra*).[559] In all these legislative provisions, the Additional Facility is foreseen only if the investor does not meet the nationality requirements of Art. 25 of the Convention. Therefore, these provisions are designed to open access to the Centre for foreign investors whose home States are not yet Contracting States to the Convention (see paras. 10, 11, 300, 301 *supra*).

b) Prospect of Future Consent

410 Another type of legislative provision referring to the settlement of disputes by ICSID makes it clear that further action on the part of the host State is necessary to establish consent. For instance, the Egyptian Investment Law of 1989[560] provided

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553 Case No. ARB/89/1.

554 *Craig, W. L.*, The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk, 8 ICSID Review – FILJ 264, 270/1 (1993).

555 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 337.

556 At para. 329.

557 At para. 335.

558 At para. 342.

559 See Article 16(2) of the Georgia Investment Law of 1996 quoted in *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 337; Article 15 of the El Salvador Investment Law quoted in *Inceysa* v. *El Salvador*, Award, 2 August 2006, para. 331. References to the Additional Facility may also be found in the legislation of Cameroon, the Central African Republic, Côte d'Ivoire, Guinea and Madagascar. See also *Shihata/Parra*, The Experience, p. 346.

560 The Law was replaced in 1997 by the Law on Investment Guarantees and Incentives.

in Art. 55, after a reference to the role of domestic courts in the settlement of disputes under that law:

> The parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country or within the framework of the [ICSID] Convention . . . , subject to the terms and conditions, and in the instances where such agreements do apply.[561]

Similar clauses, providing for further agreement between the host State and the foreign investor, may be found in the investment legislation of Madagascar,[562] Malawi,[563] Mozambique,[564] Mauritania,[565] Tanzania[566] and Comoros.[567]

The legislation of some countries provides for the determination of one of several methods of dispute settlement by way of an investment licence. For instance, Art. 30 of the Uganda Investment Code, 1991, provides: **411**

> (2) A dispute between a foreign investor and the Authority or the Government in respect of a licensed business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with the following methods as may be mutually agreed by the parties
>
> (a) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes, or
>
> (b) within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or
>
> (c) in accordance with any other international machinery for the settlement of investment disputes.
>
> (3) The licence in respect of an enterprise may specify the particular mode of arbitration to be resorted to in the case of a dispute relating to that enterprise and that specification shall constitute the consent of the Government, the Authority or their respective agents and the investor to submit to that mode and forum of arbitration.

A similar clause may be found in the investment legislation of Niger.[568]

In these types of clauses referring to ICSID, the legislative provisions as such do not amount to consent to ICSID's jurisdiction. They do not constitute an offer by the host State that may be accepted by the investor through a unilateral act. Rather, they require a specific agreement between the host State and the investor contained in an investment agreement, an investment licence or another document. Such an agreement may be withheld at the host State's discretion.[568a] **412**

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561 See also *Delaume, G. R.*, The Pyramids Stand – The Pharaohs Can Rest in Peace, 8 ICSID Review – FILJ 231, 257/8 (1993); *Marchais, B. P.*, The New Investment Law of the Arab Republic of Egypt, 4 ICSID Review – FILJ 305/6 (1989).

562 Art. 33 of the Investment Code, 1989, 5 ICSID Review – FILJ 151 (1990).

563 Sched. 18 of the Investment Promotion Act 1991.

564 Art. 25 of the Law of Investment, 1993.

565 Art. 7.2 of the Investment Code, 2002.

566 Art. 23(2) of the Investment Act 1997.

567 Art. 23 of the Investment Code, 1990.

568 Art. 6 of the Investment Code, 1989.

568a See *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, paras. 326–337.

413 Yet another group of legislative provisions making reference to ICSID does not deal with consent. For instance, Moroccan legislation provides that the ICSID Convention is applicable to disputes between the investor and the Administration under the conditions and in the cases defined in the Convention.[569] Other laws address the question of recognition and enforcement of ICSID awards.[570]

414 In *Amco* v. *Indonesia*, the consent to ICSID's jurisdiction was contained in an agreement between the parties (see para. 389 *supra*). Before the Tribunal, Amco additionally relied on Indonesia's foreign investment law and on investment promotion literature as containing Indonesia's written consent to ICSID arbitration.[571] The Tribunal noted that the Act of 1967 in question merely referred to arbitration in general terms without any mention of ICSID. Moreover, the law had been enacted before the Convention had entered into force for Indonesia. Therefore, there was no commitment under the Act to submit investment disputes to ICSID arbitration. As to the investment promotion literature, it could not contain a direct commitment but could be taken into account in the interpretation of the investment agreement.[572]

415 In *Inceysa* v. *El Salvador*, the Claimant relied on several pieces of legislation as a basis for ICSID's jurisdiction. The Tribunal examined the statutory provisions cited by the Claimant in some detail and found that some of these, while referring to arbitration, contained no express reference to ICSID. Consequently, they could not meet the requirement of consent under Article 25 of the Convention.[573] On the other hand, El Salvador's Investment Law provided for ICSID's jurisdiction[574] (see paras. 201, 391, 396, 397 *supra* and 521, 534 *infra*).

c) Acceptance by the Investor

416 While a host State may express its consent to ICSID's jurisdiction through legislation, the investor must perform some reciprocal act to perfect consent. Even where consent is based on the host State's legislation, it can only come into existence through an agreement between the parties. The provision in the host State's legislation can amount to no more than an offer that may be accepted by the investor.[575] The Convention requires consent in writing (see paras. 379–381 *supra*). This would indicate a minimum of formality in accepting the host State's offer.[576]

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569 Law on Industrial Investments, 1983, Art. 39; Law on Maritime Investments, 1982, Art. 29; Law on Mining Investments, 1984, Art. 35.

570 Singapore Arbitration (International Investment Disputes) Act, 1968.

571 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 5, 17.

572 At paras. 21–22.

573 *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 309–330.

574 At para. 331.

575 *Broches, A.*, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law 263, 269 (1966); *Delaume*, How to Draft, p. 172.

576 *Amerasinghe*, Submissions to the Jurisdiction, p. 217; *Amerasinghe, C. F.*, The International Centre for Settlement of Investment Disputes and Development through the Multinational

417 Consent must be perfected at the time of the institution of proceedings (see paras. 479–480 *infra*). The investor may accept the host State's offer by submitting a request for conciliation or arbitration to the Centre[577] (see para. 469 *infra*). This is illustrated by *Tradex* v. *Albania*. The Albanian Law of 1993 contained an offer of consent by the host State (see para. 395 *supra*). The Tribunal said:

> . . . it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws, the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law.[578]

418 Similarly, the Tribunal in *Zhinvali* v. *Georgia* found that the host State's offer of consent, contained in its Investment Law, was later accepted in writing by the Claimant when it filed its Request for Arbitration.[579]

419 While it is possible to perfect consent through the institution of proceedings, it may not be wise for the investor to rely on the host State's offer contained in its legislation without accepting it at an early stage. Consent will be perfected only upon the acceptance of the offer. Also, the time of consent triggers a number of legal consequences under the Convention (see paras. 475–478 *infra*), the most important of which is that consent becomes irrevocable (see paras. 596–634 *infra*). Therefore, once the investor has accepted consent based on legislation, the agreement on consent will stay in effect even if the legislation is repealed (see para. 618 *infra*).

420 The investor may express its acceptance in a variety of ways other than instituting proceedings. These include a simple written communication to the host State to the effect that consent to ICSID's jurisdiction in accordance with the legislation is accepted, a statement contained in an application for an investment licence or a mere application if under the law in question the successful applicant automatically gets specified benefits including access to ICSID.[580] The investor's acceptance of consent can be given only to the extent of the offer made in the legislation (see paras. 518–539 *infra*). 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.[581]

421 In *SPP* v. *Egypt* (see paras. 400–404 *supra*), the Claimants had sent a letter to Egypt's Minister of Tourism on 15 August 1983, about one year before the institution of arbitration, which said in relevant part:

> . . . we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Centre for the

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Corporation, 9 Vanderbilt Journal of Transnational Law 793, 810 (1976); *Amerasinghe*, The Jurisdiction of the International Centre, p. 224; *Szasz*, The Investment Disputes Convention, p. 27.

577 *Broches*, Convention, Explanatory Notes and Survey, p. 643; *Amerasinghe*, Submissions to the Jurisdiction, p. 217.

578 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 63.

579 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 342.

580 See also News from ICSID, Vol. 3/2, p. 8 (1986).

581 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 224/5; *Szasz*, The Investment Disputes Convention, p. 29.

> Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law No. 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration.[582]

Before the Tribunal, the Claimants contended successfully that their own consent was expressed in the letter and again by the act of filing their request for arbitration with the Centre.[583]

422 The host State's legislation containing the offer of consent may prescribe certain conditions, time limits or formalities for the acceptance by the investor. In a number of investment laws, the investor's consent is linked to the process of obtaining an investment authorization. The choice of one of several methods for dispute settlement offered by the legislation (see para. 398 *supra*) may have to be stated expressly in the application for the investment authorization. Provisions of this kind may be found in the respective legislation of Côte d'Ivoire,[584] Cameroon[585] and the Central African Republic.[586] They require an express choice of method by the investor. This would indicate that the mere submission of an application for an investment licence without any reference to the ICSID Convention would not suffice. In order to perfect consent to ICSID's jurisdiction, the investor must explicitly select the Centre.

423 Consent to jurisdiction may be contained in an investment licence also where the legislation does not already amount to the host State's consent to jurisdiction (see para. 411 *supra*). The licence, which is issued upon the investor's application, may specify that ICSID is the chosen method of dispute settlement. This specification may constitute the consent of the government as well as of the investor.[587]

424 Some investment laws require written consent by the investor independently of an investment authorization procedure. Thus, section 11 of the Botswana Settlement of Investment Disputes (Convention) Act, 1970, provides:

> *Submission to Jurisdiction of Centre*
>
> 11. Any national of any other State which is a party to the Convention may submit to the Centre for settlement by conciliation or arbitration in pursuance of the Convention, any legal dispute with Botswana arising directly out of an investment by such foreign national in Botswana, provided that such foreign national has within one year after the commencement of this Act or within one year after the making of the investment, whichever is the later, filed with the Minister a consent in writing to the like submission to the Centre by Botswana of any such legal dispute.

425 An example for a provision allowing the investor's consent, either in connection with an authorization or independently of it, is offered by Art. 45(3) of the Cameroon Investment Code, 1990. After listing several possible methods of

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582 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 40.
583 At para. 48.
584 Art. 24 of the Investment Code, 1995.
585 Art. 45(1) of the Investment Code, 1990.
586 Art. 30 of the Investment Code, 1988.
587 See sec. 30(3) of the Uganda Investment Code, 1991.

settlement, including ICSID and the Additional Facility (see paras. 398, 399 *supra*), it provides:

> (3) The choice of one of the above procedures must be expressly stated, either at the time of the legal formation of the enterprise or in the application for the approval of the enterprise concerned. In the latter case, the arbitration or conciliation procedure shall be mentioned in the approval document.

426 In the absence of formal requirements in the host State's legislation for the investor's consent, a maximum of flexibility should be allowed. Any indication of acceptance on the part of the investor should be permissible. This may be accomplished by any written instrument by which the investor signifies its submission to the legal framework provided in the host State's legislation, including settlement under the Convention. Nevertheless, it is advisable to make an acceptance as clear as possible. Implicit acceptance, while not impossible, is liable to lead to jurisdictional disputes, to uncertainties concerning the exact date of consent (see para. 417 *supra*) and to difficulties once the host State changes its legislation.

5. Consent through Bilateral Investment Treaties

427 There is little reference to bilateral investment treaties (BITs) in the *travaux préparatoires* to the Convention (History, Vol. II, p. 400). This is hardly surprising considering that at the time of the Convention's drafting BITs had only just started to appear in State practice. The Report of the Executive Directors to the Convention does not mention the possibility of consent being expressed by way of treaties. But it does refer to the possibility of a unilateral offer of consent by the host State through its legislation and the acceptance of that offer by the investor (see para. 393 *supra*). The same principle is applied to treaties to which the host State is a party. While the treaty on its own cannot amount to consent to the Centre's jurisdiction by the parties to the dispute, it may constitute the host State's offer to do so. This offer may then be taken up by a national of the other State party to the treaty.

428 Consent through BITs has become accepted practice. In 1969, the Centre published a set of "Model Clauses Designed for Use in Bilateral Investment Agreements",[588] but it does not seem that these have been used widely. Rather, ICSID clauses in BITs have evolved in a haphazard way and display a large variety of form and substance.[589] Many States, including some developing countries, have developed their own national practice in this regard, usually through the use of

588 8 ILM 1341 (1969).

589 For broad overviews see *Broches, A.*, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, *in*: The Art of Arbitration, Liber Amicorum Pieter Sanders (*Schultz, J./van den Berg, A.* eds.) 63 (1982); *Burdeau, G.*, Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les états, Revue de l'arbitrage 11–16 (1995); *Delaume*, Le Centre International, p. 783; *Delaume, G. R.*, ICSID and Bilateral Investment Treaties, News from ICSID, Vol. 2/1, pp. 13/4 (1985); *Delaume*, Transnational Contracts, Ch. XV, pp. 12–14; *Laviec*, Protection et promotion, pp. 278/9; *Parra*, Provisions on the Settlement, pp. 290/1, 322 *et seq.*; *Peters*, Dispute Settlement Arrangements, pp. 121 *et seq.*, 141; *United Nations Centre on Transnational Corporations*, Bilateral Investment Treaties 96 *et seq.* (1988).

model BITs.[590] Over the years, ICSID clauses have been incorporated into many hundreds of BITs. Today, they can be found in the overwhelming majority of new BITs.

429 It is clear that a BIT, in order to provide a basis for ICSID jurisdiction, must be in force at the relevant time. In *Tradex* v. *Albania*, the Tribunal found that the Request for Arbitration had been submitted before the entry into force of the BIT between Albania and Greece. Therefore, it was not possible to establish jurisdiction on the basis of that treaty.[591] In *CSOB* v. *Slovakia*, the Tribunal, while confirming the principle of consent to ICSID jurisdiction by way of a BIT, found that the BIT between the Czech and Slovak Republics had not entered into force.[592] A notice of the Ministry of Foreign Affairs in the Official Gazette of the Slovak Republic that the BIT had entered into force was not accepted by the Tribunal as an independent basis for jurisdiction. The notice neither reflected an intention of the State to become bound nor had it led to an estoppel[593] (see also paras. 390 *supra*, 619 *infra*).

430 Not every reference to the Convention in a BIT constitutes an offer of consent by the host State. While some clauses amount to an unequivocal commitment, others contain promises of future consent or hold out a general prospect of sympathetic consideration. Still others simply state that consent may be given by way of agreements with the investor.[594]

a) Binding Offer of Consent by the Host State

431 The majority of ICSID clauses in modern BITs express consent on the part of the two Contracting States to submit to ICSID's jurisdiction, for the benefit of

590 The most comprehensive study is *Dolzer/Stevens*, Bilateral Investment Treaties (1995). For detailed descriptions of the practice of individual countries see for Switzerland *Dominicé, Ch.*, La clause CIRDI dans les traités bilatéraux suisses de protection des investissements, *in*: Im Dienst an der Gemeinschaft, Festschrift für Dietrich Schindler zum 65. Geburtstag 457 (1989) and *Kraft, M.-C.*, Les accords bilatéraux sur la protection des investissements conclus par la Suisse, *in*: Foreign Investment in the Present and a New Economic Order (*Dicke, D.* ed.) 83 (1987). For the United States see *Gann, P. B.*, The U.S. Bilateral Investment Treaty Program, 21 Stanford Journal of International Law 373, 415 *et seq.* (1985); *Gudgeon, K. S.*, Arbitration Provisions of U.S. Bilateral Investment Treaties, *in*: International Investment Disputes: Avoidance and Settlement (*Rubin, S. J./Nelson, R. W.* eds.) 41 (1985); *Vandevelde, K. J.*, The Bilateral Investment Treaty Program of the United States, 21 Cornell International Law Journal 201, 256 *et seq.* (1988); *Vandevelde, K. J.*, U.S. Bilateral Investment Treaties – The Second Wave, 14 Michigan Journal of International Law 621, 655 *et seq.* (1993); *Schwebel*, The Reshaping of the International Law of Foreign Investment by Concordant Bilateral Investment Treaties, *in*: Law in the Service of Human Dignity, Essays in Honour of Florentino Feliciano (*Charnovitz, S./Steger, D.P./van den Bossche, P.*, eds.) 241 (2005); *Schwebel, S. M.*, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, 3 TDM No. 2 (2006).

591 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 58.

592 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 37–43.

593 At paras. 44–47.

594 For a survey of clauses in BITs referring to investor-State arbitration see Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking (*UNCTAD* ed.) 100–126 (2007).

nationals of the other State party to the treaty.[595] The treaty between the United Kingdom and Sri Lanka of 1980 offers an example of a simple ICSID clause in Art. 8:

> (1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (herein referred to as "the Centre") for settlement by conciliation or arbitration under the Convention . . . any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.[596]

This clause was the basis for the Centre's jurisdiction in the first case brought under a BIT, *AAPL* v. *Sri Lanka*.[597] Similar clauses in BITs have formed the basis for jurisdiction in a large number of other cases.[598] In all these cases the Claimants' reliance on the ICSID clauses in the BITs as a basis for the Centre's jurisdiction was not questioned. **432**

Many BITs contain similar clauses. The Model Agreements of China of 2003, of France of 2006, of Germany of 2005, of the United Kingdom of 2005 and of the United States of 2004 all provide for definite consent to ICSID's jurisdiction by the host State.[599] **433**

Some BITs do not specifically mention consent. But formulations to the effect that a dispute "shall be submitted" to the Centre or that the parties have the right to initiate proceedings leave no doubt as to the binding character of these clauses. For instance, the German Model Agreement in its Art. 11 (Model I) provides: **434**

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595 See *Broches, A.*, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, *in*: The Art of Arbitration, Liber Amicorum Pieter Sanders (*Schultz, J./van den Berg, A.* eds.) 63, 66 (1982); *Delaume, G. R.*, ICSID and Bilateral Investment Treaties, News from ICSID, Vol. 2/1, pp. 12, 13 (1985); *Peters*, Dispute Settlement Arrangements, pp. 121 *et seq.*

596 19 ILM 886, 888 (1980).

597 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, para. 2. See also *Amerasinghe, C. F.*, The Prawn Farm (AAPL) Arbitration, 4 Sri Lanka Journal of International Law 155 (June 1992); *Rambaud, P.*, Des obligations de l'Etat vis-à-vis de l'investisseur étranger (Sentence AAPL c. Sri Lanka), 38 Annuaire Français de Droit International 501 (1992); *Ziadé, N. G.*, Some Recent Decisions in ICSID Cases, 6 ICSID Review – FILJ 514 (1991).

598 *AMT* v. *Zaire*, Award, 21 February 1997, para. 5.19; *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 30; *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, paras. 28–30, 44; *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 87; *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, para. 19; *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000, paras. 26, 27; *Gruslin* v. *Malaysia*, Award, 27 November 2000, para. 2.3; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 27; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 12.4–12.5; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, para. 56; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, paras. 25, 26; *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, para. 34; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 94; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, para. 73; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, para. 66; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 109; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 36; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 35.

599 These Model Agreements are reproduced in *Dolzer, R./Schreuer, C.*, Principles of International Investment Law 352 *et seq.* (2008).

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

435 In *CSOB* v. *Slovakia*, the Respondent contended that the dispute settlement clause in the BIT (see paras. 390, 429 *supra*), which stated that the investor and the host State had the right to submit disputes to ICSID, meant that any submission had to be made jointly by both parties. The Tribunal rejected this interpretation. It pointed out that a holding that the parties must submit their dispute jointly would mean that the ICSID clause in the BIT was subject to an agreement by the parties after the dispute had arisen. The fact that some BITs contained provisions for joint submission of disputes to arbitration did not compel the conclusion that provisions whose wording is at best ambiguous should be interpreted in this way. Moreover, the Tribunal noted that the BIT offered a choice between ICSID and UNCITRAL arbitration and that any dispute was to be resolved by the method that was chosen first. The Tribunal concluded that this provision made sense only on the assumption that each party to a dispute had the right to institute the arbitration proceedings separately.[600]

b) Prospect of Future Consent

436 Other clauses in BITs referring to ICSID's jurisdiction amount to an undertaking by the host State to give consent in the future. This may be achieved by providing that a future investment agreement between the host State and the investor shall, upon the investor's request, include a provision for the submission of disputes to ICSID.[601] More simply, the BIT may contain an undertaking to assent to any demand by the investor to submit to dispute settlement by the Centre. For instance, the Netherlands-Pakistan BIT of 1988 provides in its Art. 10:

> The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for arbitration or conciliation, to the Centre . . . , any dispute that may arise in connection with the investment.[602]

437 Clauses of this kind do not give the investor an immediate right of access to the Centre. If the host State refuses to give its consent, it would be in breach of its obligation under the BIT. But the Secretary-General of ICSID will in all likelihood reject a request for conciliation or arbitration under these circumstances in accordance with his or her screening powers under Arts. 28(3) or 36(3). A request

600 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 56–58.
601 See France-Malaysia BIT (1975) Art. 5.
602 See also Japan-Egypt BIT (1977) Art. 11; UK-Philippines BIT (1980) Art. X; Australia-Czech Republic BIT (1993) Art. 11; Japan-Pakistan BIT (1998) Art. 10. For further examples see *Dolzer/Stevens*, Bilateral Investment Treaties, p. 133; *Broches, A.*, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, *in*: The Art of Arbitration, Liber Amicorum Pieter Sanders (*Schultz, J./van den Berg, A.* eds.) 63, 65/6 (1982).

must contain information concerning the consent of the parties to conciliation or arbitration (Arts. 28(2) and 36(2)). It is unlikely that a promise to give consent will be accepted as amounting to consent. Therefore, any remedy must, in the first place, lie with the treaty partner to the BIT. The investor's home State can demand that the host State give its consent and, if necessary, resort to such procedures as are available between the States parties to the BIT.[603]

438 An even weaker reference to ICSID is contained in some BITs that provide for the host State's sympathetic consideration of a request for ICSID dispute settlement. For instance, the Netherlands-Kenya BIT of 1970 provides in Art. 11:

> The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.

It is obvious that a clause of this kind does not amount to consent by the host State. The most that can be read into it is that consent may not be withheld arbitrarily and that the States parties to the BIT must consider ICSID in good faith.

439 Some BITs contemplate a future agreement between the host State and the investor containing consent to ICSID's jurisdiction. An example is Art. 6 of the Sweden-Malaysia BIT of 1979:

> In the event of a dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes . . .[604]

440 Some BITs refer to ICSID but state specifically that the reference does not constitute the consent required by Art. 25(1) of the Convention. Art. 12 of the BIT between Argentina and New Zealand states in relevant part:

> (3) In the case of international arbitration, unless the parties to the dispute agree otherwise, the dispute shall be submitted to either:
>
> (a) The International Centre for the Settlement of Investment Disputes (ICSID) . . . ; or,
>
> (b) If both parties to the dispute agree, arbitration under the [UNCITRAL] Arbitration Rules . . . as then in force.
>
> (4) Paragraph (3) of this Article shall not constitute, by itself, the consent of the Contracting Party required in Article 25(1) of the [ICSID] Convention. . . .

c) Consent to Different Forms of Arbitration

441 The dispute settlement clauses in many BITs refer to ICSID as one of several possibilities. The alternatives contemplated may include the domestic courts of the host State, procedures agreed to by the parties to the dispute, ICC arbitration, the Arbitration Institute of the Chamber of Commerce of Stockholm, arbitration

603 *Broches*, *loc. cit.*

604 See also Sweden-Egypt BIT (1978) Art. 6; Sri Lanka-Switzerland BIT (1981) Art. 9.

under the UNCITRAL rules, and other forms of *ad hoc* arbitration.[605] While some of these composite settlement clauses contemplate a subsequent agreement of the parties to select one of these procedures (see para. 446 *infra*), others contain the State's advance consent to all of them, thereby leaving the choice with the party instituting the proceedings.

442 An example for this technique may be found in some Swiss BITs.[606] For instance, the Lebanon-Switzerland BIT of 2000 provides in its Art. 7:

> 2. If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute, at his choice, for settlement to:
>
> (a) the competent court of the Contracting Party in the territory of which the investment has been made; or
>
> (b) the International Center for Settlement of Investment Disputes (ICSID) . . . , once both Contracting Parties have become members of this Convention; or
>
> (c) an ad hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

443 As the above example demonstrates, some BITs offering several methods of settlement specify that the choice among them is with the investor.[607] These clauses should be distinguished from contingent submissions where one of the parties to the BIT is not yet a Contracting State to the ICSID Convention. In these cases, the Additional Facility and non-ICSID procedures are envisaged for cases that might arise before both the host State and the investor's State of nationality have become Contracting States[608] (see paras. 221, 222, 226, 229, 299–302 *supra*).

444 A comprehensive menu of dispute settlement procedures is typically offered in BITs concluded by the United States.[609] Art. 24 of the Model Agreement of 2004 provides in relevant part:

> 3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
>
> (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
>
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

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605 See *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 147 *et seq.*; *Parra*, Provisions on the Settlement, pp. 325 *et seq.*; *Peters*, Dispute Settlement Arrangements, pp. 122 *et seq.*

606 See also *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, para. 34.

607 See Switzerland-Paraguay BIT (1992) Art. 9; Lithuania-Poland BIT (1992) Art. 7. See also *Peters*, Dispute Settlement Arrangements, pp. 122 *et seq.*

608 See Art. VI of the Ukraine-US BIT (1994) and *Lemire* v. *Ukraine* (AF), Award, 18 September 2000, para. 4. See also *Shihata/Parra*, The Experience, pp. 347, 351/2.

609 See *e.g.* Argentina-US BIT (1991) Art. VII(3). On the choice under the latter provision see *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, para. 73.

(c) under the UNCITRAL Arbitration Rules; or
(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

Art. 25 of the US Model BIT adds that each Party to the treaty consents to arbitration and that this consent and the submission of a claim to arbitration will satisfy the requirements for consent of the Convention and of the Additional Facility.

445 Under this provision the alternative between ICSID and Additional Facility depends not on the claimant's choice but on whether the treaty partner of the United States is a Party to the Convention. But the possibility of UNCITRAL arbitration is open not only if ICSID is not available but also if the investor, for whatever reason, prefers a dispute settlement method other than ICSID.[610]

446 Some BITs of the United Kingdom provide for a choice by agreement of the parties to the dispute among several methods of dispute settlement. Thus, the parties may agree to ICSID, ICC or UNCITRAL arbitration. If no agreement can be reached on one of these procedures, UNCITRAL arbitration shall be used.[611] The UK Model BIT of 2005 provides to this effect in Art. 8 (second alternative):

> (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
> (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention . . . and the Additional Facility . . .); or
> (b) the Court of Arbitration of the International Chamber of Commerce; or
> (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of . . . [UNCITRAL].
>
> If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

d) Acceptance by the Investor

447 The Convention requires consent in writing by both parties to the dispute. Just as in the case of legislative provisions for the settlement of disputes by ICSID, a provision on consent in a BIT can be no more than an offer that needs to be accepted in order to amount to a consent agreement. The treaty provision cannot

610 See also *Vandevelde, K. J.*, U.S. Bilateral Investment Treaties – The Second Wave, 14 Michigan Journal of International Law 621, 655–659, 664–667, 684/5, 691/2 (1993).
611 See UK-Santa Lucia BIT (1983) Art. 8.

replace the need for consent by the foreign investor.[612] The observations made in the context of national legislation concerning the timing, form and scope of an acceptance by the investor (paras. 416–420 *supra*) apply equally to BITs. An additional requirement is that the BIT must be between the host State and the State of the investor's nationality.

448 An investor may accept an offer of consent contained in a BIT simply by instituting ICSID proceedings. Tribunals have accepted this form of expressing consent in numerous cases. Most investment arbitration cases in recent years are based on consent established in this way. Some tribunals have simply applied this principle without discussing its rationale.[613] Other tribunals have explained the combination of the offer given by the host State through the BIT and the acceptance by the investor through the request for arbitration.[614] In *Generation Ukraine* v. *Ukraine*, the Tribunal 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.[615]

449 Similarly, the Tribunal in *El Paso* v. *Argentina* said:

> It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State, required by

612 See paras. 7, 20, 21 and 22 of the notes to the Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements, 8 ILM 1341 (1969). See also *Laviec*, Protection et promotion, pp. 279/80; *Parra*, Provisions on the Settlement, pp. 339 *et seq*.

613 *AAPL* v. *Sri Lanka*, Award, 27 June 1990, paras. 2–4; *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 30; *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, para. 19; *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000, paras. 26, 27; *Gruslin* v. *Malaysia*, Award, 27 November 2000, para. 2.3.

614 *AMT* v. *Zaire*, Award, 21 February 1997, paras. 5.17–5.23; *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, paras. 8, 28–33, 43, 44; *Goetz* v. *Burundi*, Award, 10 February 1999, paras. 67, 81; *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 37, 38; *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 87; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 27; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 12.1–12.8; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, para. 56; *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, paras. 24–30; *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, paras. 30–31; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 94–100; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, paras. 69–74; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, para. 65; *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 198; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 108; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 130–132; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 140; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 35–37; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 33–37; *ADC* v. *Hungary*, Award, 2 October 2006, para. 363; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, para. 74; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 118; *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, para. 104.

615 *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 12.2, 12.3.

> Article 25 to give jurisdiction to the Centre, and that the filing of a request by the investor is considered to be the latter's consent.[616]

450 Withdrawal of an offer of consent contained in a treaty, before its acceptance, is less likely than in the case of national legislation (see para. 419 *supra*). Consent offered through a treaty is more difficult to withdraw than consent contained in national legislation. A State's attempt to withdraw its consent contained in a BIT would normally be a breach of the treaty and would presumably trigger some adverse reaction on the part of the other party to the treaty. An ICSID clause in a treaty remains valid notwithstanding an attempt by a party to terminate it, unless there is objectively a basis for termination under the law of treaties. Nevertheless, the irrevocability of consent provided for in the last sentence of Art. 25(1) operates only after the consent has been perfected through its acceptance by the investor (see paras. 598, 599, 619 *infra*). Therefore, in order to avoid complications, early acceptance is advisable.[617] In a number of cases investors had, in fact, expressed their consent before submitting their request for arbitration.[618]

451 Some BITs containing binding consent clauses ignore the fact that consent by the investor is an indispensable requirement to complete consent. Some French BITs provide that a dispute "est soumis à la demande de l'une ou l'autre de ces Parties [au différend] à l'arbitrage du Centre . . ." purely on the basis of the BIT.[619]

452 It appears that a consent clause thus formulated is flawed. While the investor may institute proceedings against the host State on the basis of the BIT, thereby signifying its consent, the host State cannot do so without a prior expression of consent on the part of the investor. The Tribunal in *AMT* v. *Zaire* emphasized the need for the expression of consent by the investor:

> The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consents between the Parties. When Article 25 states in paragraph 1 that "the parties" must have consented in writing to submit the dispute to the Centre, it does not speak of the States or more precisely, it speaks of a State and a national of another State. It appears therefore that the two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the States.[620]

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616 *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 35.

617 *Broches, A.*, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, *in*: The Art of Arbitration, Liber Amicorum Pieter Sanders (*Schultz, J./van den Berg, A.* eds.) 63, 68/9 (1982).

618 *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, para. 44; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, para. 56; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 36; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 37; *ADC* v. *Hungary*, Award, 2 October 2006, para. 363.

619 France-Nigeria BIT (1990) Art. 8; *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 134/5. See also Art. 8 of the Austria-Morocco BIT (1992). Art. 10 of the Asian-African Legal Consultative Committee's Model Bilateral Agreements on Promotion and Protection of Investments, 23 ILM 237, 250, 264 (1984), also provides for the institution of ICSID arbitration "at the instance of either party" without reference to the need for consent by the investor.

620 *AMT* v. *Zaire*, Award, 21 February 1997, para. 5.18.

453 Some BITs recognize the need for mutual consent by stating that only the investor is entitled to institute proceedings. The clause in German BITs, cited above (para. 434), is an example. While such a one-sided approach to ICSID's jurisdiction is technically possible, it is not in the interest of the host State to grant access to the Centre to investors without obtaining reciprocal rights.

454 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.[621] British treaties provide for the reciprocal expression of consent and for access by both parties to the Centre. Art. 8 (first alternative) of the United Kingdom Model Agreement of 2005 provides in relevant part:

> (3) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. . . .

455 Consent by the investor must be expressed in some positive way and cannot be substituted by the BIT or simply assumed. But there are ways by which an investor may be induced to give consent. Submission to ICSID or other methods of settlement may be made a condition for admission of investments in the host State and may form part of the licensing process. BITs may provide specifically that their benefits will extend only to investors that have consented to ICSID's jurisdiction. They may also provide that diplomatic protection will not be available to an investor that has declined to accept an offer of consent contained in a BIT. Suggestions to incorporate clauses to this effect in BITs have found little or no manifestation in practice[622] (see Art. 27, paras. 33–37).

6. Consent through Multilateral Treaties

456 A number of multilateral treaties also provide for ICSID's jurisdiction. The underlying mechanism is similar to that in the BITs discussed above. The treaties contain offers by the States parties to them to consent to ICSID's jurisdiction. These offers may be taken up by investors who are nationals of the other States parties to the treaties.[623]

a) NAFTA

457 The North American Free Trade Agreement of 1992 between Canada, Mexico and the United States[624] contains a Chapter Eleven on Investments. Its Section A

621 See *AMT* v. *Zaire*, Award, 21 February 1997, para. 5.21.
622 See Clauses VII, VIII and IX of the Model Clauses for Use in Bilateral Investment Agreements, 8 ILM 1341, 1349–1351 (1969); *Laviec*, Protection et promotion, p. 280.
623 See *Parra*, Provisions on the Settlement, pp. 344 *et seq*., 356.
624 32 ILM 605 (1993).

offers a set of substantive rules on investment (Arts. 1101–1114). Section B deals with the "Settlement of Disputes between a Party and an Investor of Another Party".[625] Art. 1122 bears the title "Consent to Arbitration" and provides in relevant part:

> 1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
> 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

Art. 1120 provides that after a waiting period of six months, a disputing investor may submit a claim to arbitration under the ICSID Convention, the Additional Facility of ICSID or under the UNCITRAL Arbitration Rules. As long as Canada and Mexico are not parties to the ICSID Convention, the NAFTA will not operate to confer jurisdiction under the Convention. But ICSID Additional Facility arbitration is available between US investors and Canada or Mexico and between Canadian or Mexican investors and the US. In disputes between Canadian investors and Mexico or Mexican investors and Canada not even the ICSID Additional Facility may be used (see paras. 9–13, 224–226, 300–301 *supra*). In disputes of the latter kind only UNCITRAL arbitration is available.[626] But even in UNCITRAL arbitration, the Secretary-General of ICSID may serve as the appointing authority for arbitrators under Arts. 1124 and 1126 of the NAFTA. Therefore, access to ICSID arbitration, Additional Facility arbitration and UNCITRAL arbitration is largely dictated by the state of ratification of the ICSID Convention and not a matter of choice. Even where ICSID arbitration or Additional Facility arbitration is available, the investor may eschew the Centre and opt for UNCITRAL arbitration. **458**

The NAFTA specifically provides that the investor must consent to arbitration (Art. 1121), thereby emphasizing the reciprocal nature of consent to arbitration. However, under the NAFTA, submission of a claim to arbitration is open only to an investor and not to a host State. **459**

b) Energy Charter Treaty

The Energy Charter Treaty (ECT) of 1994 between the European Communities and 51, mostly European, States also provides consent to ICSID's jurisdiction **460**

625 Generally see: *Alvarez, G. A./Park, W. W.*, The New Face of Investment Arbitration: NAFTA Chapter 11, 28 The Yale Journal of International Law 365 (2003); *Holbein, J. R./Ranieri, N.*, North American Free-Trade Agreements: Chapter 11 Investor-State Arbitration (2007); *Bjorklund, A./Hannaford, J./Kinnear, M.*, Investment Disputes under NAFTA (2006); *Legum, B.*, The Innovation of Investor-State Arbitration under NAFTA, 43 Harvard International Law Journal 531 (2002); *Weiler, T.* (ed.), NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (2004).

626 See *Shihata/Parra*, The Experience, pp. 347/8, 351/2.

by the Contracting Parties in relation to investors of all other Contracting Parties (Art. 26).[627] The Treaty contains an unconditional consent to ICSID and to the Additional Facility, whichever may be available. The Article specifically requires consent in writing also on the part of the investor. Apart from the ICSID Convention or the Additional Facility, the investor is given the choice of the courts and administrative tribunals of the host State, previously agreed procedures, UNCITRAL arbitration and arbitration in the framework of the Arbitration Institute of the Stockholm Chamber of Commerce. The Article only envisages the submission of a claim by the investor but not by the host State.

461 A number of ICSID cases have been instituted under the ECT. Only some of these have yielded published decisions.[628] Some have been settled without a published record[629] while others are still at an early stage of the proceedings at the time of writing.[630]

c) Regional Treaties in Latin America

462 The 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone (MERCOSUR) contain similar provisions. Art. 9 of the Colonia Protocol gives the investor the option to institute one of several procedures. These include arbitration under the ICSID Convention or the Additional Facility, the courts of the host State, an as yet to be established permanent dispute settlement system and UNCITRAL arbitration. Consent by the investor is not mentioned specifically.

463 The 1994 Free Trade Agreement between Mexico, Colombia and Venezuela (Cartagena FTA) also offers consent to ICSID arbitration. Under Arts. 17–18, the investor is given the option to institute ICSID arbitration, Additional Facility arbitration or UNCITRAL arbitration, depending on the ICSID Convention's state of ratification by the three States. The three methods are not offered by way of a choice. UNCITRAL arbitration is only offered if both ICSID arbitration and Additional Facility arbitration are unavailable. The investor must communicate its

627 34 ILM 360, 399 (1995); *Wälde, T. W.*, International Investment under the 1994 Energy Charter Treaty, 29 Journal of World Trade 5, 56–63 (1995); *Vandevelde, K. J.*, Arbitration Provisions in the BITs and the Energy Charter Treaty, *in*: The Energy Charter Treaty (*Wälde, T. W.* ed.) 409, 413 (1996); *Happ, R.*, Dispute Settlement Under the Energy Charter Treaty, 45 German Yearbook of International Law 331 (2002); *Wälde, T. W.*, Energy Charter Treaty-based Investment Arbitration Controversial Issues, 5 The Journal of World Investment & Trade 373 (2004); *Hobér, K.*, The Energy Charter Treaty: An Overview, 8 The Journal of World Investment & Trade 323 (2007).

628 *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 179; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, para. 118.

629 *AES Summit Generation* v. *Hungary* (no published decision); *Alstom Power Italia* v. *Mongolia* (no published decision).

630 *Hrvatska Elektropriveda* v. *Slovenia*, registered 28 December 2005; *Libananco* v. *Turkey*, registered 19 April 2006; *Azpetrol* v. *Azerbaijan*, registered 30 August 2006; *Cementownia "Nowa Huta"* v. *Turkey*, registered 16 November 2006; *Europe Cement* v. *Turkey*, registered 6 March 2007; *Liman Caspian Oil* v. *Kazakhstan*, registered 16 July 2007; *Electrabel* v. *Hungary*, registered 13 August 2007; *AES Summit Generation* v. *Hungary II*, registered 13 August 2007.

consent in writing to the other party and include it in the request for arbitration (Annex to Arts. 17–16, Rule 2).

d) Non-Binding References to ICSID

464 Some multilateral instruments contain reference to ICSID dispute settlement without offering consent on the part of the participating States. In this regard, they are similar to some provisions in national legislation and in BITs (see paras. 410–412, 438–446 *supra*).

465 Art. X of the 1987 ASEAN Agreement for the Promotion and Protection of Investments[631] foresees several methods of dispute settlement, including ICSID. However, the choice is subject to an agreement between the parties to the dispute. If no agreement can be reached, the dispute is to go to *ad hoc* arbitration. Therefore, this clause cannot be seen as consent to jurisdiction under the ICSID Convention.

466 The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment[632] are not a binding instrument and as such incapable of forming the basis of consent by States. They encourage States to submit disputes with investors to arbitration under the ICSID Convention or the ICSID Additional Facility Rules.[633]

467 Similarly, the 1992 European Community Statement on Investment Protection Principles[634] recommends ICSID arbitration as the primary choice while also mentioning ICC as well as UNCITRAL arbitration.

7. The Temporal Elements of Consent

a) Time of Consent

468 Rule 2 of the Institution Rules provides:

> (3) "Date of consent" means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

The possibility that the parties did not act on the same day covers two situations. A single instrument may be signed on different days. Alternatively, the consent may be expressed not in one but in two or several instruments. If the consent clause is contained in an offer by one party, its acceptance by the other party will determine the time of consent. For instance, the offer may be made in an investment application by the investor that is subsequently approved by the host State. This was the situation in *Amco* v. *Indonesia* (see para. 389 *supra*).[635]

469 The date of acceptance is particularly important if the host State makes a general offer to accept ICSID's jurisdiction in its legislation or in treaties. In these cases, the time of consent is determined by the investor's acceptance of the offer. At the latest, this offer may be accepted through bringing a request for conciliation

631 27 ILM 612 (1988).
632 31 ILM 1363, 1379 (1992).
633 Guideline V at p. 1384.
634 Doc. ACP-CEE 2172/92, 4 October 1992.
635 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 10, 25.

or arbitration to the Centre[636] (paras. 416–426, 447–455 *supra*). The investor is under no time constraints to accept the offer and thus to complete the consent unless the offer, by its own terms, provides for acceptance within a certain period of time. But it should be borne in mind that consent, once completed, has several legal consequences and its timing is relevant for a number of questions under the Convention such as withdrawal of consent, nationality of the investor, exclusion of other remedies, diplomatic protection and for various intertemporal rules (see paras. 475–478 *infra*).[637] Therefore, care should be taken to perfect consent at the appropriate time and not to rely on a standing offer without actually taking it up.

b) Contingent Expression of Consent

470 Some expressions of consent are contingent upon the fulfilment of a future condition for jurisdiction. Contingent submissions to the Centre are expressions of consent based on the expectation that the conditions will be met in the future (see paras. 221–223, 299 *supra*). They become effective upon the fulfilment of the outstanding conditions.

471 In some cases the conditions *ratione personae* for the Centre's jurisdiction have not yet been met when the document containing the consent clause is signed. For instance, the host State or the State of the investor's nationality may not yet have ratified the Convention. In such a case, the date of consent will be the date on which all the conditions have been met.[638] If the host State ratifies the Convention after the signature of the consent agreement, the time of consent will be the entry into force of the Convention for the host State in accordance with Art. 68(2) (see paras. 215–223 *supra*). The same applies to a ratification by the State of the investor's nationality subsequent to the signature of the agreement containing the consent clause (see paras. 287–288 *supra*). If the consent agreement is made with a constituent subdivision or agency that has not yet been designated by the host State, the date of consent will be the date of designation (see paras. 258, 259 *supra*). Effective consent by a constituent subdivision or agency may also be delayed until it is approved by the host State or notification that no such approval is necessary has been made (see paras. 903–920 *infra*).

472 In *Holiday Inns* v. *Morocco*, no fewer than three conditions for the full validity of consent were lacking at the time the agreement containing the consent clause was signed: (i) the host State had not yet ratified the Convention (see para. 216 *supra*); (ii) the investor's home State had not yet ratified the Convention (see para. 288 *supra*); and (iii) one of the corporate parties to the dispute had not yet been created (see paras. 320–321 *supra*). The Tribunal noted that all these defects had

636 *Amerasinghe*, Submissions to the Jurisdiction, p. 217; *Broches*, Convention, Explanatory Notes and Survey, p. 643.

637 For a different view see the Partial Dissenting Opinion of Professor Francisco Orrego Vicuña to *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007.

638 *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 75 (1974); *Delaume*, Le Centre International, p. 781.

been cured before the institution of proceedings and stated that ". . . it is the date when the conditions are definitely satisfied . . . which constitutes in the sense of the Convention the date of consent . . ." (see para. 288 *supra*).[639]

473 In *Generation Ukraine* v. *Ukraine* the entry into force of the BIT between Ukraine and the United States on 16 November 1996 antedated the entry into force of the ICSID Convention for Ukraine on 7 July 2000. The Respondent argued that its consent, expressed in the BIT, was only "preliminary" and subject to "final" consent once the Convention came into force for Ukraine.[640] The Tribunal rejected this argument. It noted that there was nothing in the BIT that suggested that its consent was only preliminary. The Tribunal said:

> 12.6 Ukraine's consent to ICSID arbitration in Article VI(3) of the BIT was naturally conditional upon a future event, *viz*. Ukraine's ratification of the ICSID Convention. This no doubt explains the proviso to the consent in Article 3(a)(i) which states: "provided that the Party is a party to [the ICSID] Convention". But Ukraine's free standing consent to ICSID arbitration was perfected as soon as the ICSID Convention entered into force for Ukraine on 7 July 2000. Ukraine did not make any reservation to the BIT whereby it could reassess the status of its consent once the condition precedent for its full validity had been fulfilled.[641]

The Tribunal concluded that Ukraine's consent was valid since the condition precedent to the Ukraine's offer to arbitrate had been fulfilled by the date of the institution of proceedings.[642]

474 In *Autopista* v. *Venezuela*, the contract clause expressing the parties' consent was subject to a condition: the transfer of the company's majority share to a national of another Contracting State. The Tribunal found that the consent had become effective on the date of the share transfer.[643]

c) Relevance of the Time of Consent

475 Consent to the jurisdiction of the Centre triggers a number of legal consequences under the Convention. Perhaps the most important one is that consent, once perfected, becomes irrevocable under the last sentence of Art. 25(1) (see paras. 596–634 *infra*). The nationality of the foreign investor under Art. 25(2) is determined by reference to the date of consent. Natural and juridical persons must be nationals of another Contracting State on the date of consent (see paras. 679–687, 752–759, 871–895 *infra*).

476 Consent to the jurisdiction of the Centre will, unless otherwise stated, exclude other remedies pursuant to Art. 26 of the Convention. Therefore, resort to domestic courts or to other forms of arbitration becomes unavailable, in principle, from the date of consent. Similarly, under Art. 27(1) diplomatic protection by the investor's

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639 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 667/8. See also *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 2.18, 4.09, 5.24.
640 *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, para. 12.1.
641 At para. 12.6. 642 At para. 12.8.
643 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 89–91.

State of nationality is no longer permitted once the parties have consented to the jurisdiction of the Centre (see Art. 27, paras. 30–37).

477 The parties' rights and duties under the Convention are frozen from the date of consent. Under Art. 66(2), an amendment to the Convention will not apply with respect to consent given before the amendment's entry into force. Similarly, under Art. 72 a denunciation of the Convention by a State in accordance with Art. 71 will not affect a consent given before the date of the denunciation. By the same token, declarations by States excluding certain territories from the application of the Convention under Art. 70 will not affect a consent once it is given.

478 Arts. 33 and 44 of the Convention provide that proceedings will be conducted in accordance with the Conciliation Rules and Arbitration Rules in effect on the date on which the parties have given their consent. The parties may agree otherwise. But if they do not, it is not the Rules in their latest version that apply but those in force on the date of consent. The idea is to protect the parties against amendments that might not suit them.[644]

d) Consent at the Time of the Institution of Proceedings

479 The jurisdictional requirements under the Convention must be met on the date of the institution of proceedings (see paras. 35–40 *supra*). The opening sentence of para. 24 of the Executive Directors' Report states that:

> 24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given.[645]

Rule 2(1)(c) of the Institution Rules directs that a request for conciliation or arbitration must:

> (c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;[646]

Rule 2(2) requires that this information must be supported by documentation. If the party wishing to institute proceedings cannot supply documentation of written consent to the jurisdiction of the Centre, the Secretary-General will find that the dispute is manifestly outside the jurisdiction of the Centre and will refuse to register it in accordance with Arts. 28(3) and 36(3) of the Convention. But a decision on the validity and scope of consent is left to the conciliation commission or arbitration tribunal in accordance with Arts. 32 and 41.

480 In *Tradex* v. *Albania*, the Claimants relied on the bilateral investment treaty between Albania and Greece as one of two bases for jurisdiction (see paras. 395, 417, 429 *supra*). The Tribunal noted that the Request for Arbitration was dated

644 See Introductory Note D to the Arbitration Rules of 1968, 1 ICSID Reports 65.
645 1 ICSID Reports 28.
646 See also *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 5.08.

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.[647]

e) Consent After the Institution of Proceedings: Forum Prorogatum

481 Both the Working Paper and the Preliminary Draft foresaw consent not only by way of an agreement prior to the institution of proceedings but also by the "acceptance . . . of jurisdiction in respect of a dispute submitted to the Center by another party" (History, Vol. I, p. 112). The idea is based on a practice of the International Court of Justice whereby failure to contest jurisdiction by the respondent State is deemed to be consent to the Court's jurisdiction.[648] This would have allowed a claimant to bring a claim to the Centre even without previous consent. The decision on jurisdiction would have depended on whether the respondent contests or accepts the jurisdiction in the particular case. After relatively little debate (History, Vol. II, pp. 323, 402, 403, 470, 706), Mr. *Broches* retracted the suggestion since he recognized that the host State's refusal of consent under these circumstances might do damage to its reputation (at pp. 499, 509, 540, 566, 711). Subsequent drafts and the Convention make no reference to this possibility and the Secretary-General's screening power with respect to consent would appear to make this method of obtaining consent impossible.[649]

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

483 The situation is somewhat different if the existence of a valid consent is unclear or if the precise scope of the consent (see paras. 513–539 *infra*) is subject to doubt. These are questions that are to be decided by the commission or tribunal under Arts. 32 and 41, and it is in these proceedings that the position taken by the respondent may become relevant.

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

485 What if the respondent does appear and fails to raise objections to the tribunal's jurisdiction, proceeds to plead on the merits concerning matters that are beyond the scope of its original consent, or even explicitly states that it wishes to confirm

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647 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 58.

648 *Rosenne*, The World Court, 6th ed., 73 (2003).

649 *Broches, A.*, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law 263, 270 *et seq.* (1966); *Masood*, Jurisdiction of International Centre, pp. 123/4; *Kovar*, La compétence du Centre, p. 49.

or extend its earlier consent? Is the tribunal under an obligation to examine the question of jurisdiction from the perspective of consent as it existed at the time of the registration of the request and must it decline jurisdiction if consent was absent or incomplete at that time? One Tribunal seems to have thought so,[650] relying on the Report of the Executive Directors who stated that "[c]onsent of the parties must exist when the Centre is seized".[651]

486 The Convention does not give a clear answer to this question. Arts. 32 and 41 merely provide that the respondent may raise an objection to jurisdiction or competence, that the commission or tribunal must consider the objection and that it is the commission or tribunal which decides on its competence. The Convention does not say whether the commission or tribunal must examine the Centre's jurisdiction and, if necessary, decline its competence if the matter is uncontested. But Arbitration Rule 41(2) and Conciliation Rule 29(2) state that the tribunal or commission may at any stage of the proceedings consider the question of its jurisdiction on its own initiative.

487 A mere delay in the raising of a jurisdictional objection will not be interpreted as implied consent given in the course of proceedings. (See also Art. 41, paras. 40–42.) In *Gruslin* v. *Malaysia* the Respondent had not, at first, raised the objection that the investment did not comply with the condition that it had to be an "approved project" as required by the applicable BIT. The Tribunal found that the host State's initial failure to insist on that condition did not extend its consent as expressed in the BIT. Therefore, the host State was not precluded from raising non-compliance with that condition later on.[652]

488 On the other hand, there are good reasons to assume that defects of jurisdiction through lack of consent may be cured after the institution of proceedings. If there is no disagreement on consent between the parties, it does not make sense for the commission or tribunal to decide that it lacks competence. This would force the parties to record their consent in writing before resubmitting the request to the Centre, which, in turn, would then have to repeat the process of constituting the commission or tribunal.[653]

489 There is an even more serious argument. If the defect in the consent cannot be cured implicitly or even explicitly by the parties during the proceedings but remains an objective bar to the Centre's jurisdiction, it may be raised at any time especially as a ground for annulment. Under these circumstances, a party might be tempted not to raise an objection to jurisdiction while it is still optimistic about the outcome of the case. Once it becomes clear to a party that it has lost the case on the merits, lack of consent might be brought forward to argue that the tribunal has manifestly exceeded its powers. Even if one takes the strict attitude

650 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 407. See also paras. 313–327.
651 Para. 24, 1 ICSID Reports 28.
652 *Gruslin* v. *Malaysia*, Award, 27 November 2000, paras. 18.1–18.4, 19.3.
653 *Broches, A.*, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law 263, 277/8 (1966).

that consent must have been fully perfected before the institution of proceedings, it is impossible to deny that a party must be estopped from arguing lack of consent after not raising it as a jurisdictional objection at an early stage in the proceedings and after pleading on the merits.[654] This conclusion is supported by Rule 41(1) of the Arbitration Rules and Rule 29(1) of the Conciliation Rules: a jurisdictional objection must be made as early as possible and, in principle, no later than at the end of the time limit for the counter-memorial.

490 ICSID practice on this point is scant and somewhat circumstantial. In *Amco* v. *Indonesia*, it was argued on behalf of Indonesia in the annulment proceedings that the acts of the army and police personnel in seizing the hotel, if illegal under international law, constituted an international tort and not an investment dispute. The Tribunal's jurisdiction, as accepted by the Parties' consent, only extended to investment disputes and not to torts. Therefore, Indonesia argued, the Tribunal had manifestly exceeded its powers. The *ad hoc* Committee, apart from rejecting the distinction between international torts and investment disputes (see para. 71 *supra*), found that Indonesia was precluded from challenging the jurisdiction of the Tribunal since it had, in the course of the annulment proceedings, expressly waived the claims of nullity relating to the Tribunal's jurisdiction.[655] The question at issue was not so much the scope of consent but rather the nature of the dispute. But the *ad hoc* Committee did accept the principle that jurisdictional objections, once they have been waived, cannot be reintroduced.

491 In *SPP* v. *Egypt*, the question of consent after the institution of proceedings also arose in a somewhat peripheral way. The original request for arbitration had been made by SPP(ME). During the hearings on jurisdiction, SPP(ME) was joined on the Claimant's side by SPP, the parent company. The parties agreed on this move, which was accepted by the Tribunal (see paras. 345, 346 *supra*).[656] This procedure was criticized in the Dissenting Opinion on the ground that under Art. 36(2) the consent to arbitration had to precede the request for arbitration and that there was nothing to show that SPP had consented to the jurisdiction of the Centre before its intervention.[657]

492 In the one case where an ICSID tribunal held that *forum prorogatum* was admissible, the finding was probably based on a misunderstanding. In *Klöckner* v. *Cameroon*, there was a series of successive agreements between the parties. A Protocol of Agreement of December 1971 laid down the general outline of the investment operation. It contained an ICSID arbitration clause. It was followed by a Supply Contract in March 1972 also containing an ICSID arbitration clause. In 1977, a Management Contract was concluded between Klöckner and SOCAME, a company owned jointly by the Government and by Klöckner. This contract contained not an ICSID clause but an ICC arbitration clause.

654 See also *Szasz*, The Investment Disputes Convention, p. 26.
655 *Amco* v. *Indonesia*, Decision on Annulment, 16 May 1986, paras. 67–69.
656 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 14.
657 *SPP* v. *Egypt*, Dissenting Opinion, 20 May 1992, 3 ICSID Reports 184.

493 ICSID arbitration was initiated in 1981 by Klöckner on the basis of the ICSID clause in the Supply Contract.[658] Before the Tribunal, the respondent Government not only accepted ICSID jurisdiction on that basis but actually broadened it by invoking the ICSID clause in the Protocol of Agreement. In turn, this extension of jurisdiction was accepted by the Claimant. The Respondent then brought a counter-claim arising from the Claimant's management of the operation. The Claimant opposed the counter-claim arguing that it was governed by the Management Contract which was subject to ICC and not to ICSID arbitration. The Tribunal accepted its competence over the counter-claim saying that the initial Protocol of Agreement had already provided, in principle, for the technical and commercial management of the operation by Klöckner "ensured by a Management Contract".

494 After restating the Claimant's position with regard to the Management Contract and its acceptance of the Protocol of Agreement as an additional basis for jurisdiction, the Tribunal said:

> Once the Centre has been validly seized (as it was in this case by Klöckner's Request), consent as to the "*ratione materiae*" extent of the Tribunal's jurisdiction may be expressed at any time, even in written submissions to the Tribunal ("*forum prorogatum*"). On this score, the Report of the Executive Directors of the World Bank indicates at paragraph 24 that "the Convention does not . . . specify the time at which consent should be given".[659]

495 The quotation from the Report of the Executive Directors misrepresents its contents. The original says that consent must exist when the Centre is seized, but the Convention does not *otherwise* specify the time at which consent should be given (para. 479 *supra*).[660] More importantly, consent with regard to the Protocol of Agreement existed when the original request for arbitration was made but was merely not invoked in the request. Therefore, the question of *forum prorogatum* never arose.

496 The *ad hoc* Committee criticized the Tribunal's interpretation of the Claimant's acceptance of the Protocol of Agreement as a basis of jurisdiction. The Claimant had never admitted that the reference to management in the Protocol of Agreement conferred jurisdiction upon ICSID with regard to management. The *ad hoc* Committee concluded that it was:

> . . . superfluous for the Award to add that consent to ICSID's jurisdiction may be expressed at any time, under the principle of "*forum prorogatum*".[661]

497 Therefore, the quotation from the Award in para. 494 above carries somewhat less authority than would appear at first sight. The acceptance by the Claimant of ICSID's jurisdiction over the Protocol of Agreement did not amount to consent given after the institution of proceedings. A valid consent clause was already contained in the Protocol of Agreement. The Respondent had merely brought a

658 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 13.
659 At p. 14.
660 *Cf.* also the Dissenting Opinion at 2 ICSID Reports 91.
661 *Klöckner* v. *Cameroon*, Decision on Annulment, 3 May 1985, paras. 5–11, at para. 9.

counter-claim arguing that it was within the scope of the consent of the parties in accordance with Art. 46. The Claimant, in turn, accepted the existence of the additional base for jurisdiction while denying that it covered the counter-claim.

498 The correct answer to the problem of *forum prorogatum* in the ICSID context would appear to be as follows: a conciliation commission or arbitral tribunal must examine its competence carefully on the basis of any objections to the Centre's jurisdiction but also *motu proprio*. If the commission or tribunal finds that there is agreement between the parties to the proceedings on the existence, validity and scope of their consent at the time of its decision on jurisdiction, it may proceed on the basis of that agreement. In other words, agreement between the parties before the commission or tribunal would cure any defects concerning consent that may have existed at the time proceedings were instituted. A mere delay in raising a jurisdictional objection would not support the existence of an agreement of this kind. But a party that has indicated its consent during the proceedings either explicitly or by pleading on the merits of the case without objecting that consent was lacking, defective or too narrow is precluded from raising such an objection later on. This preclusion would apply to the original proceedings as well as to any annulment proceedings.

f) Applicability of Consent Ratione Temporis

499 Bilateral investment treaties frequently provide that they shall also apply to investments made before their entry into force.[662] Some BITs state, however, that they shall 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.

Under provisions of this kind the decisive time for the applicability of the consent to arbitration is the time at which the dispute has arisen. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date cannot be read as excluding jurisdiction over events occurring before that date. A dispute requires not only the development of the events to a degree where a difference of legal positions can become apparent but also the existence of communication between the parties that demonstrates that difference.

662 In *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 153, the Tribunal noted that the BIT (in force 6 May 1996) by its express terms was applicable to investments made since 1954. It concluded that pre-BIT disputes may be brought before an ICSID tribunal pursuant to the BIT.

500 In *Maffezini* v. *Spain*, the Respondent challenged the tribunal's jurisdiction alleging that the dispute originated before the entry into force of the Argentina-Spain BIT. 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. This, according to the Claimant, had occurred only after the BIT's entry into force.[663]

501 The Tribunal distinguished between the events giving rise to the dispute and the dispute itself. It 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.[664] The Tribunal said:

> . . . 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. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.[665] This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.[666]

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. It followed that the Tribunal was competent to consider the dispute.[667]

502 In *Lucchetti* v. *Peru*, the applicable BIT also provided that it would not apply to disputes that arose prior to its entry into force. 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 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.[668]

503 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 disputes had the same origin or source. The dispute that was now before the Tribunal had already crystallized by 1998. The adoption of

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663 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 90–98.
664 At para. 95.
665 The Tribunal's reference is to an early version of this Commentary.
666 At para. 96.
667 At para. 98. See also *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 146–150, where the Tribunal applied the same principle to consent expressed through a contract.
668 *Lucchetti* v. *Peru*, Award, 7 February 2005, paras. 27–47.

Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute. It followed that the Tribunal lacked jurisdiction *ratione temporis*.[669]

504 In *Jan de Nul* v. *Egypt*, the BIT between the Belgo-Luxembourg Economic Union and Egypt also provided that it would not apply to disputes that had arisen before its entry into force. A dispute already existed 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 . . .[670]

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 dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.[671]

It followed that the Tribunal had jurisdiction over the claim.[672]

505 *Helnan* v. *Egypt* 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.[673]

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 different nature from

669 At paras. 48–56.
670 *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, para. 117.
671 At para. 128.
672 At paras. 110–131.
673 *Helnan* v. *Egypt*, Decision on Jurisdiction, 17 October 2006, para. 52.

the dispute that had arisen subsequently. Hence, the Tribunal had jurisdiction over the dispute.[674]

506 It follows from the above that consent expressed in a treaty may well cover events that took place before the treaty's entry into force. 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.[675] The Tribunal in *Impregilo* v. *Pakistan* said:

> . . . care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT.[676]

507 The fact that jurisdiction is established under a treaty 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.[677] Therefore, it is entirely possible that a tribunal exercising jurisdiction on the basis of consent expressed in a treaty will apply customary international law to events that occurred before the treaty's entry into force.

508 A similar situation can arise where consent to jurisdiction by the State is expressed in national legislation. In *Tradex* v. *Albania* a domestic statute, the "1993 Law", was the basis for ICSID's jurisdiction. Art. 8 of that statute provided for ICSID jurisdiction "if a foreign investment dispute arises". The dispute had arisen before the statute's entry into force. The Tribunal examined the contention that the words "dispute arises" indicated a limitation of consent to disputes arising after the entry into force of the Albanian Law. After a careful examination of the text and the history of the Law it rejected this contention.[678] It concluded that "a dispute which started before the coming into force of the 1993 Law can be covered by the submission to ICSID jurisdiction".[679] The Tribunal also rejected the argument that a submission to arbitration must be presumed to be only meant for future disputes unless otherwise expressed.[680]

509 The Tribunal also dealt with the distinction between jurisdiction *ratione temporis* and the substantive law applicable to the facts of the case. The Tribunal said:

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674 At paras. 53–57.

675 But see *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 45–136, 167, 168, which fails to make the necessary distinctions between jurisdiction and substantive law.

676 *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 309.

677 See especially Article 28 of the Vienna Convention on the Law of Treaties providing for non-retroactivity of treaties. See also ILC Draft Article on the Law of Treaties with Commentaries, Yearbook of the International Law Commission 1966-II, p. 212, para. 2; Article 13 of the ILC's Articles on State Responsibility. For discussions of this issue see *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 8.13, 11.1–11.4, 17.1, 17.5; *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, paras. 166, 167; *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 167–178; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 253–258.

678 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 62–69.

679 5 ICSID Reports 65.

680 5 ICSID Reports 68.

> . . . it occurs frequently that courts and arbitral tribunals have to apply certain substantive rules of law which were in force during the relevant period though they have been replaced by new rules as from a certain date. Accepting ICSID jurisdiction for the present dispute under Art. 8, therefore, by no means implies that the substantive protection rules of the 1993 Law would be applicable in the consideration of the merits of this case.[681]

510 A clause in a treaty or in legislation providing for consent may be broad and refer to investment disputes in general terms. Or it may be restricted to disputes concerning alleged violations of the document containing the consent. If consent to arbitration contained in a treaty is limited to violations of that treaty, the date of the treaty's entry into force is also necessarily the date from which acts and events are covered by consent to jurisdiction. For instance, under the NAFTA[682] and under the ECT[683] the scope of the consent to arbitration is limited to claims arising from alleged breaches of the respective treaties. In that case the entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law.

511 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.[684] The Tribunal in *SGS* v. *Philippines* applied the concept of a continuing breach in the following terms:

> 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 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.[685]

512 A variant of the theory of continuing breach was applied in *Tecmed* v. *Mexico*. 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.[686] Also, the BIT's language appeared to be directed at the future.[687] 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

681 5 ICSID Reports 66.
682 Article 1116 NAFTA.
683 Article 26(1) of the ECT.
684 See especially *Mondev* v. *United States* (AF), Award, 11 October 2002, paras. 57–75; *Feldman* v. *Mexico* (AF), Decision on Jurisdiction, 6 December 2000, para. 62.
685 *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, para. 167.
686 *Tecmed* v. *Mexico* (AF), Award, 29 May 2003, para. 63.
687 At paras. 64, 65.

> consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, . . .[688]

8. Limitations on Consent

513 During the Convention's drafting there was never any doubt that the parties had the right to limit the scope of their consent. The Working Paper contained a somewhat sweeping clause to the effect that either party had the right to stipulate in their consent ". . . that one or more of the provisions of this Convention shall not apply . . ." (History, Vol. I, p. 110). This clause was criticized as going too far (History, Vol. II, pp. 55, 57, 65) and does not appear in subsequent drafts. All later drafts as well as the Convention just refer to "any dispute" or "all disputes" subject to the Convention's objective requirements (History, Vol. I, pp. 112, 116, 118). The Comment to the Preliminary Draft contains the following observation:

> 9. When entering into any undertaking pursuant to Section 2 a party would, of course, be free to include such limitations on the scope of the particular undertaking as may seem to it appropriate provided that those limitations were not inconsistent with its obligations deriving from the Convention as a whole.[689]

The principle of the parties' freedom to limit the extent of their consent remained uncontroverted (History, Vol. II, pp. 268, 336, 505, 566, 706). Mr. *Broches* explained that the parties' freedom in shaping their consent was merely limited by such principles as the non-revocability of consent or the binding nature of awards (at p. 505).

514 Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide. For instance, the host State's investment legislation or its BIT with the investor's home State may provide for the Centre's jurisdiction in the most general terms. If the investor accepts ICSID jurisdiction only with regard to a particular dispute or in respect of certain investment operations, the consent between the parties will be thus limited.[690] It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance. If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent.

a) Limitations on Consent in Direct Agreements

515 Art. 25 merely defines the outer limits of the consent that the parties may give. There is nothing to stop them from circumscribing it in a narrower way. The parties are free to delimit their consent by defining it in abstract terms, by excluding certain types of disputes or by listing the questions they are submitting

688 Para. 68. See also paras. 172, 178, 179, 181. 689 History, Vol. II, p. 205.
690 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 224/5; *Szasz*, The Investment Disputes Convention, p. 29.

to ICSID's jurisdiction.[691] The 1993 Model Clauses offer the following formula for this purpose:

> **Clause 4**
>
> The consent to the jurisdiction of the Centre recorded in citation of basic clause above shall [only]/[not] extend to disputes related to the following matters: . . .[692]

These limitations to a specific consent agreement must be distinguished from the notifications that may be given under Art. 25(4). Art. 25(4) allows Contracting States to state in advance and in general terms which classes of disputes they would not consider submitting to the Centre's jurisdiction (see paras. 921–941 *infra*).

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

517 Consent clauses contained in investment agreements typically refer to "any dispute" or to "all disputes" under the respective agreements. The consent clause in *AGIP* v. *Congo* is characteristic of this:

> All disputes that may arise with respect to the application or interpretation of the present Protocol of Agreement will be finally settled in accordance with the [ICSID] Convention . . .[693]

But there are also occasional counter-examples such as exceptions relating to the proper application or interpretation of the host State's law.[694]

b) Limitations on Consent in Legislation

518 References to ICSID contained in national investment legislation typically relate to the application and interpretation of the piece of legislation in question. For instance, the 1987 Investment Code of Guinea provides:

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691 *Amerasinghe*, Submissions to the Jurisdiction, pp. 220–222.

692 4 ICSID Reports 361. See also Clauses XIV and XV of the 1968 Model Clauses, 7 ILM 1159, 1173 (1968) and Clause V of the 1981 Model Clauses, 1 ICSID Reports 201.

693 *AGIP* v. *Congo*, Award, 30 November 1979, para. 18. See also *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 12; *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, para. 1.15; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 10; *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 13; *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 23; *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 350; *Atlantic Triton* v. *Guinea*, Award, 21 April 1986, 3 ICSID Reports 17; *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 2; *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 10; *CDC* v. *Seychelles*, Award, 17 December 2003, para. 4; *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 49, 58; *World Duty Free* v. *Kenya*, Award, 4 October 2006, para. 6.

694 *Delaume, G. R.*, ICSID Clauses: Some Drafting Problems, News from ICSID, Vol. 1/2, p. 16 (1984); *Delaume*, Transnational Contracts, Ch. XV, p. 7.

> 28–2 . . . unless otherwise agreed by the parties concerned, disputes between the Guinean state and foreign nationals relating to the application or interpretation of this code shall be settled definitively in arbitration conducted:
> – In accordance with the provisions of the [ICSID Convention] . . .[695]

519 In *SPP* v. *Egypt*, the Centre's jurisdiction was based on Art. 8 of Egypt's Law No. 43 of 1974.[696] That provision offered several forms of dispute settlement, including the ICSID Convention, "in respect of the implementation of the provisions of this Law".[697] Before the Tribunal, Egypt argued that Art. 8 of the Law was not applicable to disputes involving the non-performance of obligations under contracts. Rather, Art. 8 should be restricted to disputes concerning the non-performance of obligations under the Law itself.[698] The Tribunal remarked that it had some difficulty in accepting the above distinction as applying to all contracts and agreements, even those entered into by the Government itself. At the same time, the Tribunal found it unnecessary to address this question since, in the particular case, the alleged breach by Egypt of an agreement with one of the Claimants also constituted a breach of the Law. The alleged breach of the agreement would also violate the prohibition of nationalization or confiscation in Law No. 43.[699]

520 Some national laws are more sweeping and simply refer to disputes concerning foreign investments.[700] In *Zhinvali* v. *Georgia* the Tribunal accepted an ICSID consent clause in the Georgia Investment Law of 1996 which simply referred to "disputes between a foreign investor and a government body".[701]

521 In *Inceysa* v. *El Salvador*, Art. 15 of the El Salvador Investment Law provided as follows:

> In the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to:
> (a) [ICSID] . . .
> (b) [the Additional Facility] . . .[702]

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695 See also the Madagascar Investment Code, 1989, Art. 33. See also *Parra*, Provisions on the Settlement, pp. 320/1.

696 This Law was subsequently replaced by Law No. 230 of 1989 which, in turn, was replaced by Law No. 8 of 1997. See *Marchais, B. P.*, The New Investment Law of the Arab Republic of Egypt, 4 ICSID Review – FILJ 297 (1989).

697 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 70.

698 At para. 67.

699 At paras. 68–69. See also the Dissenting Opinion to the Decision on Jurisdiction of 14 April 1988 at 3 ICSID Reports 182/3 and the Dissenting Opinion to the Award of 20 May 1992 at 3 ICSID Reports 315–318.

700 El Salvador, Law on Investments, 1999, Art. 15; Botswana, Settlement of Investment Disputes (Convention) Act, 1970, sec. 11.

701 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 328.

702 *Inceysa* v. *El Salvador*, Award, 2 August 2006, para. 331.

The Tribunal found that this clearly constituted an offer of consent concerning all disputes referring to investments. But the Tribunal denied the rights granted by the Investment Law since the investment was tainted by illegality.[703]

522 The Tribunal added an *obiter dictum* to the effect that in order to invoke the arbitration provision in the Investment Law there had to be a claim with substantive grounds in that law. This excluded contract claims.[704] This latter reasoning is surprising in view of the fact that the Investment Law refers to ICSID jurisdiction in general terms for controversies regarding investments of foreign investors. A limitation to claims arising from the statute's substantive provisions or an exclusion of contract claims is not apparent from the Investment Law as quoted by the Tribunal.

523 Other national laws describe the questions covered by consent clauses in narrower terms. These may include the requirement that the dispute must be "in respect of a licensed business enterprise".[705] More elaborate descriptions concern disputes "related to the authenticity, interpretation or enforcement of the Approval Decree . . .".[706]

524 Some national laws circumscribe the issues that are subject to ICSID's jurisdiction narrowly. Art. 8 of the Albanian Law on Foreign Investment of 1993 offers unconditional consent to ICSID's jurisdiction (see para. 395 *supra*) but limits this consent in the following terms:

> . . . if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, . . .[707]

525 In *Tradex* v. *Albania*, the Tribunal held that it had jurisdiction, subject to the existence of an expropriation, an issue which was to be examined in the merits phase.[708] 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.[709]

c) Limitations on Consent in Treaties

526 The scope of consent to arbitration offered in BITs varies. Some clauses providing consent are wide and unlimited. Many BITs in their consent clauses contain phrases such as "all disputes concerning investments" or "any legal dispute concerning an investment". For instance, the United Kingdom Model BIT of 2005 refers to "any legal dispute . . . concerning an investment . . .".[710] These provisions

703 At para. 332.
704 At para. 333.
705 Uganda Investment Code, 1991, sec. 30(2). See also Mozambique Law of Investment, 1993, Art. 25(2).
706 Benin Code of Investments, 1990, Art. 57. See also Cameroon Investment Code, 1990, Art. 45(1); Niger Investment Code, 1989, Art. 6.
707 See *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 54. Article 7 deals with the investor's right to transfer funds abroad.
708 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 61/2.
709 *Tradex* v. *Albania*, Award, 29 April 1999, paras. 92, 132, 203–205.
710 United Kingdom Model BIT 2005, Art. 8.

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 connexion with the investment.[711]

527 In *Salini* v. *Morocco*, Article 8 of the applicable BIT defined ICSID's jurisdiction in terms of "[t]ous les différends ou divergences . . . concernant un investissement".[712] 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.[713]

528 In *Vivendi* v. *Argentina*, 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.[714]

529 The Tribunal in *SGS* v. *Pakistan* 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:

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711 For discussion of this issue see *Alexandrov, S.*, Breaches of Contract and Breaches of Treaty, 5 The Journal of World Investment & Trade 555, 572 (2004); *Griebel, J.*, Jurisdiction over "Contract Claims" in Treaty-Based Investment Arbitration on the Basis of Wide Dispute Settlement Clauses in Investment Agreements, TDM 2007; *van Haersolte-van Hof, J. J./Hoffmann, A. K.*, The Relationship between International Tribunals and Domestic Courts, *in*: The Oxford Handbook of International Investment Law (*Muchlinski, P./Ortino, F./Schreuer, C.* eds.) 962 (2008).

712 Italy-Morocco BIT, Art. 8.

713 *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, para. 61.

714 *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, para. 55.

> . . . from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9.[715]

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.[716]

530 Other tribunals have declined to follow that decision.[717] In *SGS* v. *Philippines* 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.[718]

531 The view that a jurisdiction clause referring all investment disputes to international arbitration vests the tribunal with competence over contract claims is preferable. There is no reason in law or policy why this should not be possible or desirable. The distinction between contract claims and BIT claims does not mean that these claims must be presented in different forums. An arrangement that leads to the adjudication of all claims arising from an investment dispute in one forum is clearly the better solution.

532 Other BIT clauses offering consent to arbitration circumscribe the scope of consent to arbitration in narrower terms. A provision that is typical for United States 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.[719]

The consent clause in Article 24 of the 2004 US Model BIT is similar. It covers breaches of the classical substantive standards in Articles 3–10, of an investment authorization, or of an investment agreement.

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715 *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 161.

716 *Loc. cit.* For a case with a similar result see *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, para. 25.

717 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 52, note 42; *Siemens* v. *Argentina*, Award, 6 February 2007, para. 205. See also the discussions in *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 97–101; *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 57, 82, 102, 188; *Parkerings* v. *Lithuania*, Award, 11 September 2007, paras. 261–266.

718 *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, paras. 131–135.

719 For comment see *Gudgeon, K. S.*, Arbitration Provisions of U.S. Bilateral Investment Treaties, *in*: International Investment Disputes: Avoidance and Settlement (*Rubin, S. J./Nelson, R. W.* eds.) 41, 45–47 (1985); *Peters*, Dispute Settlement Arrangements, p. 138; *Vandevelde, K. J.*, U.S. Bilateral Investment Treaties – The Second Wave, 14 Michigan Journal of International Law 621, 655 (1993).

533 Other treaties restrict consent to disputes involving their substantive provisions. For instance, the BIT between El Salvador and the Netherlands of 1999 contains a submission to arbitration in Article 9 for:

> . . . disputes which arise within the scope of this agreement between one Contracting Party and an investor of the other Contracting Party concerning an investment . . .

534 In *Inceysa* v. *El Salvador*, consent in Article XI of the El Salvador-Spain BIT extended to "any dispute . . . concerning matters regulated by this Agreement". The Tribunal found that this clause was not a manifestation of unrestricted consent for any dispute claimed to be based on the BIT.[720]

535 Under Article 1116 of the NAFTA the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself. Also, under Article 26(1) of the ECT the scope of the consent is limited to disputes "which concern an alleged breach of an obligation . . . under Part III [of the ECT]".

536 In *Kardassopoulos* v. *Georgia*, the claims concerned an alleged breach of an obligation under Part III of the ECT. Therefore, the requirements for jurisdiction under Article 26(1) were satisfied.[721]

537 The limitation of consent to violations of the treaty may be offset by an "umbrella clause" contained in the treaty. Under such a clause the States parties to the treaty undertake to observe any obligations they may have entered into with respect to investments. A violation of such an obligation may then amount to a violation of a treaty obligation. An umbrella clause is not jurisdictional in nature but contains a substantive obligation. However, it can have jurisdictional consequences. The exact meaning and effect of umbrella clauses has been the subject of much debate and disagreement in arbitral practice.

538 The scope for the jurisdiction of tribunals is even narrower where consent is limited to one or some of the rights granted under the Treaty. Some BITs restrict consent to jurisdiction to expropriation or to the amount of compensation due after an expropriation.[722] For instance, the Cyprus-Hungary BIT provides in Article 7 for submission to arbitration, including ICSID, of:

> Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment . . .

In order to establish jurisdiction under a consent clause of this kind, a tribunal must first establish the existence of an expropriation. (See also paras. 524, 525 *supra*, 574 *infra*.)

539 Tribunals applying consent clauses of this type were restricted to finding whether an expropriation had occurred and, if so, to awarding compensation.[723]

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720 *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 163, 164.
721 *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 July 2007, paras. 249–252.
722 See *Peters*, Dispute Settlement Arrangements, pp. 129 *et seq.*
723 *Telenor* v. *Hungary*, Award, 13 September 2006, paras. 18(2), 25, 57, 81–83; *ADC* v. *Hungary*, Award, 2 October 2006, para. 12 (surprisingly, in this case the Tribunal made a finding of breach of other standards that were outside its jurisdiction: see para. 445); *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 70, 129–133.

9. Procedural Conditions to Consent

540 Even if a dispute is clearly covered by the parties' consent to ICSID's jurisdiction, access to the Centre may be subject to conditions. The parties are free to add such conditions to their consent, provided they are not contrary to the Convention's mandatory provisions and are in compliance with the Centre's Rules and Regulations.[724] In practice, such conditions typically concern certain procedural steps that must be taken before proceedings can be instituted.[725] Under Art. 26, a State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention. Some States have expressed such a requirement either in their investment legislation or in bilateral investment treaties (see Art. 26, paras. 192–206).

a) Waiting Periods for Amicable Settlement

541 A common condition for the institution of proceedings before ICSID is that an amicable settlement has been attempted through consultations or negotiations. Where this is the case, negotiations must be undertaken in good faith.[726] Some national investment laws[727] and numerous BITs contain the condition that a negotiated settlement must be attempted before resort can be had to the Centre. If no settlement is reached the claimant may proceed to arbitration. The German Model Agreement of 2005 is characteristic of this:

> *Article 11*
>
> (1) Divergencies concerning investments between a Contracting Party and an investor of the other Contracting Party 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 Party, be submitted for arbitration. Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the [ICSID] Convention . . .

542 Most other Model Agreements and numerous BITs contain similar clauses. The NAFTA contains a comparable provision in Articles 1118 to 1120.[728] The ECT in Article 26(1) and (2) also provides for a mandatory period for amicable settlement before submission to arbitration. In order to forestall dilatory tactics and in order

724 Clause XIII of the 1968 Model Clauses contained a general formula for subjecting consent to unspecified conditions. 7 ILM 1159, 1172 (1968).

725 *Delaume, G. R.*, ICSID and Bilateral Investment Treaties, News from ICSID, Vol. 1/2, pp. 12, 17 (1985).

726 *Amerasinghe*, Submissions to the Jurisdiction, p. 219.

727 Albania, Law on Foreign Investments, 1993, Art. 8(2); Cameroon, Investment Code, 1990, Art. 45; Tanzania, Investment Act, 1997, Art. 23(2); Togo, Investment Code, 1985, Art. 4; Uganda, Investment Code, 1991, Art. 30(2); Jordan, Investment Promotion Law, 1995, Art. 33; DR Congo, Investment Code, 2002, Art. 38; Kyrgyz Republic, Law on Investments, 2003, Art. 18(2).

728 See *Metalclad* v. *Mexico* (AF), Award, 30 August 2000, paras. 64–67.

to make it clear when the condition precedent for settlement under the Convention has been satisfied, the treaties typically lay down time limits for negotiations. If no settlement is reached within a certain period of time, access to ICSID is open. Typical time periods foreseen for this purpose are three months, six months or twelve months.

543 If these waiting periods were to be seen as jurisdictional requirements, they would have to be complied with by the time of the institution of proceedings (see paras. 35–40 *supra*). As a consequence, if the request for arbitration is submitted before the expiry of the time period foreseen for a settlement, a tribunal would have to decline jurisdiction. On the other hand, by the time a decision on jurisdiction is rendered, the period for a settlement will typically have expired. Therefore, it would be possible for the claimant to re-commence proceedings immediately. The International Court of Justice has found that non-compliance with a requirement to engage in negotiations did not debar a State from invoking a compromissory clause in a treaty providing for the Court's jurisdiction.[729]

544 In the majority of cases tribunals found that the claimants had complied with waiting periods before proceeding to arbitration.[730] In cases where the claimants had not complied with the requirement to first attempt an amicable settlement, the reaction of tribunals has not been uniform.[731]

545 In a number of cases the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.[732] In *SGS* v. *Pakistan*, the Pakistan-Switzerland BIT provided for a 12-month consultation period before permitting the investor to go to ICSID arbitration. SGS had filed its request for arbitration only two days after notifying Pakistan of the existence of the dispute. The Tribunal

729 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Judgment (Jurisdiction and Admissibility), 26 November 1984, 1984 ICJ Reports 427–429.

730 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 54, 60–61; *AMT* v. *Zaire*, Award, 21 February 1997, paras. 5.40–5.45; *Metalclad* v. *Mexico* (AF), Award, 30 August 2000, paras. 64–69; *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 15–23; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 121–123; *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 14.1–14.6; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, para. 55; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 101–107; *LG&E* v. *Argentina*, Decision on Jurisdiction, 30 April 2004, para. 80; *MTD* v. *Chile*, Award, 25 May 2004, para. 96; *Occidental* v. *Ecuador* (UNCITRAL), Award, 1 July 2004, para. 7; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 163–173; *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, paras. 32, 33; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 62–71; *Continental Casualty* v. *Argentina*, Decision on Jurisdiction, 22 February 2006, para. 6; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, para. 38; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 39, 41; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 212–217.

731 For more detailed treatment see *Schreuer, C.*, Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 Journal of World Investment & Trade 231, 232 (2004).

732 Several decisions to this effect were in non-ICSID cases: *Ethyl Corp*. v. *Canada* (UNCITRAL), Decision on Jurisdiction, 24 June 1998, 7 ICSID Reports 12, at paras. 76–88; *Metalclad* v. *Mexico* (AF), Award, 30 August 2000, paras. 64–67; *Ronald S. Lauder* v. *The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, 9 ICSID Reports 66, paras. 181–191.

accepted the Claimant's argument that the waiting period was procedural rather than jurisdictional and that negotiations would have been futile.[733] It said:

> Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.[734] 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.[735]

Other ICSID tribunals have endorsed this position, holding that waiting periods were not jurisdictional requirements.[736]

546 Some tribunals did not share this view.[737] *Enron* v. *Argentina* 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 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.[738] 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.[739]

547 It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical. A better way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising.[740]

b) Attempt at Settlement in Domestic Courts

548 Art. 26 specifically excludes the requirement to exhaust local remedies in the host State unless otherwise stated (see Art. 26, paras. 187–231). Some consent

733 *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 80, 183–184.
734 Footnote omitted. The Tribunal cited the Decision in *Ethyl*.
735 At para. 184.
736 *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 87; *Bayindir* v. *Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 88–103.
737 *Goetz* v. *Burundi*, Award, 10 February 1999, paras. 90–93.
738 Footnote omitted: the Tribunal cited *Lauder* and *Ethyl*.
739 *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, para. 88.
740 This was the solution chosen in *Western NIS* v. *Ukraine*, Order, 16 March 2006.

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.[741] The investor may proceed to international arbitration if the domestic proceedings do not result in the dispute's settlement during that period or if the dispute persists after the domestic decision. Tribunals have held that this was not an application of the exhaustion of local remedies rule.[742]

549 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;

550 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 eighteen 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 eighteen 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".[743] 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 which allowed them to rely on other BITs of the host State that did not contain that requirement (see paras. 567–577 *infra*).[744]

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

742 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 19–37; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, para. 104; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, para. 30.

743 *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 224.

744 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 38–64; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 32–110; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 24–31; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 52–66; *National Grid* v. *Argentina* (UNCITRAL), Decision on Jurisdiction, 20 June 2006, paras. 80–93; *Suez and AWG* v. *Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 52–68.

10. Applicability of Consent to Successive Instruments

551 Investment operations often involve complex arrangements expressed in a number of successive agreements. These agreements may be concluded in stages and over a period of time. Though economically interrelated, the agreements are legally distinct and often have different features. At times, ICSID clauses are included in some of these agreements but not in others. If ICSID clauses are neither repeated nor incorporated by reference in related agreements, the question arises whether the parties' consent to ICSID's jurisdiction extends to matters regulated by these related agreements.[745]

552 Some such related agreements concern peripheral operations such as financing or arrangements with subcontractors. In these situations, it may even be doubtful whether disputes relating to them can be described as "arising directly" out of the investment (see paras. 83–112 *supra*). In *Holiday Inns* v. *Morocco*, the Tribunal found that it also had jurisdiction over peripheral transactions regulated in separate contracts not containing an ICSID clause (see para. 95 *supra*).

553 In other cases, the successive instruments, only some of which contained ICSID clauses, all related directly to the core elements of the investment. In *Klöckner* v. *Cameroon*, the parties had first signed a Protocol of Agreement in 1971 outlining the general framework of their relationship. This agreement contained an ICSID arbitration clause. Two subsequent contracts, a Supply Contract of 1972 and an Establishment Agreement of 1973, also contained ICSID arbitration clauses. However, a 1977 Management Contract did not contain an ICSID clause but referred to ICC arbitration. The parties to the agreements were, in changing combinations, Klöckner, Cameroon and SOCAME, a joint venture company. The parties to the Protocol of Agreement and to the Supply Contract were Klöckner and Cameroon. The parties to the Establishment Agreement were Cameroon and SOCAME. The parties to the Management Contract were Klöckner and SOCAME (see also paras. 492–497 *supra*).

554 Before the Tribunal, Cameroon brought a counter-claim relating to Klöckner's allegedly defective performance of its management duties. Klöckner sought to exclude questions relating to its management from the Tribunal's jurisdiction by arguing that these matters were governed exclusively by the Management Contract, which was subject to the ICC clause. This argument was countered by reference to Art. 9 of the Protocol of Agreement, which had already provided that Klöckner would "be responsible for the technical and commercial management of the Company, ensured by a Management Contract".[746]

555 The Tribunal rejected Klöckner's suggestion that ICSID's jurisdiction over the entire investment relationship, including management, had been restricted through the operation of the ICC clause in the Management Contract. It found that all disputes arising from the investment operation were subject to the ICSID clause in

745 *Delaume*, How to Draft, pp. 171/2; *Niggemann*, Zuständigkeitsprobleme, pp. 190–192.
746 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 13.

the original Protocol of Agreement. The commercial management of the factory was an essential precondition of the investment.[747] The Tribunal, though holding that it did not have jurisdiction to evaluate the Management Contract or to interpret it,[748] found that it did have jurisdiction with respect to the counter-claim, given the direct connection between the different instruments and the parties' claims.[749] The Tribunal said:

> This case involves one and the same bilateral relationship, because the three instruments are bound together by a close connecting factor: agreement was reached for the supply of a fertilizer factory, and its technical and commercial management, in return for payment of a price and for certain investment guarantees. The reciprocal obligations had a common origin, identical sources, and an operational unity. They were assumed for the accomplishment of a single goal, and are thus interdependent.[750]

After citing from the Award in *Holiday Inns* v. *Morocco* (see para. 95 *supra*), the Tribunal continued:

> There is consequently a single legal relationship, even if three successive instruments were concluded. This is so because the first, the Protocol of Agreement, encompasses and contains all three.[751]

556 The Dissenting Opinion to the Award rejected the extension of jurisdiction to management.[752] The Decision of the *ad hoc* Committee, which annulled the Award for other reasons, undertook a lengthy and critical evaluation of the Tribunal's reasoning on this point.[753] But it ultimately found tenable the Tribunal's refusal to accept the ICC clause in the Management Contract as derogating from the ICSID clause in the Protocol of Agreement. It recognized that the Tribunal may have regarded the ICSID clause as an "essential jurisdictional guarantee" for the parties. For the *ad hoc* Committee, this interpretation, whether correct or not, did not constitute a manifest excess of powers.[754]

557 Curiously, neither the Award, nor the Dissenting Opinion, nor the Decision on Annulment discusses the reason for the absence of an ICSID clause in the Management Contract. The parties to the Management Contract were Klöckner and SOCAME, which at the time was under the majority control of the foreign investor. Since neither of the parties qualified as a Contracting State, the insertion of an ICSID clause would not have made any sense. It was only later that SOCAME passed under Government control and was ultimately designated as an agency of Cameroon (see para. 260 *supra*). A proper assessment of the reasons for the absence of the ICSID clause in the Management Contract might have shed a different light on the parties' motives for inserting the ICC clause.

558 In *SOABI* v. *Senegal*, three successive contracts were directly relevant to the question of jurisdiction but only one contained an ICSID clause. In July 1975,

747 At pp. 13/14.
748 At p. 69.
749 At pp. 17/18.
750 At p. 65.
751 At p. 66. See also pp. 68/9.
752 At pp. 89–93.
753 *Klöckner* v. *Cameroon*, Decision on Annulment, 3 May 1985, paras. 4–56.
754 At para. 52.

Senegal and Naikida entered into an agreement for the construction in Senegal of 15,000 low-income housing units including the establishment of a plant for the prefabrication of reinforced concrete elements to be used in the construction. In September 1975, the Government and SOABI, a locally incorporated but foreign controlled company, entered into an agreement providing more detail to the arrangement to construct the 15,000 housing units. In November 1975, the Government and SOABI concluded an Establishment Agreement for the setting up of the prefabricated industrial concrete plant. Only the last agreement contained an ICSID clause.

559 In November 1982, SOABI instituted ICSID proceedings seeking compensation for the alleged breach of the construction contract by relying on the arbitration clause in the Establishment Agreement. The Government objected to the Centre's jurisdiction and argued that the ICSID clause in the Establishment Agreement only concerned the construction of the plant, whereas the dispute related to the second phase of the project, the construction of the 15,000 units. SOABI argued that there was one overall project and that the Establishment Agreement, including its arbitration clause, covered all aspects of SOABI's activities.[755] The Tribunal, after joining the jurisdictional question to the merits, reached the conclusion that the prior agreements regarding the construction of the plant and of the 15,000 units were implicitly embraced in the Establishment Agreement and, therefore, fell within the scope of its ICSID clause.[756]

560 In the conciliation case (see paras. 19–27 *supra*) *Tesoro* v. *Trinidad and Tobago*,[757] jurisdiction was based on the Heads of Agreement signed in 1968, a comprehensive document setting out the terms of a joint venture between the parties. The Heads of Agreement contained a combined ICSID conciliation/arbitration clause. On the same date as the Heads of Agreement, the same parties also signed ten "side letters" touching on a number of matters also covered in the Heads of Agreement. The side letters did not contain ICSID clauses. The side letters referred to the Heads of Agreement but the Heads of Agreement did not refer to the side letters.[758] In its Counter-Memorial, the Government made an objection to jurisdiction. The Government argued that Tesoro's claim was based on one of the side letters which did not contain an ICSID clause. The sole Conciliator, Lord Wilberforce, found that ICSID had jurisdiction over the dispute since the side letter and the Heads of Agreement constituted one agreement and the Heads of Agreement clearly contained an ICSID clause.[759]

755 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 47–58.
756 *SOABI* v. *Senegal*, Award, 25 February 1988, paras. 4.01–4.17. See *Ziadé, N. G.*, Introductory Note to the SOABI v. Senegal Award, 6 ICSID Review – FILJ 123 (1991).
757 *Tesoro* v. *Trinidad and Tobago*, Report, 27 November 1985. See *Nurick, L./Schnably, S. J.*, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, 1 ICSID Review – FILJ 340 (1986).
758 At pp. 343/4.
759 At pp. 347/8.

561 These cases suggest that ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship. Therefore, a series of interrelated contracts may be regarded, in functional terms, as representing the legal framework for one investment operation. ICSID clauses contained in some, though not all, of the different contracts may be interpreted to apply to the entire operation.[760] This practice is based on the concept of the general unity of the investment operation (see paras. 93–105 *supra*).

562 Other tribunals have adopted a more differentiated approach to ICSID clauses contained in only one of several related instruments. *CSOB* v. *Slovakia* involved a Consolidation Agreement between the Claimant and the Ministry of the Slovak Republic designed to deal with the issue of non-performing receivables (see para. 100 *supra*). The Consolidation Agreement contained a reference to a projected BIT which the Tribunal accepted as incorporating its ICSID clause (see para. 390 *supra*). Subsequent Loan Agreements with the Slovak Collection Company did not include an ICSID clause.

563 The Tribunal adopted the doctrine of the unity of the investment operation.[761] It found that the loan to the Collection Company was closely related to and could not be disassociated from the other transactions and that the Slovak Republic's undertaking and the loan formed an integrated whole.[762] Yet, in a supplementary decision on jurisdiction, the Tribunal found that it was not granted jurisdiction with respect to the Loan Agreements. The unity of the investment operation did not mean that the Tribunal automatically acquired jurisdiction with regard to each agreement concluded to implement the investment operation. This result was based in part on the somewhat indirect incorporation by reference of the consent to ICSID arbitration contained in the projected BIT that the Tribunal found had not entered into force. It was also based on the fact that the respective agreements were between different parties. Therefore the Tribunal's competence was confined to the Consolidation Agreement.[763]

564 In *Duke Energy* v. *Peru*, the investor and Peru had entered into a series of contracts called Legal Stability Agreements ("LSAs"). Only one of these (the DEI Bermuda LSA) contained an ICSID clause.[764] The Tribunal embraced the principle of the unity of the investment and analysed the decisions in *Holiday Inns*, *CSOB* and *SOABI*.[765] It said:

760 This passage, contained in the 1st edition of this Commentary, is quoted in *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, para. 130.
761 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 72.
762 At paras. 80, 82.
763 *CSOB* v. *Slovakia*, Decision on Further and Partial Objection to Jurisdiction, 1 December 2000, paras. 26–32.
764 *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 80–82, 89, 90.
765 At paras. 119–131.

> The reality of the overall investment, which is clear from the record, overcomes Respondent's objection that it could never have consented to arbitration of a dispute related to the broader investment . . .[766]

But the Tribunal immediately added language that seems to severely limit this principle:

> 132. However, the Tribunal also acknowledges the corollary finding in the CSOB case, namely that Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any of the other LSAs. . . .
>
> 133. While the Tribunal's lack of jurisdiction over the other LSAs will not prevent it from taking them into consideration for the purposes of the interpretation and application of the DEI Bermuda LSA . . ., it will not be in a position to "give effect" to the protections in those LSAs. In other words, in the peculiar circumstances of this case (successive agreements *for the protection* of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.[767]

565 The goal of settling investment disputes finally and comprehensively supports the generous application of the principle of the unity of the investment also for purposes of interpreting consent to jurisdiction. A situation in which an ICSID tribunal addresses some of the issues between the parties but leaves other closely related ones to be litigated elsewhere is unsatisfactory. Partial decisions are uneconomical and not conducive to the settlement of disputes. But this approach can be maintained only to the extent that it reflects the parties' presumed intentions. Where it is clear that the parties wished to exclude certain matters from ICSID's jurisdiction, this intention must be respected.[768]

566 Similar questions have arisen in the relationship of treaty clauses providing for international arbitration and contract clauses providing for other forms of litigation, notably before domestic courts. The resulting issues are discussed in the context of Art. 26 (see Art. 26, paras. 73–109).

11. The Applicability of MFN Clauses to Consent

567 A most favoured nation (MFN) clause contained in a treaty extends the better treatment granted to a third State or its nationals to a beneficiary of the treaty.[769] Most BITs, the NAFTA (Article 1103) and the ECT (Article 10(7)) contain MFN clauses. Some of these MFN clauses specify whether they cover dispute settlement. But most MFN clauses are worded in general terms and typically just refer to the treatment of investments. This has led to the question whether the effect of MFN clauses extends to the provisions on dispute settlement in these treaties.[770] Is it

766 At para. 131.
767 At paras. 132, 133. Footnotes omitted. Italics original.
768 See also *Tupman*, Case Studies, p. 834.
769 See also *Dolzer, R./Myers, T.*, After *Tecmed*: Most-Favored-Nation Clauses in Investment Protection Agreements, 19 ICSID Review – FILJ 49 (2004).
770 See *Gaillard, E.*, Establishing Jurisdiction Through a Most-Favored-Nation Clause, New York Law Journal, 2 June 2005; *Freyer, D. H./Herlihy, D.*, Most-Favored-Nation Treatment and

possible to avoid the limitations and conditions attached to consent, or even to overcome the absence of consent to arbitration by relying on the treaty's MFN clause?

568 In a number of cases tribunals have admitted the applicability of MFN clauses to dispute settlement. These cases involved procedural obstacles to arbitration. In *Maffezini* v. *Spain* the consent clause in the Argentina-Spain BIT required resort to the host State's domestic courts for eighteen 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.

569 On the basis of that clause, the Argentinian Claimant relied on the Chile-Spain BIT which does not contain the requirement to try the host State's courts for eighteen months. The Tribunal undertook a detailed analysis of the applicability of MFN clauses to dispute settlement arrangements[771] 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.[772]

However, 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. 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.[773]

570 Subsequent decisions 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 clause of another treaty that did not contain the eighteen months rule.[774] These tribunals pointed out that arbitration

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Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?, 20 ICSID Review – FILJ 58 (2005); *Fietta, S.*, Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?, 2 TDM 3 (2005); *Gallus, N.*, *Plama* v. *Bulgaria* and the Scope of Investment Treaty MFN Clauses, 2 TDM 3 (2005); *Ben Hamida, W.*, Clause de la nation la plus favorisée et mécanismes de règlement des différends: que dit l'histoire?, Revue trimestrielle LexisNexis JurisClasseur – J.D.I. 1127 (2007); *Ben Hamida, W.*, MFN Clause and Procedural Rights: Seeking Solutions from WTO Experiences, TDM February 2008.

771 *Maffezini* v. *Spain*, Decision on Jurisdiction, 25 January 2000, paras. 38–64.

772 At para. 64.

773 At paras. 62, 63.

774 *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 32–110; *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, paras. 24–31, 41–49; *Suez et al*. v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 52–66; *Suez and AWG* v. *Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 52–68. But see *Wintershall* v. *Argentina*, Award, 8 December 2008.

was an important part of the protection of foreign investors and that MFN clauses should consequently 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.[775]

571 In another group of cases the tribunals displayed a 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 existence of consent to arbitration.

572 In *Salini* v. *Jordan*, the dispute concentrated on whether the consent to arbitration contained in the Italy-Jordan BIT extended to contract claims as well as to treaty claims. The Tribunal refused to apply the MFN clause to this question. It concluded that the MFN clause "does not apply insofar as dispute settlement clauses are concerned".[776]

573 In *Plama* v. *Bulgaria*, the Tribunal found that it had jurisdiction on the basis of Article 26 of the Energy Charter Treaty.[777] The claimant additionally attempted to base the Tribunal's jurisdiction on the BIT between Bulgaria and Cyprus. That BIT does not provide for investor-State arbitration. The Claimant sought to use an MFN clause in that BIT to avail itself of the Bulgaria-Finland BIT which does. Therefore, the reliance on the MFN clause was not just directed at overcoming a procedural obstacle but was an attempt to import consent from another treaty. The Tribunal rejected this attempt stating that any intention to incorporate dispute settlement provisions from another treaty by way of an MFN clause would have to be expressed clearly and unambiguously. It said:

> 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.[778]

574 In *Telenor* v. *Hungary*, consent to investor-State arbitration under the BIT between Hungary and Norway was limited to the 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. However, the Tribunal 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

775 *Gas Natural* v. *Argentina*, Decision on Jurisdiction, 17 June 2005, para. 49.
776 *Salini* v. *Jordan*, Decision on Jurisdiction, 29 November 2004, paras. 102–119.
777 *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 179.
778 At para. 223.

be inferentially extended by an MFN clause seeing that Hungary and Norway had made a deliberate choice to limit arbitration.[779] The Tribunal 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.[780]

575 The two sets of cases are distinguishable on factual grounds. The cases in which the tribunals accepted the applicability of the MFN clauses concerned procedural conditions to consent. The cases in which the effect of the MFN clauses was denied concerned attempts to extend jurisdiction to issues not covered by consent clauses in the basic treaties.[781] Nevertheless, there is substantial contradiction in the reasoning of the tribunals. The tribunals made conflicting statements as to the applicability, or otherwise, of MFN clauses to dispute settlement in general.

576 Much depends on the wording of the particular MFN clause. Some BITs indicate whether an MFN clause applies to dispute settlement or not. In the absence of such an indication, there is no convincing reason for distinguishing between substantive standards and dispute settlement. As a matter of treaty interpretation, it is difficult to understand why a broadly formulated MFN clause that refers to "treatment" should apply only to issues of substance, but not to questions of dispute settlement.

577 The argument that the MFN clause is inapplicable in cases where the basic treaty limits or refrains from granting consent, since the parties' intention in that respect is 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 intended to endow its beneficiary with rights that are additional to the rights contained in the basic treaty. The meaning of an MFN clause is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights clearly go beyond the basic treaty.[782]

12. The Interpretation of Consent

a) The Law Applicable to the Interpretation of Consent

578 The exact scope of consent to ICSID's jurisdiction may be unclear and may require interpretation. This raises the question of the appropriate methods for the interpretation of an expression of consent. The first step in such an inquiry is the identification of the law applicable to this issue. Tribunals have held consistently that questions of jurisdiction are not subject to Art. 42 which governs the law applicable to the merits of the case.[783] Rather, questions of jurisdiction are governed

779 *Telenor* v. *Hungary*, Award, 13 September 2006, paras. 90–97.
780 At para. 100.
781 The non-ICSID case *RosInvest* v. *Russia*, SCC Award on Jurisdiction, October 2007, paras. 124–139, does not fit this scheme: the Tribunal applied the MFN clause in the UK-Soviet Union BIT to import the wider jurisdictional clause from the Denmark-Russia BIT.
782 See *RosInvest* v. *Russia*, Award on Jurisdiction, October 2007, para. 131.
783 *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, paras. 48–50; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, para. 38; *Siemens* v. *Argentina*, Decision

by Art. 25 of the Convention and by the instruments expressing consent. These instruments amount to an agreement between the State and the foreign investor. In the words of the Tribunal in *CMS* v. *Argentina*:

> Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions.[784]

579 Where consent is based on a treaty it would seem obvious to apply principles of treaty interpretation.[785] Reliance on domestic law principles of interpretation appears attractive where consent is based on a clause in domestic legislation. But it must be kept in mind that an ICSID clause in a treaty or in legislation is only the first step towards agreed consent. The offer must be accepted in writing by the investor (see paras. 447–455 *supra*). The perfected consent is neither a treaty nor simply a contract under domestic law, but an agreement between the host State and the investor based on a treaty.

580 In cases involving consent expressed in direct agreements between the host State and the investor, the parties repeatedly relied on alleged principles resulting from the international nature of the consent clauses. These included the argument that there was a presumption against the limitation of a State's sovereignty[786] or against derogation from general principles of law concerning dispute settlement.[787] Arguments inspired by international law but seeking to uphold jurisdiction relied on the principle of effective interpretation[788] and *pacta sunt servanda*.[789] There was also a suggestion that ICSID jurisdiction was in derogation from general rules of municipal law and had to be interpreted strictly.[790] The Tribunals have adopted a reserved attitude towards these various arguments.

581 In *Amco* v. *Indonesia*, consent was based on an investment application providing for ICSID arbitration that had been accepted by the host State. The Tribunal said that it would determine the true common will and intention of the parties

> . . . from the normal expectations of the parties, as they may be established in view of the agreement as a whole, and of the aim and the spirit of the Washington Convention as well as of the Indonesian legislation and behaviour.[791]

582 In *CSOB* v. *Slovakia*, consent to arbitration was based on a contract between the parties that referred to a BIT. Although the BIT had never entered into force,

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on Jurisdiction, 3 August 2004, paras. 29–31; *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 34–39; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 15–17, 57; *Jan de Nul* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 65–68.

784 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 88.

785 See *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 20.

786 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 674, 679; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 16.

787 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 48.

788 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 674.

789 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14.

790 *SOABI* v. *Senegal*, Award, 25 February 1988, para. 4.08.

791 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 18. See also paras. 21–23.

the Tribunal concluded that by referring to the BIT the parties had intended to incorporate the arbitration clause in the BIT into their contract[792] (see paras. 390, 429 *supra*). 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.[793]

583 In *SPP* v. *Egypt*, jurisdiction was based on a provision in Egyptian legislation (see paras. 400–404 *supra*). The Tribunal refused to accept Egypt's argument that the parties' consent to arbitration should therefore be interpreted in accordance with Egyptian law. Neither did it accept the Claimant's argument that the arbitration clause was subject to the rules of treaty interpretation.[794] 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.[795]

584 In *Zhinvali* v. *Georgia*, consent was based on an offer of ICSID arbitration in the host State's Investment Law.[796] The Tribunal found that its interpretation of consent was primarily governed by the law of Georgia subject to the control of international law. The Tribunal quoted *CSOB* and *SPP*. It said:

> . . . we are dealing with an internal statute rather than a bilateral agreement and hence the Tribunal believes that, if the national law of Georgia addresses this question of "consent", which the Tribunal finds that it does, then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law. . . . the 1996 Georgia Investment Law, the Tribunal believes, is completely in keeping with any international law principles that may be applicable. Thus, we have reached our conclusion on the basis of our reading of Georgia's own law, which, in this case, we see no reason to view as in any way divergent from international law.[797]

585 The available practice, as set out above, varies in its emphasis on domestic and on international law. Some of this variation is due to the different ways in which consent is expressed by way of contracts, on the basis of treaties or on the basis of legislation. The end result is always an agreement between a State and a

792 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, paras. 49–55.
793 At para. 35.
794 *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, paras. 55–60.
795 At para. 61.
796 *Zhinvali* v. *Georgia*, Award, 24 January 2003, para. 229.
797 At paras. 339, 340.

foreign investor. This leads to a methodological mix involving treaty interpretation, statutory interpretation and general principles of contract law. The framework for this process is always Art. 25 of the Convention.

b) Restrictive or Extensive Interpretation of Consent

586 A recurrent theme in pleadings before ICSID tribunals is the argument that consent by the host State to the Centre's jurisdiction should be construed restrictively. For instance, in *Holiday Inns* v. *Morocco*, the respondent Government insisted on the need for a restrictive interpretation of a State's undertaking to arbitrate since it was in derogation from the State's sovereignty.[798] The Claimants attempted to invoke an alleged principle of interpretation in the opposite sense: that of effective interpretation epitomized in the Latin phrase *ut res magis valeat quam pereat*.[799] ICSID tribunals have been disinclined to embrace either of the two principles.[800]

587 In *Amco* v. *Indonesia*, the Tribunal was confronted with the argument that consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty should be construed restrictively.[801] 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.[802]

In the Tribunal's view, the proper method for the interpretation of the consent agreement was to read it in the spirit of the ICSID Convention and in the light of its objectives. ICSID arbitration was in the interest of both parties, a thought that was expressed in the first paragraph of the Convention's Preamble. The investor's interest in submitting investment disputes to international arbitration was matched by a parallel interest of the host State: to protect investments is to protect the general interest of development and of developing countries.[803]

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798 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 674, 679.

799 1 ICSID Reports 674. The Tribunal's reaction to these arguments is not clear from the only published record of the case.

800 See also *Schreuer, C.*, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, 3 TDM 2, at p. 4 (2006).

801 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 12, 16.

802 At para. 14. Emphases original. See also to the same effect paras. 18 and 29. This passage was quoted with approval in *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, at para. 6.27; *Ethyl Corp*. v. *Canada* (UNCITRAL), Decision on Jurisdiction, 24 June 1998, at para. 55; *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, at para. 34; *Inceysa* v. *El Salvador*, Award, 2 August 2006, para. 177.

803 At para. 23.

588 This teleological method of interpreting consent[804] does not embrace the extensive or effective method of interpretation explicitly. But it is liable to lean towards a result that upholds jurisdiction and will create a presumption in favour of the validity or applicability of consent.[805]

589 In *SOABI* v. *Senegal*, the Government's argument was that Art. 25 of the Convention must be given a strict interpretation "as with any provision derogating from general rules of municipal law".[806] The Tribunal noted that consent to arbitral proceedings was in 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.[807] 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.[808]

590 In *SPP* v. *Egypt*, the argument of the restrictive interpretation of jurisdictional instruments was raised in relation to an ICSID clause in national legislation. The Tribunal found that there was no presumption of jurisdiction, particularly where a sovereign State was involved, and that jurisdiction only existed insofar as consent thereto had been given by the parties. Equally, there was no presumption against the conferment of jurisdiction with respect to a sovereign State. After referring to a number of international 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.[809]

591 In *Mondev* v. *United States*, decided under the Additional Facility, 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".[810] 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

804 A teleological approach to interpretation is also apparent in *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 107.
805 See also *Rand/Hornick/Friedland*, ICSID's Emerging Jurisprudence, p. 58, and more generally *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 231/2; *Amerasinghe*, The Jurisdiction of the International Centre, pp. 214, 216, 222.
806 *SOABI* v. *Senegal*, Award, 25 February 1988, para. 4.08.
807 At para. 4.09.
808 At para. 4.10.
809 *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 63.
810 *Mondev* v. *United States* (AF), Award, 11 October 2002, para. 42.

> 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.[811]

592 A number of other tribunals have also endorsed a balanced approach to the interpretation of consent clauses. Such an approach rejects both a presumption against and in favour of jurisdiction.[812]

593 In *Tradex* v. *Albania*, the Tribunal appears to have embraced, although with some qualifications, a doctrine of effective interpretation. After finding that the Albanian Investment Law 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 rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular.[813]

To put this statement into perspective it should be remembered that the Tribunal ultimately found that it lacked jurisdiction (see para. 525 *supra*).

594 The above examples would indicate that neither of the alleged principles carries much weight when applied to expressions of consent to the jurisdiction of ICSID. The issue of a restrictive or extensive interpretation of treaty clauses has also arisen in other contexts in investment arbitration.[814]

595 More important than theoretical considerations or general doctrines on the interpretation of consent agreements is the practice of tribunals on specific issues arising from the application of these agreements. These issues involve the various elements that are required for a finding of jurisdiction such as the interpretation of the concept of an investment, treatment of questions of nationality, application of MFN clauses and umbrella clauses and a number of other questions.

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811 At para. 43. Footnotes omitted. The Tribunal cited several decisions by the International Court of Justice and by other tribunals.

812 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, at para. 34; *Methanex* v. *United States* (UNCITRAL), Preliminary Award on Jurisdiction, 7 August 2002, 7 ICSID Reports 239, paras. 103–105; *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 91; *Duke Energy* v. *Peru*, Decision on Jurisdiction, 1 February 2006, paras. 76–78; *Inceysa* v. *El Salvador*, Award, 2 August 2006, paras. 176–181; *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 195–197.

813 *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 68.

814 *Loewen* v. *United States* (AF), Decision on Jurisdiction, 9 January 2001, para. 51; *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 171; *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, para. 116; *Eureko* v. *Poland* (non-ICSID), Partial Award, 19 August 2005, 12 ICSID Reports 335, paras. 248, 258; *Noble Ventures* v. *Romania*, Award, 12 October 2005, para. 52; *El Paso* v. *Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 68–70; *Suez et al.* v. *Argentina*, Decision on Jurisdiction, 16 May 2006, paras. 59, 64; *Azurix* v. *Argentina*, Award, 14 July 2006, para. 307; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 97–99, 132; *Suez and AWG* v. *Argentina*, Decision on Jurisdiction, 3 August 2006, paras. 60, 61, 66; *Enron* v. *Argentina*, Award, 22 May 2007, para. 331. See also *Ecuador* v. *Occidental*, Court of Appeal (England), 4 July 2007, para. 28.

J. "When the parties have given their consent, no party may withdraw its consent unilaterally."

1. The Irrevocability of Consent

596 The Working Paper, the Preliminary Draft and the First Draft did not contain express statements to the effect that consent, once given, was irrevocable (History, Vol. I, pp. 110–116). But it does not appear that the principle was ever cast into doubt. Mr. *Broches* explained tirelessly that while there was no obligation to give consent, once such an undertaking was voluntarily made, no subsequent withdrawal should be possible (History, Vol. II, pp. 68, 70, 241, 303, 334, 335, 402, 403, 405, 406, 464, 503). He was joined by a number of delegates, mainly from developed countries (at pp. 305, 402, 403, 405, 701). Eventually, Italian and British proposals suggested that this principle should be stated explicitly in the Convention (at p. 757). After some further deliberation (at p. 836), it was adopted in the Revised Draft in its final form.

597 The principle of irrevocability of consent is confirmed by the Convention's Preamble, which states:

> ***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;

It is reiterated in the Report of the Executive Directors, which points out that "[c]onsent to jurisdiction . . . once given cannot be withdrawn unilaterally".[815]

598 The binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim *pacta sunt servanda* and applies to undertakings to arbitrate in general.[816] The principle's aptness is obvious where the consent is expressed in a compromissory clause contained in an agreement.[817] It applies equally where an offer of consent is contained in national legislation or a treaty which has been accepted by the investor (see paras. 392–463 *supra*). Consent to ICSID's jurisdiction is always by agreement even if the elements of agreement are expressed in separate documents (see paras. 388, 416, 447, 468 *supra*).

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

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815 Para. 23, 1 ICSID Reports 28.

816 See *Delaume, G. R.*, The Finality of Arbitrations Involving States: Recent Developments, 5 Arbitration International 21, 24 *et seq.* (1989).

817 See the *obiter dictum* in *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 43.

before the Centre (see paras. 417, 469 *supra*) but in doing so he or she runs the risk that the offer may be withdrawn at any time before then.[818]

600 The perfection of consent may also be delayed by other circumstances. If either the host State or the State of the investor's nationality has not yet ratified the Convention at the time consent is given by the parties, the consent will only be perfected and hence become irrevocable once these objective conditions for jurisdiction have been met (see para. 471 *supra*).

601 In *Holiday Inns* v. *Morocco*, neither the host State nor the State of the investor's nationality were parties to the Convention on the date the agreement containing the consent clause was signed. The Tribunal noted the dates of the subsequent ratifications by the two States and concluded:

> . . . it is on the last of those dates, . . . , that the Parties "have consented to submit the dispute to arbitration" within the meaning of Article 25(2)(b) of the Convention. From that date neither Party could unilaterally withdraw its consent as provided in Article 25(1).[819]

602 Similar considerations must apply to consent given by a constituent subdivision or agency of the host State. Such consent is subject to the condition that the constituent subdivision or agency has been designated to the Centre (see paras. 247–267 *supra*) and that its consent has been approved by the State or that the State has notified the Centre that no such approval is required (see paras. 903–920 *infra*). It is not before these conditions are met that the consent becomes effective and hence irrevocable.

603 The irrevocability of consent only applies to unilateral attempts at withdrawal. It is clear that the parties may terminate consent to jurisdiction by mutual agreement either before or after the institution of proceedings. In particular, the parties may reach a settlement and discontinue proceedings (see Art. 48, paras. 69–87).

604 In *Gruslin* v. *Malaysia*, the Respondent had failed to raise a particular objection to jurisdiction in an earlier pleading. The Tribunal held that this did not mean that the raising of that objection in a subsequent pleading constituted an impermissible derogation from a prior consent to jurisdiction.[820]

605 The Convention not only declares the unilateral withdrawal of consent inadmissible but also makes provision for the institution and continuance of proceedings despite the refusal of a party to cooperate. The provisions on the constitution of conciliation commissions and arbitral tribunals (Arts. 29–30, 37–38), on *ex parte* procedure (Arts. 34(2), 45) and on the enforcement of awards (Art. 54) are designed to secure the successful conclusion of proceedings even in the face of a recalcitrant party.

606 The parties are free to subject their consent to limitations and conditions (see paras. 513–550 *supra*). However, once consent has been given, its irrevocability

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818 See also *Hirsch*, The Arbitration Mechanism, p. 50.

819 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 12 May 1974, 1 ICSID Reports 668. See also paras. 287, 288, 472 *supra*.

820 *Gruslin* v. *Malaysia*, Award, 27 November 2000, paras. 18.1–18.4.

extends to the introduction of new limitations and conditions. In other words, the prohibition of withdrawal covers the full extent of the consent to jurisdiction.

2. Prohibition of Indirect Withdrawal of Consent

a) Notification under Art. 25(4)

607 Contracting States may notify the Centre of classes of disputes that they would not consider submitting to the jurisdiction of the Centre (see paras. 921–941 *infra*). A notification of this kind may not be used to withdraw or limit a consent given previously. The point is well illustrated by three related cases instituted against Jamaica.[821] In all three cases, the Government had entered into agreements with the foreign investor containing "no further tax" clauses and clauses containing consent to ICSID's jurisdiction.[822] All three cases involved bauxite mining. On 8 May 1974, Jamaica sent the following communication to the Centre:

> In accordance with Article 25 of the Convention establishing the International Centre for the Settlement of Investment Disputes, the Government of Jamaica hereby notifies the Centre that the following class of dispute at any time arising shall not be subject to the jurisdiction of the Centre.
>
> *Class of Dispute*
>
> Legal Dispute arising directly out of an investment relating to minerals or other natural resources.[823]

This notification was phrased to match the wording of Art. 25(4) of the Convention but was evidently designed to withdraw consent with respect to the three investors. Exactly one month later, Jamaica enacted new legislation that effected a ninefold increase in the taxes on the mining operations.[824]

608 The three Tribunals found that the Government could not limit or withdraw its consent to jurisdiction by way of a notification under Art. 25(4):

> 23. In the present case the written consent was contained in the arbitration clauses between the Government and Kaiser . . . This consent having been given could not be withdrawn. The notification under Article 25 only operates for the future by way of information to the Centre and potential future investors in undertakings concerning minerals and other natural resources of Jamaica.[825]

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821 *Alcoa Minerals* v. *Jamaica*; *Kaiser Bauxite* v. *Jamaica*; *Reynolds* v. *Jamaica*. The *Alcoa* case is described by *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90 (1976).

822 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 12. See also *Schmidt*, Arbitration, pp. 93/4.

823 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 14; *Schmidt*, Arbitration, p. 102. See also: Notification concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, ICSID/8-D, p. 3.

824 *Schmidt*, Arbitration, p. 94.

825 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 23; *Schmidt*, Arbitration, p. 103.

The Tribunals added that any other interpretation would very largely, if not wholly, deprive the Convention of any practical value for Contracting States and investors.[826] The cases were subsequently discontinued after settlements agreed by the Parties.

b) Denunciation of the Convention

Under Art. 71, a Contracting State may denounce the Convention at six months' notice. Since participation by the host State and the investor's State of nationality are conditions for the validity of consent (see paras. 471, 600 *supra*), the termination of either State's participation in the Convention could vitiate consent. Art. 72 blocks this indirect way of withdrawing consent. It provides that the Convention's denunciation by the host State or the investor's home State shall not affect consent to jurisdiction given previously. **609**

On 2 May 2007 the Republic of Bolivia submitted a written notice of denunciation. The Secretary-General registered a case against Bolivia on 31 October 2007.[827] **610**

The same principle applies if a State party to the Convention excludes the application of the Convention to any territory for which it is responsible under Art. 70. In accordance with Art. 72, such a notice of exclusion will not affect any consent to jurisdiction given previously. **611**

c) Withdrawal of Designation or Approval in Respect of a Constituent Subdivision or Agency

Valid consent to jurisdiction by a constituent subdivision or agency of the host State depends on two additional requirements: 1. The host State must have designated the constituent subdivision or agency to the Centre (see paras. 230–267 *supra*). 2. The host State must either have approved the consent given by its constituent subdivision or agency or notified the Centre that no such approval is required (see paras. 903–920 *infra*). Only after these conditions are met does the consent become effective and irrevocable. **612**

Once consent to the jurisdiction by a constituent subdivision or agency has become effective, it may not be vitiated by a repeal of the designation (see para. 267 *supra*) or by the withdrawal of the approval of consent (see para. 908 *infra*).[828] Similar considerations must apply if the host State abolishes the constituent subdivision or agency for the purpose of defeating consent. This is not to say that every abolition or privatization of a constituent subdivision or agency would automatically lead to the host State assuming its rights and duties under an agreement on **613**

826 At para. 24.

827 *E.T.I. Euro Telecom* v. *Bolivia*.

828 See, however, *Amerasinghe*, Jurisdiction Ratione Personae, p. 237 and *Amerasinghe*, The Jurisdiction of the International Centre, pp. 190/1, who is of the opinion that the approval of the consent would become binding on the host State and therefore irrevocable only when one or both parties to the investment agreement have acted or changed their position in reliance on it. See also *Delaume*, ICSID Arbitration, p. 111.

jurisdiction (see paras. 313–316 *supra*). But it follows from the prohibition of a unilateral withdrawal of consent that a host State may not nullify the consent given by one of its constituent subdivisions or agencies by removing or restructuring it.

d) Withdrawal of Investment Authorization

614 Consent to jurisdiction is sometimes limited to investments approved or authorized by the host State (see para. 422 *supra*). Consent would then become effective and irrevocable only after the approval or authorization of the investment by the host State. A subsequent revocation of the investment licence might serve to withdraw consent to ICSID's jurisdiction indirectly.

615 In *SPP* v. *Egypt*, jurisdiction was based on Art. 8 of Egypt's Law No. 43 of 1974 (see paras. 400–404 *supra*). Art. 1 of that Law made the application of the jurisdictional clause conditional upon the approval of the project by the Egyptian authorities. Before the Tribunal, Egypt argued that any rights conferred upon the Claimants by Law No. 43 were extinguished when the approval of their project was withdrawn on 28 May 1978. This withdrawal took place before SPP(ME) had accepted the Centre's jurisdiction in a letter of 15 August 1983.[829] The Tribunal examined the situation under Egyptian law and found that under the prevailing circumstances the withdrawal of the approval had exceeded the capacity of the acting authority and, therefore, had no juridical effect. The Tribunal added the following observations:

> 66. In any event, the same conclusion results from general principles of law. Even without going into the question of the autonomy of an arbitration clause, the Tribunal notes that Egypt did not repeal Law No. 43 before the Claimants formally invoked ICSID jurisdiction, and indeed has still not repealed it. If Law No. 43 contained an offer by Egypt to accept ICSID jurisdiction prior to cancellation of the Pyramids Oasis project, that offer did not terminate as a result of the withdrawal of the approval of the project. For cancellation of the project did not alter the fact that an investment had been made under Law 43. Accordingly, the Tribunal finds that Law No. 43 is applicable to the investment dispute in the present case.[830]

616 In the particular case, the attempted withdrawal of the investment authorization had taken place before the offer of consent contained in Law No. 43 was accepted by the investor. Therefore, consent had not yet become effective. Nevertheless, the Tribunal found that even the unilateral offer contained in Law No. 43 was not terminated by the cancellation of the project. However, it indicated that if Law No. 43 had been repealed before the Claimants had invoked ICSID's jurisdiction, the offer would have lapsed.

617 The Convention's prohibition of unilateral withdrawal of consent means that acceptance of the offer by the investor would be an absolute bar to measures by the host State to defeat ICSID's jurisdiction. Therefore, even if a valid investment

829 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 64.
830 At para. 66.

authorization is a condition for obtaining the host State's consent to jurisdiction, a subsequent withdrawal of the authorization cannot nullify consent after acceptance by the investor.

e) Repeal of National Legislation providing for Consent

618 A host State is free to change its investment legislation including the provision concerning consent to ICSID's jurisdiction. An offer of consent contained in national legislation (see paras. 392–426 *supra*) that has not been taken up by the investor will lapse when the legislation is repealed.[831] The situation is different if the investor has accepted the offer in writing while the legislation was still in force. The consent agreed to by the parties then becomes insulated from the validity of the legislation containing the offer. It assumes a contractual existence independent of the legislative instrument that helped to bring it about. Therefore, repeal of investment legislation providing for ICSID's jurisdiction will not effect a withdrawal of consent if the investor has accepted the offer during the legislation's lifetime.

f) Termination of a Treaty providing for Consent

619 Bilateral investment treaties (BITs) and multilateral international instruments providing for consent to ICSID's jurisdiction (see paras. 427–463 *supra*) are more difficult to terminate or amend than national legislation. Yet the fact remains that consent based on treaties is only perfected once it is accepted by the investor (see para. 447 *supra*). It is only after its acceptance by the investor that an offer of consent contained in a BIT or other international instrument becomes irrevocable and hence insulated from attempts by the host State to terminate the treaty or instrument. In *CSOB* v. *Slovakia*, the Tribunal found that the BIT had never entered into force despite the fact that it was published in Slovakia's Official Gazette together with a notice announcing its entry into force (see para. 429 *supra*). After the institution of ICSID proceedings, Slovakia published a corrective notice in its Official Gazette asserting the BIT's invalidity. The Tribunal said:

> In this connection, it should be noted that if the Notice were to be held to constitute a valid offer by the Slovak State to submit to international arbitration, the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997, asserting the invalidity of the BIT, would be of no avail to Respondent, since Claimant accepted the offer in the Request for Arbitration filed prior to the publication of the corrective notice.[832]

g) Invalidity or Termination of the Investment Agreement containing Consent

620 If an investment agreement between the host State and the investor containing a clause providing for ICSID's jurisdiction is alleged to be invalid or has been terminated, it may be argued that the consent clause is also invalidated or ceases

831 For an argument to the contrary see *Hirsch*, The Arbitration Mechanism, pp. 53/4.
832 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 45.

to operate. A party contending that the investment agreement is not in force may deny the power of an ICSID commission or tribunal even to determine its own competence: if there is no legal basis for the Centre's jurisdiction, no commission or tribunal may be constituted; if constituted it has no power to decide anything, including the question of jurisdiction.

621 It is evident that the assertion that an investment agreement, including the ICSID clause contained therein, is void cannot be the end of the matter. A unilateral invocation of invalidity or termination of the investment agreement will not defeat the consent clause. Any other result would be contrary not only to the prohibition of unilateral withdrawal of consent, as contained in Art. 25(1), but also to the principle that the commission or tribunal shall be the judge of its own competence (Arts. 32 and 41). In other words, the commission or tribunal must have the power to decide on disputes concerning the alleged invalidity of investment agreements even if the commission's or tribunal's very existence depends on the agreement's validity (see Art. 41, paras. 5, 6). Despite some problems of formal logic, this is the only practical way to deal with attempts to defeat consent clauses in investment agreements by asserting their invalidity.

622 International arbitral practice has developed a general legal principle that supports this result. It is the doctrine of the severability or separability of the arbitration agreement. Under this doctrine, the agreement providing for arbitration assumes a separate existence, which is autonomous and legally independent of the agreement containing it.[833] The most important argument in favour of this doctrine is the assumption that the parties, in providing for the arbitration of disputes relating to the agreement, intended *all* disputes, including disputes about the agreement's validity, to be resolved through arbitration.[834] Otherwise, a party could at any time defeat its obligation to arbitrate simply by declaring the agreement void or terminated. Therefore, the "intention of the parties and the requirements of effective arbitration combine to give rise to the concept of severability".[835] This principle of severability of the arbitration agreement is supported by the weight of international arbitral codifications[836] and cases as well as by national arbitral practice.[837]

623 The Arbitration (Additional Facility) Rules (see paras. 9–13 *supra*) expressly provide for the separability of the arbitration agreement from the underlying contract. Their Art. 45(1) provides:

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833 For an extensive analysis see *Schwebel, S. M.*, International Arbitration: Three Salient Problems, 1–60 (1987). See also *Hirsch*, The Arbitration Mechanism, pp. 50/1; *Langkeit, J.*, Staatenimmunität und Schiedsgerichtsbarkeit. Verzichtet ein Staat durch Unterzeichnung einer Schiedsgerichtsvereinbarung auf seine Immunität?, 72/3 (1989).

834 *Schwebel*, International Arbitration, at p. 3. 835 *Ibid.* at p. 4.

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

837 *Schwebel*, International Arbitration, at pp. 24–59.

> (1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.

624 Despite the weight of authority against a unilateral withdrawal of consent by way of asserting the invalidity of the underlying agreement, *Delaume* would recommend a clarification of this point in the agreement. He has suggested that no harm will be done and something might be gained by including a proviso in the consent clause that would specify its applicability to disputes arising "at any time during the duration of this contract or thereafter".[838] This formula addresses the problem of the agreement's termination but not the allegation of its nullity *ab initio*. To dispel any doubts as to the severability of the agreement to arbitrate and as to the intention of the parties in this regard, the consent clause may be further specified as applying not only to the construction, application and effect of the agreement but also to its validity.

h) Incapacity to Give Consent

625 A special form of arguing the invalidity of an arbitration agreement is a State's contention that under its own law it lacks the capacity to make such a submission. If the rule providing for the incapacity to arbitrate is introduced after the consent has been given, it is clear that this unilateral measure by the State cannot affect its prior consent.[839] The situation is not so obvious if the rule providing for incapacity was in force at the time of consent. Technically, this is not a withdrawal of consent since the State's position is that consent was never validly given. But from the investor's perspective, who has relied on the State's undertaking to arbitrate, a subsequent claim of incapacity amounts to a withdrawal of consent (see also Art. 42, paras. 46, 47, 154–156).

626 No problems are likely to arise with regard to constituent subdivisions and agencies under the Convention. The dual requirement of a designation to the Centre of any such entity possessing the authority to give consent (see paras. 230–267 *supra*) and of approval of consent (or notification to the Centre that no approval is required) (see paras. 903–920 *infra*) makes it unlikely that consent will be challenged on the ground of incapacity.

627 But even the argument that a State's own expression of consent was defective under its law and hence invalid is unlikely to succeed. The State's argument can take two forms: it may argue that its substantive law restricts or excludes its capacity to submit to arbitration. Such prohibitions are not uncommon.[840] Alternatively, it may argue that the commitment to arbitrate was not given by the right organ or in violation of prescribed procedures.

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838 *Delaume*, How to Draft, p. 174.
839 *Audit, B.*, Transnational Arbitration and State Contracts, pp. 91/2 (1987).
840 See *Parra, A. R.*, Principles Governing Foreign Investment, as Reflected in National Investment Codes, 7 ICSID Review – FILJ 428, 447 (1992).

628 In either case, there are weighty arguments to dismiss a plea of incapacity as vitiating a State's consent. It is the primary duty of the Contracting State to ensure the observance of its own law. Alternatively, good faith requires that any incapacities or procedural requirements must be divulged to the other side. A party may not avail itself of its own violation of legal rules.[841] The weight of practice in international arbitration is squarely against allowing States to invoke their incapacity to arbitrate to the detriment of the other party.[842]

629 In *IBM* v. *Ecuador*, jurisdiction was based on the BIT between Ecuador and the United States. The Respondent argued that the dispute was incapable of being settled by arbitration since there was no constitutional or legal provision that empowered the Ecuadorean Government to do so.[843] The Tribunal rejected this argument and found that Ecuador was bound by its international obligations.[844]

630 The observations made above are predicated on the good faith or "legitimate ignorance" of the non-State partner. If an investor is grossly negligent or fully aware of the host State's incapacity or non-compliance with procedural requirements, it will not be able to rely on the consent clause. An appropriate standard might be gleaned by analogy from Art. 46 of the Vienna Convention on the Law of Treaties, which provides:

> *Provisions of internal law regarding competence to conclude treaties*
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Therefore, it is wise to take legal advice as to the requirements for consent in the State concerned. As a general rule, it may be expected that the government minister in charge of economic matters has authority to give consent to arbitration. But such an expression of consent may be subject to the approval of other organs of the State.

631 An investor may reduce its risk drastically if it can obtain a written assurance, possibly in the agreement itself, which sets out the legal requirements for consent

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841 *Audit*, Transnational Arbitration and State Contracts, pp. 92–96. See also Institut de Droit International, Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, Art. 5, 63 Annuaire II 324, 328 (1989).

842 See *Audit, loc. cit.*; *Delaume*, ICSID Arbitration, pp. 105–107; *Delaume, G. R.*, The Finality of Arbitrations Involving States: Recent Developments, 5 Arbitration International 21, 26 (1989); *Langkeit, J.*, Staatenimmunität und Schiedsgerichtsbarkeit. Verzichtet ein Staat durch Unterzeichnung einer Schiedsgerichtsvereinbarung auf seine Immunität?, 74 *et seq*. (1989); *Paulsson, J.*, May a State Invoke its Internal Law to Repudiate Consent to Arbitration?, 2 Arbitration International 90 (1986). See especially, *Benteler* v. *Belgian State*, Award of *Ad Hoc* Tribunal, 18 November 1983, 1 Journal of International Arbitration 184–190 (1984).

843 *IBM* v. *Ecuador*, Decision on Jurisdiction, 22 December 2003, heading 2.5.

844 At paras. 71, 85.

under the host State's domestic law and declares that they have been met. This may be supplemented by a statement on the part of the investor that it will not be responsible for any irregularity.[845]

632 Problems concerning the validity of consent can also arise on the investor's side. A corporation may plead lack of authority on the part of a person representing it or non-observance of proper corporate procedure. Therefore, it is advisable to obtain evidence of authority from whoever purports to give consent to the jurisdiction of ICSID on behalf of the investor.[846]

i) Conferral of Host State Nationality

633 In the case of natural persons, the investor must not possess the host State's nationality either at the time of consent or at the time a request for conciliation or arbitration is registered (Art. 25(2)(a)) (see paras. 664–678 *infra*). Therefore, acquisition of the host State's nationality after the date of consent would destroy the basis for jurisdiction *ratione personae*. The prohibition of unilateral withdrawal of consent protects the investor from the jurisdictional consequences of an involuntary acquisition of host State nationality after the date of consent if the compulsory grant of nationality is designed to defeat jurisdiction or is otherwise contrary to international law.

634 In the same vein, a host State cannot destroy an essential jurisdictional requirement by depriving a local company of its foreign control, as required by Article 25(2)(b), through an act of expropriation (see para. 895 *infra*).

K. "(2) 'National of another Contracting State' means:"

635 Art. 25(2) undertakes to give a definition of the words "national of another Contracting State" contained in Art. 25(1). What follows is not a definition of the concept of nationality. Art. 25(2) merely offers some clarifications on eligible and non-eligible nationalities at certain dates.

636 The investor's party status in ICSID proceedings is subject to a positive and to a negative nationality requirement. The investor must possess the nationality of a Contracting State. Therefore, investors who only have the nationality of a non-Contracting State are excluded (see paras. 284–288 *supra*). On the other hand, the investor must not, in principle, be a national of the host State. Therefore, nationals of the host State are also excluded, subject to an important exception for certain juridical persons, contained in Art. 25(2)(b).

637 Art. 25(2) distinguishes between natural persons or individuals on one side and juridical persons, such as corporations, on the other. The rule on nationality for natural persons is stricter than for juridical persons. For natural persons the

845 *Audit*, Transnational Arbitration and State Contracts, p. 97.

846 Institution Rule 2(1)(f) states that a request for arbitration, made by a juridical person, must state that all internal action to authorize the request has been taken. The request must be supported by documentation to this effect. This rule refers not to the giving of consent but to the institution of proceedings. See also *Delaume*, How to Draft, p. 170.

nationality requirement must be met at two distinct dates. For juridical persons it exists only with regard to one date. For natural persons possession of the host State's nationality is an absolute bar to becoming a party to ICSID proceedings. For juridical persons an exception is possible.

638 Much of the debate during the preparatory works on the investor's nationality turned on the question of whether it was necessary to set out objective requirements. Mr. *Broches*, in particular, emphasized the optional character of ICSID's jurisdiction and pointed out that it was up to the host State to decide whom it wished to regard as a foreign investor (History, Vol. II, pp. 256, 284, 287, 360, 397, 450, 539, 540, 580, 581/2). Nevertheless, the view prevailed that the Convention should contain objective criteria also in this respect (see para. 5 *supra*). A consensual element was preserved in the second clause of Art. 25(2)(b) in relation to a juridical person possessing the nationality of the host State. But even an agreement to treat such a juridical person as a national of another Contracting State is subject to the objective requirement that it must be under foreign control (paras. 813–825 *infra*).

639 Therefore, the existence of a consent agreement between a host State and an investor cannot be taken as an automatic recognition that the investor has met the Convention's nationality requirements. This holds true also for the satisfaction of the nationality conditions to qualify for protection under investment protection treaties. The nationality requirements are part of the Convention's objective criteria that must be ascertained in addition to the existence of consent.

L. "(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;"

640 The nationality of individual investors received considerable attention in the deliberations surrounding the Convention's drafting. In actual practice, most cases that have reached ICSID have involved juridical persons. But at the time of writing at least thirty ICSID and Additional Facility cases, past and present, have involved investors who were natural persons.[847]

847 *Pharaon* v. *Tunisia* (ARB/86/1) settled; *Gruslin* v. *Malaysia* (ARB/94/1) settled; *Goetz* v. *Burundi*, Award, 10 February 1999; *Azinian* v. *Mexico* (AF), Award, 1 November 1999; *Lemire* v. *Ukraine* (AF), Award, 18 September 2000; *Maffezini* v. *Spain*, Award, 13 November 2000; *Gruslin* v. *Malaysia*, Award, 27 November 2000; *Feldman* v. *Mexico* (AF), Decision on Jurisdiction, 6 December 2000, *Feldman* v. *Mexico* (AF), Award, 16 December 2002; *Genin* v. *Estonia*, Award, 25 June 2001; *Olguín* v. *Paraguay*, Award, 26 July 2001; *Loewen* v. *United States* (AF), Award, 26 June 2003, *Loewen* v. *United States* (AF), Decision on Request for Supplementation, 13 September 2004; *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003; *Mitchell* v. *DR Congo*, Award, 9 February 2004; *Soufraki* v. *UAE*, Award,

1. Determination of Nationality

a) Applicable Law

641 During the Convention's preparatory work, it was generally acknowledged that nationality would be determined by reference to the law of the State whose nationality is claimed subject, where appropriate, to the applicable rules of international law (History, Vol. II, pp. 67, 286, 321, 448, 580, 705, 839).[848] In particular, it was pointed out that the commission or tribunal would have to deal appropriately with cases where a host State imposed its nationality upon an investor[849] (at pp. 582, 658, 705, 868, 874, 876/7) (see also para. 678 *infra*).

642 Whether a person is a national of a particular State is determined, in the first place, by the law of the State whose nationality is claimed. Indeed, in determining whether the individual holds a particular nationality, tribunals are entitled, and may be required, to apply that law.[850] Questions of nationality are not governed by the law applicable to the dispute in accordance with Art. 42 unless, of course, that law also happens to be the law of the State whose nationality is at issue. But an international tribunal is not bound by the national law in question under all circumstances.[851]

643 In *Soufraki* v. *UAE* the Tribunal explained that:

> 55. It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not

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7 July 2004, *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007; *Kardassopoulos* v. *Georgia*, Decision on Jurisdiction, 6 June 2007; *Ahmonseto* v. *Egypt*, Award, 18 June 2007 (unpublished); *Pey Casado* v. *Chile*, Award, 8 May 2008; *Goetz* v. *Burundi* (ARB/01/2); *Funnekotter* v. *Zimbabwe* (ARB/05/6); *Micula* v. *Romania* (ARB/05/20); *Roussalis* v. *Romania* (ARB/06/1); *Lemire* v. *Ukraine* (ARB/06/18); *Foresti* v. *South Africa* (ARB(AF)/07/1); *Anderson* v. *Costa Rica* (ARB(AF)/07/3); *Beccara* v. *Argentina* (ARB/07/5); *Alemanni* v. *Argentina* (ARB/07/8); *Fuchs* v. *Georgia* (ARB/07/15); *Unglaube* v. *Costa Rica* (ARB/08/1); *Alpi* v. *Argentina* (ARB/08/9). See also *Broches, A.*, A Guide for Users of the ICSID Convention, News from ICSID, Vol. 8/1, p. 5 (1991); *Sinclair, A. C.*, Nationality of Individual Investors in ICSID Arbitration, 7(6) International Arbitration Law Review 191 (2004).

848 See also *AES* v. *Argentina*, Decision on Jurisdiction, 26 April 2005, para. 79.

849 This passage contained in the first edition of this Commentary was endorsed in *Pey Casado* v. *Chile*, Award, 8 May 2008, para. 320.

850 *E.g.*, *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, p. 11; *Soufraki* v. *UAE*, Award, 7 July 2004, paras. 55, 81, upheld by the *ad hoc* Committee, Decision on Annulment, 5 June 2007, para. 60; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, paras. 152, 171/2, 193; *Pey Casado* v. *Chile*, Award, 8 May 2008, paras. 275–323; *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, para. 86.

851 See also *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 145.

> a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.[852]

Soufraki sought to annul the Award in part because the Tribunal was required to *apply* Italian law, not merely to give it "great weight". The *ad hoc* Committee dismissed this complaint, explaining that whatever ambiguity may have existed in the Award, it was clear "that the Tribunal did *in reality* apply Italian law".[853] The Committee explained that the Tribunal's statement should more properly be that the Tribunal "will apply the nationality law of the State in question and accord great weight to the interpretation and application of that law by its authorities".[854] The case did not turn on any decision of the Italian courts, but in other cases it would be incumbent upon Tribunals to apply decisions of higher judicial bodies. The Committee stated that "when applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's 'interpretative authorities'".[855]

644 Parties have argued repeatedly that nationality provisions of national law may be disregarded in cases of ineffective nationality lacking a genuine link between the State and the individual.[856] There is no published decision upholding this doctrine.[857] National rules on nationality need not be followed in certain situations of involuntary acquisition of nationality in violation of international law or cases of withdrawal of nationality that are contrary to international law.[858] A further category, recognized by the *ad hoc* Committee in *Soufraki* v. *UAE*, may be nationality asserted on the basis of fraud or mistake.[859]

645 In *Micula* v. *Romania*, the Respondent argued that the Claimants' Swedish nationality was not "opposable" to Romania in view of a genuine connection with Romania and the lack of effective ties with Sweden.[860] The Tribunal noted that the Claimants had only one nationality, namely that of Sweden. It found that there

852 *Soufraki* v. *UAE*, Award, 7 July 2004, para. 55.
853 *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007, para. 93.
854 *Ibid*.
855 *Ibid*., para. 96, citing *Case Concerning the Payment of Various Serbian Loans Issued in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 20 (1929), p. 36.
856 See the *Nottebohm* case, in which the International Court of Justice ruled: ". . . nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." 1955 ICJ Reports 23.
857 Tribunals have considered whether ICSID jurisdiction requires a genuine link, but have not been required to decide the issue, in *Olguín* v. *Paraguay*, Decision on Jurisdiction, 8 August 2000, para. 18, *Olguín* v. *Paraguay*, Award, 26 July 2001, paras. 60–62; *Soufraki* v. *UAE*, Award, 7 July 2004, paras. 42–46. It is clear that the test of "real and effective" nationality cannot apply in order to avoid the consequences of Art. 25(2)(a) if the investor also has the nationality of the host State: *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, p. 16; *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 198.
858 Oppenheim's International Law, 9th ed., Vol. I, pp. 852–856.
859 *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007, para. 71. See also *Amerasinghe*, Jurisdiction Ratione Personae, p. 249.
860 *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, para. 89.

is a clear reluctance in international law to apply the test of a genuine or effective link where only a single nationality is at issue and that there is in any event little support for that test in ICSID proceedings. The Tribunal held that the *Nottebohm* case does not allow disregarding an individual's single nationality on the basis that the individual has not resided in the country of his nationality for a period of time.[861]

646 International legal practice on questions of nationality has developed primarily in the context of diplomatic protection. Some tribunals and commentators have suggested that the principles developed in that context need not be followed for purposes of ICSID's jurisdiction. The function of nationality for diplomatic protection is said to be different from its function for bringing the private party within the jurisdictional pale of the Centre.[862] In *Olguín* v. *Paraguay* the Tribunal explained in *obiter* remarks that:

> . . . internal rules of this nature, pertaining to the grant of diplomatic protection to individuals, and therefore, to something that under international law is a prerogative of the mother country, could not, by analogy, be applied to the case of access to the ICSID forum, one of whose most important and unique objectives is to effectively give the individual the right of action, excluding the mother country's endorsement of his claim or any other initiatives from the mother country, the only requirement being that it be a party to the 1965 Convention and the relevant BIT.[863]

647 Unfortunately, no criteria are offered for such an alternative approach. Until international practice develops new criteria for purposes of access to institutions like the Centre, the rules as developed in the context of diplomatic protection remain the only reliable guidance. If there is an agreement on nationality between the parties, a commission or tribunal may be expected to be more flexible in the application of the traditional standards. Such an agreement would create a strong presumption (see paras. 657–659 *infra*).

b) Certificate of Nationality

648 The Working Paper for the Convention foresaw a complicated preliminary procedure to determine the nationality of the non-State party (History, Vol. I, p. 120). The subsequent Preliminary Draft provided for "a written affirmation of nationality signed by or on behalf of the Minister of Foreign Affairs of the State whose nationality is claimed". The affirmation was to be accepted as "conclusive proof" (at p. 122). This procedure received only scant support (History, Vol. II, p. 295) and ran into overwhelming opposition (at p. 582).[864] In particular, there were doubts as to whether the Minister of Foreign Affairs would be the appropriate authority to issue such a certificate (at pp. 259, 323, 325, 396, 397, 400, 503, 507/8, 538). There were also concerns that this procedure might lead to nationalities of

861 *Ibid.*, paras. 98–103.
862 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 198–203. See also *Hirsch*, The Arbitration Mechanism, pp. 76/7.
863 *Olguín* v. *Paraguay*, Award, 26 July 2001, para. 62 (unofficial translation).
864 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 198/9.

convenience (at p. 323) or that an investor might be unable to obtain the required certificate (at p. 539). There was broad consensus that any certificate should not be treated as conclusive proof but only as *prima facie* evidence (at pp. 256, 394/5, 504, 508, 543, 582).

649 The procedure for the certification of nationality was dropped from subsequent drafts and does not appear in the Convention. Therefore, the decision as to whether the investor meets the Convention's nationality requirements is incumbent upon the commission or tribunal in the same way as with the other objective requirements for ICSID's jurisdiction. A certificate of nationality will be treated as part of the "documents or other evidence" to be examined by the tribunal in accordance with Art. 43. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.[865]

650 In *Soufraki* v. *UAE* the Claimant relied on the Italy-United Arab Emirates BIT. The UAE challenged his assertion that he qualified as an Italian national under the BIT, on grounds that his dominant or effective nationality was not Italian. In the course of the jurisdiction proceedings, Soufraki disclosed facts that led the Tribunal to conclude that he had automatically lost his Italian nationality by operation of the applicable Italian law when, in 1991, he voluntarily acquired Canadian citizenship.[866] The issue of genuine and effective nationality was therefore superfluous and the question became whether Soufraki had ever reacquired Italian nationality. The facts as found by the Tribunal led it to conclude that at no point after 1991 had Soufraki taken steps to reacquire Italian nationality as provided for by Italian law.[867]

651 Soufraki nevertheless insisted that Italian officials continued to treat him as Italian. In support of his claim, Soufraki produced two Italian passports, five certificates of Italian nationality (three of which predated the acquisition of Canadian nationality) and a letter from the Italian Ministry of Foreign Affairs.[868] The UAE disputed the relevance and reliability of the certificates and the letter.

652 Relying on the principle in Art. 41 that an ICSID tribunal is "the judge of its own competence", the Tribunal held that it was entitled to look behind the documentation and investigate matters in order to satisfy itself of its jurisdiction (see para. 643 *supra*).

653 The Tribunal agreed with the UAE that the passports and certificates were not reliable for ICSID's jurisdictional purposes since they had been issued by Italian authorities who were not apprised of the relevant details by which they could have determined that Soufraki was no longer an Italian national. The key details were the date and fact of his acquisition of Canadian nationality. The Tribunal issued an award declining jurisdiction.

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865 In *Soufraki* both the Tribunal and the *ad hoc* Committee endorsed this passage from the First Edition of this Commentary: *Soufraki* v. *UAE*, Award, 7 July 2004, para. 63; *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007, para. 74. Also: *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 151.

866 *Soufraki* v. *UAE*, Award, 7 July 2004, paras. 66–68.

867 *Ibid.*, para. 81.

868 *Ibid.*, para. 14.

654 Soufraki applied for the annulment of the Award arguing, *inter alia*, that the Tribunal exceeded its powers by not accepting the certificates of nationality at face value as determinative of the question of his nationality. Soufraki argued that an ICSID tribunal's power to scrutinize official certificates was limited only to cases of alleged fraud. The UAE argued that inquiry was also called for where there was evidence of error or mistake.[869] The *ad hoc* Committee agreed with the UAE. The Committee insisted that the power of ICSID tribunals to scrutinize certificates of nationality or passports is "well established" in international law generally.[870] The Committee did observe that "[i]t is only in exceptional cases – like the case under scrutiny – that ICSID tribunals have to review nationality documentation issued by state officials".[871]

655 The *ad hoc* Committee rejected the application for annulment. It held that in the particular circumstances the Tribunal did not commit any error, much less one justifying annulment, in "not considering the national documentation on nationality as conclusive and in ascertaining on its own the nationality of the Claimant".[872] The *ad hoc* Committee said:

> . . . the principle is in fact well established that international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment.[873]

656 The Tribunal in *Pey Casado* v. *Chile* endorsed the approach of the *Soufraki* v. *UAE* Tribunal in agreeing that it was for the Tribunal itself to decide, applying Chilean law, whether Pey Casado remained a Chilean national or had validly renounced this nationality (see para. 677 *infra*).[874]

c) Agreement on Nationality

657 The Model Clauses published by the Centre suggest an express clarification of the investor's nationality in an agreement between the host State and the investor (see para. 293 *supra*). A stipulation concerning the investor's nationality in an investment agreement is not necessary but useful. It may forestall a dispute at a later stage. At the same time, an agreement of this kind cannot create a nationality that does not exist. If under the law of the State in question and on the facts the investor does not have the alleged nationality, the agreement will be of no avail. But an agreement on nationality will create a strong presumption in favour of

869 *Soufraki* v. *UAE*, Decision on Annulment, 5 June 2007, paras. 49, 70, 71.
870 At para. 64. See also *Medina & Sons* v. *Costa Rica*, 3 RIAA 2483; *Flutie Cases*, 9 RIAA 148; *Flegenheimer Case* 25 ILR 91 (1958); *Sandifer, D.*, Evidence before International Tribunals (rev. ed., Charlottesville, 1975) 222/3; Oppenheim's International Law, 9th ed., Vol. I, p. 855.
871 *Ibid.*, para. 28.
872 *Ibid.*, paras. 75/6, 132, 134.
873 *Ibid.*, para. 64.
874 *Pey Casado* v. *Chile*, Award, 8 May 2008, paras. 319/20. See also *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, paras. 91–97.

the existence of the stipulated nationality. This would be otherwise if there was deception on the part of the investor as to its true nationality.[875]

658 Model Clause 6 (see para. 293 *supra*) suggests that the investor's State of nationality be named in an agreement on nationality. A mere stipulation that the Convention's nationality requirements have been met is possible but would not have the same value (see paras. 289–296 *supra*).

659 Bilateral investment treaties usually refer to the nationals of the respective States Parties. Subject to small variations, nationals are defined by reference to the Parties' domestic laws on citizenship.[876] This example is followed by the 1994 Mexico-Colombia-Venezuela Free Trade Agreement (see para. 463 *supra*) in Art. 17–01. An extension of treaty rights to permanent residents[877] cannot extend ICSID's jurisdiction beyond nationals of Contracting States to the ICSID Convention. But the exclusion of foreign investors who are permanent residents in the host States[878] would make an ICSID consent clause inapplicable to such investors.

2. Nationality of a Contracting State

660 The investor must have the nationality of a Contracting State. Therefore, an investor who only has the nationality of a non-Contracting State is excluded (see para. 285 *supra*). Stateless persons are also debarred from access to the Centre.[879]

661 There was considerable debate during the Convention's preparation on the question of dual or multiple nationality. No particular problem arises if an investor has the nationality of more than one Contracting State. The possession of the nationality of a non-Contracting State in addition to that of a Contracting State would not be a bar to becoming a party to ICSID proceedings.[880] The Preliminary Draft specifically provided that a national of a Contracting State "may possess concurrently the nationality of a State not party to this Convention" (History, Vol. I, p. 122; Vol. II, p. 170). Although the provision does not appear in later drafts, no concern was expressed about situations of this kind[881] (see Art. 27, paras. 10, 11).

662 If the nationality of the non-Contracting State is the effective nationality and the nationality of the Contracting State is merely one of convenience, the host State may wish to challenge the investor's standing. But it will be estopped from doing so if it has recognized the nationality of the Contracting State in full awareness of

875 *Amerasinghe*, The Jurisdiction of the International Centre, p. 204.
876 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 31–33.
877 *E.g.*, in the Energy Charter Treaty 1994, Art. 1(7)(a)(i), 34 ILM 360, 383 (1995); also Arts. 201, 1111 of NAFTA, 32 ILM 605 (1993), on which see also *Feldman* v. *Mexico* (AF), Decision on Jurisdiction, 6 December 2000, paras. 24–38; *Feldman* v. *Mexico* (AF), Award, 16 December 2002, para. 48.
878 MERCOSUR Investment Protocol of Colonia 1994, Arts. 1(2), 9.
879 *Hirsch*, The Arbitration Mechanism, p. 77; *Kovar*, La compétence du Centre, p. 40; *Nathan, K. V. S. K.*, ICSID Convention, p. 84.
880 *Olguín* v. *Paraguay*, Award, 26 July 2001, paras. 60–62.
881 *Broches*, The Convention, p. 357.

the facts (see para. 657 *supra*). If the investor has the nationality of the host State, Art. 25(2)(a) presents an absolute bar to jurisdiction. In such a situation there is no room for an argument based on effective nationality (see paras. 664–678 *infra*).

663 A host State that does not insist on the effectiveness of the nationality of the Contracting State may be faced with a diplomatic claim by the non-Contracting State. Art. 27(1) of the Convention prohibits diplomatic protection in respect of claims that the parties have consented to submit to arbitration. But this prohibition would not apply to a non-Contracting State[882] (see Art. 27, paras. 10–12).

3. No Nationality of the Host State

664 The Convention states categorically that the individual investor, to be eligible for party status, must not be a national of the host State. Thus, even persons who possess the nationality of another Contracting State are excluded if they possess the host State's nationality concurrently.

665 This principle was not contained in the early drafts of the Convention. In fact, the Preliminary Draft provided exactly the opposite by stating that the national of the other Contracting State "may possess concurrently the nationality . . . of the State party to the dispute" (History, Vol. I, p. 122; Vol. II, pp. 170/1). This idea received only qualified support (History, Vol. II, pp. 259, 445, 538, 540) and ran into overwhelming opposition (at pp. 256, 258, 260, 285, 325). Mr. *Broches* emphasized that this was merely designed to allow a host State to regard the dual national as a foreign investor if it wished to do so (at pp. 257, 284, 324, 359, 395, 398, 445, 580). But there was a widespread opinion that it was unrealistic to expect a State to submit to an international jurisdiction with respect to its own national (at pp. 325, 394, 396, 397, 398, 445, 581). The provision was deleted and the First Draft was silent on the dual nationality of individual investors (History, Vol. I, p. 124).

666 The debate on dual nationality continued and the idea to exclude dual nationals, if one of the nationalities was that of the host State, gained strength (History, Vol. II, pp. 707, 708, 709, 840, 869, 877). Suggestions to admit dual nationals if the host State's nationality was not effective (at pp. 400, 708) or if the host State had recognized the foreign nationality specifically (at pp. 708, 868, 878/9) failed. Eventually, a proposal was adopted unanimously to exclude dual nationals explicitly if one of their nationalities was that of the host State (at pp. 868, 874, 876, 878, 880/1, 937).[883]

667 The Report of the Executive Directors explains the provision on dual nationality in the following terms:

> 29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time

882 *Amerasinghe*, The Jurisdiction of the International Centre, p. 206.
883 See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 205.

> he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.[884]

668 The ineligibility of an investor who also possesses the host State's nationality applies irrespective of which of the several nationalities is the effective one. This disqualification may not even be cured by agreement between the parties. This bar would also apply if consent is based on a treaty. If an investor possesses the nationalities of both States parties to a bilateral investment treaty (BIT), he or she may enjoy the benefits of the BIT for other purposes. But the dual national would be disqualified from invoking the ICSID clause in the BIT.[885] The ICSID Secretariat has declined to register requests for arbitration presented by individuals having the nationality of the host State and another Contracting State on grounds that such disputes are manifestly outside the jurisdiction of the Centre. This is notwithstanding that the instrument of consent – whether contract, law or treaty – may purport to afford protection to such persons.[886]

669 *Champion Trading* v. *Egypt* concerned claims under the Egypt-United States BIT brought by both corporate and natural persons who were shareholders in an Egyptian company. The natural persons were three brothers born in the United States to an Egyptian father. They were found to be nationals of the United States by birth and residence, but also Egyptian nationals on account of the nationality of their father at the time of their birth.[887] The Tribunal found that as dual nationals, possessing the nationality of the host State to the dispute, they had no access to ICSID by application of the rule in Art. 25(2)(a).[888] The Tribunal volunteered the view that the application of the *jus sanguinis* principle over multiple generations to persons having no contact with their ancestral country of origin might raise a question about the appropriateness of the blanket exclusion expressed in Article 25(2)(a).[889] However, in the circumstances of the case, the Tribunal considered there to be no unfairness since the brothers had relied upon their Egyptian nationality at the time they set up the investment.[890]

670 The rule that the investor may not have the nationality of the Contracting State to the dispute applies irrespective of which of two or more nationalities is more effective. This has been confirmed in at least two published decisions.

671 In *Champion Trading* v. *Egypt* the Claimants argued that even if the three brothers were found to be Egyptian nationals, this was not their "effective nationality" as they had no ties with Egypt. They contended that their non-effective Egyptian nationality should be disregarded when considering the application of Art. 25(2)(a) since their dominant and effective nationality was that of the United States. This argument was unsuccessful. The Tribunal ruled that the dominant and effective

884 1 ICSID Reports 29.
885 *Dolzer/Stevens*, Bilateral Investment Treaties, p. 141; *Shihata/Parra*, The Experience, p. 308.
886 *Parra, A.*, The Institution of ICSID Arbitration Proceedings, 20(2) News from ICSID, p. 13 (2003).
887 *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, p. 11.
888 *Ibid.*, pp. 16/7.
889 *Ibid.*, p. 17.
890 *Ibid.*, pp. 16–17.

nationality test had no application in the case of dual nationals who possess the nationality of the Contracting State to the dispute in the light of the "clear and specific rule" in Art. 25(2)(a) of the Convention.[891]

672 In *Siag* v. *Egypt*, the two Claimants were both natural persons. They invoked the Egypt-Italy BIT in bringing claims against Egypt for harm done to an investment in the Gulf of Aqaba. It was not disputed that both were Italian nationals,[892] but Egypt argued that jurisdiction should be denied, in the light of Art. 25(2)(a), because all of the Claimants' substantial connections were with Egypt, not Italy. Whilst the Tribunal acknowledged these connections, the majority found them not to be relevant to the question of jurisdiction. This was because the Claimants were found not to have been nationals of Egypt at the relevant times, nor indeed dual nationals at all.[893]

673 The Tribunal went on to offer the further conclusion that "the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality".[894] Strictly speaking, that conclusion went beyond what was necessary to dispose of the dispute and is not directly supported by authority, including the Decision on Jurisdiction in *Champion Trading* v. *Egypt* upon which the Tribunal purported to rely.[895] The latter decision was restricted to the application of the particular rule in Art. 25(2)(a), but in *Siag* v. *Egypt* neither Claimant had the nationality of the host State.

674 The dissenting arbitrator would have applied the doctrine of effective nationality to deny jurisdiction given the Claimants' extensive connections with Egypt, albeit not formal nationality, especially at the time they made or acquired their investment.[896] Whilst he admitted that the question of dominant and effective nationality predominantly arises in situations of dual nationality, he did not agree with the majority that the doctrine could not be applied in relation to a person who was not a dual national.[897] The dissenting arbitrator's proposed application of the doctrine of effectiveness apparently reflected the difficulty he had with upholding jurisdiction in respect of the claims of formerly Egyptian nationals, whose investment had benefited from that status.[898]

675 The Convention speaks of the nationality of the Contracting State party to the dispute. If the party to the dispute is not the host State itself but one of its constituent subdivisions or agencies (see paras. 230–267 *supra*) a literal interpretation may reach the result that the rule excluding host State nationals does not apply. But

891 *Ibid.*, p. 16. The Iran-United States Claims Tribunal in the "*Dual Nationality Case, A/18*", upon which the Claimants relied for the application of an effective nationality test, also observed that the real and effective nationality principle may be excluded if "an exception is clearly stated": Decision No. Dec 32-A18-FT dated 6 April 1984, reprinted in (1984) 5 Iran-US C.T.R. 251, 263.

892 *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 142.

893 *Ibid.*, paras. 159, 162, 171–173, 196. See also *Siag* v. *Egypt*, Decision on Jurisdiction, Dissenting Opinion of Orrego Vicuña, p. 6.

894 *Ibid.*, para. 198.

895 *Ibid.*, para. 197.

896 *Siag* v. *Egypt*, Dissenting Opinion of Orrego Vicuña, pp. 1/2, 4/5.

897 *Ibid.*, p. 2.

898 *Ibid.*, pp. 2, 4–5.

this result would be contrary to the idea underlying that rule. There is no evident reason why a host State national should be able to take a constituent subdivision or agency before ICSID any more than the host State itself.

676 The individual investor's only chance to gain access to the Centre may be to relinquish the host State's nationality before consent to ICSID's jurisdiction is perfected. Obviously, the benefits from such a step would have to be weighed against any costs arising from the surrender of the host State's nationality. Also, the investor would have to ensure that the renunciation of the nationality is valid under the host State's law. A written affirmation to this effect is advisable.

677 *Pey Casado* v. *Chile* concerned the question whether Pey Casado had duly renounced his Chilean nationality. Applying Chilean law, the Tribunal first found that renunciation of Chilean nationality was possible and consistent with the Chilean Constitution. It then found that Pey Casado had taken a number of acts intended to renounce his Chilean nationality and that the Chilean officials had acknowledged these and acted consistent with them having due effect. The Tribunal concluded that Pey Casado was no longer a Chilean national for purposes of ICSID's jurisdiction.[899]

678 There is one situation in which the host State's nationality may be disregarded. An involuntary acquisition of nationality after consent to jurisdiction has been given should not deprive the investor of access to the Centre if the compulsory grant of nationality is intended to defeat jurisdiction or is otherwise contrary to international law. The host State may not impose its nationality on a foreign investor for the purpose of withdrawing its consent (see para. 633 *supra*). During the Convention's drafting, the problem of compulsory granting of nationality was discussed and the opinion was expressed that this would not be a permissible way for a State to evade its obligation to submit a dispute to the Centre (History, Vol. II, pp. 658, 705, 876). But it was decided that this question could be left to the decision of the conciliation commission or arbitral tribunal (at pp. 868, 874, 877).[900]

4. Critical Dates

679 Both the positive and the negative nationality requirements must be met at the time of consent as well as at the time the request for conciliation or arbitration is registered. The nationality of the other Contracting State must exist at both dates and the nationality of the host State must not exist at either date.

680 There was much debate and uncertainty on the critical dates for the investor's nationality during the Convention's drafting.[901] The Working Paper referred to the date when the dispute is submitted to the Centre (History, Vol. I, p. 120), the Preliminary Draft to the date of consent (at p. 122; Vol. II, p. 171). The subsequent

899 *Pey Casado* v. *Chile*, Award, 8 May 2008, paras. 314–322.
900 This passage from the First Edition of this Commentary was noted to be of "particular significance" in *Pey Casado* v. *Chile*, Award, 8 May 2008, para. 321.
901 See also *Amerasinghe*, The Jurisdiction of the International Centre, pp. 206/7.

discussions showed a wide spectrum of opinions. Some supported the date of consent (pp. 446, 539), others the time of investment (pp. 398, 708) and yet others the time of the institution of proceedings (pp. 446, 658). Some suggested that proof of nationality should be maintained throughout the proceedings up to the time of an award (pp. 395, 538, 583), while Mr. *Broches* favoured nationality at the time of consent as well as at the institution of proceedings (pp. 260, 445, 538, 582/3).

681 The First Draft provided that the positive nationality requirement must be met on the date of consent and on the date of the institution of proceedings (History, Vol. I, p. 124). The double test of time was later extended to the negative nationality requirement, that is the absence of the host State's nationality (History, Vol. II, pp. 874, 878, 880/1). This was explained by the possibility that the individual investor might change his or her nationality between the two dates (at p. 869). The Revised Draft retained the double test of time but changed the second date to that of registration (History, Vol. I, p. 124). This is also the rule that is reflected in the Convention.

682 The critical dates for the possession of the nationality of another Contracting State and the non-possession of the host State's nationality should be distinguished from the dates at which these States become Contracting Parties to the Convention (see paras. 215–223, 287–288 *supra*). In particular, it is not necessary that the investor's home State or the host State are Contracting States on the date that consent to ICSID's jurisdiction is given. But consent becomes effective only upon the fulfilment of all the requirements for its validity. It is the date at which all these requirements are met, including the Convention's entry into force for the host State and for the investor's home State, that constitutes the date of consent (see paras. 468–471 *supra*).

683 In *Siag* v. *Egypt*, the dissenting arbitrator expressed the view that Art. 25(2)(a) should be read to exclude claims by individual investors who were nationals of the host State at the time of the host State's "consent" to submit disputes to ICSID. He read the date of consent broadly to mean not only the date when consent was perfected (typically, in investment treaty arbitration, the date of the request for arbitration) but also at the time of entry of an investment. In his view, it was at the date of entry that the Contracting Parties incurred "specific legal effects, including obligations of the host State under the treaty and the prohibition to exercise diplomatic protection by the other Contracting Party".[902] The dissenting arbitrator apparently would have disregarded the Claimants' subsequent loss of Egyptian nationality and found them to be caught by the barrier to jurisdiction in Art. 25(2)(a), since they were both Egyptian at the time they made or acquired their investment.[903] This view appears to be more a call for reform than a construction of the applicable text. The dissenting arbitrator himself recognized that there was

902 *Siag* v. *Egypt*, Decision on Jurisdiction (Dissenting Opinion), 11 April 2007, p. 4.
903 *Ibid*.

no support for such a reading in the Convention and that the parties had not raised such arguments themselves. He acknowledged that ICSID's rules on the institution of proceedings would need to be clarified if his view were to prevail.

684 The Convention only states that the positive and negative nationality requirements must be met at two discrete dates, that of consent and that of registration. It is silent on the intervening period. In the traditional law of diplomatic protection, a requirement of continuous nationality is often asserted from the time the claim arises up to the date it is taken up by the State of the injured person's nationality or even up to the date of a decision.[904] The Convention does not require continuity of nationality. Its wording is directed at distinct points in time and not at a continuous period of time, which could have been expressed quite easily by "from" and "to", or "continuously until", rather than by "as well as" and "on either date".[905]

685 It follows that it is possible that the investor will have different nationalities on the two dates. The individual investor may change his or her nationality between the two critical dates, without affecting jurisdiction, as long as he or she has the nationality of some Contracting State other than the host State at both dates.[906] The Convention would even permit the rather unlikely situation that the investor acquires the host State's nationality after the date of consent and loses it before the date of registration.

686 Institution Rule 2 provides:

> (1) The request shall:
>
> . . .
>
> (d) indicate with respect to the party that is a national of a Contracting State:
>
> (i) its nationality on the date of consent; and
>
> (ii) if the party is a natural person:
>
> (A) his nationality on the date of the request; and
>
> (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request;

The Secretary-General will decide, *inter alia*, on the basis of this information whether or not the request is manifestly outside the jurisdiction of the Centre under Arts. 28(3) and 36(3). Institution Rule 2 does not require that the assertions

904 *Loewen* v. *United States* (AF), Award, 26 June 2003, paras. 220 *et seq*.

905 This passage, contained in the First Edition of this Commentary, was quoted with approval in *Siag* v. *Egypt*, Decision on Jurisdiction, 11 April 2007, para. 205. See, however, an *obiter dictum* in a footnote to the Award in *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, footnote 9, where the Tribunal asserts that a "plausible justification exists for requiring continuous nationality (at least to the date of registration of a request for arbitration) of an individual but not of a juridical person: An individual has substantial control over his nationality, and thus an involuntary change of it, with consequent loss of a right to ICSID arbitration, is improbable."

906 See *Amerasinghe*, The Jurisdiction of the International Centre, pp. 207/8; *Hirsch*, The Arbitration Mechanism, pp. 79/80; *Kovar*, La compétence du Centre, pp. 40/1. See also History, Vol. II, p. 538. *Contra*: *Laviec*, Protection et promotion, p. 281.

as to nationality are substantiated by documentary evidence at the stage of the request. Such evidence may have to be produced at a later stage.[907]

687 The date of the request may be identical with the date of consent if the investor takes up an offer by the host State to submit to ICSID's jurisdiction (see paras. 417, 469 *supra*). But the date of the request will almost certainly precede that of its registration. Theoretically, a change of nationality may occur in the short period between the date of the request and the date of its registration. Since it is the date of the registration and not that of the request that is the second critical date, such a change of nationality would be relevant but would have to be raised as an issue of jurisdiction or admissibility before the tribunal.[908] Under Arts. 32 and 41 of the Convention, it is ultimately up to the commission or tribunal to decide whether all jurisdictional requirements, including those of nationality, have been met at the relevant dates.

M. "and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration . . ."

688 Art. 25(2)(b) defines "national of another Contracting State" with respect to juridical persons. It consists of two clauses. The first, reproduced above, contains the general rule. The second (see text before para. 760 *infra*) provides an important exception to that rule. The first clause of Art. 25(2)(b) is almost identical to the first part of Art. 25(2)(a) dealing with natural persons. Both provide that the investor, in order to have access to the Centre, must have had the nationality of a Contracting State other than the host State on the date of consent. But Art. 25(2)(a) continues by providing for a second critical date, the date of registration, and by expressly excluding investors with multiple nationalities if one of them is that of the host State. By contrast, Art. 25(2)(b) in its second clause provides a special exception from the exclusion of host State nationals if they are foreign controlled and it is agreed to treat them as such. It is clear that the exception in Art. 25(2)(b) does not import an additional requirement of "control" into the first clause (see paras. 694–707 *infra*).

1. Juridical Persons

689 The Convention does not define the concept of a juridical person. The Working Paper was silent on juridical persons but the Preliminary Draft referred to a "company", which was described as including "any association of natural or juridical persons, whether or not such association is recognized by the domestic law of the Contracting State concerned as having juridical personality" (History, Vol. I, p. 122; Vol. II, p. 170). It was pointed out that countries might differ in their treatment of partnerships, associations or companies (at pp. 284, 359, 360, 661)

907 See Note D to Institution Rule 2, 1 ICSID Reports 53/4.
908 See Notes H and I to Institution Rule 2, 1 ICSID Reports 54. See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 208; *Szasz*, A Practical Guide, p. 19.

and Mr. *Broches* suggested that for purposes of the Convention the matter might be left to the host State (at p. 284). But there was also some opposition to extending the definition of the term "company" to a mere association of natural persons or to an unincorporated partnership. Mr. *Broches* suggested that the matter might be left to be worked out by a tribunal in practice (at p. 538).[909] The subsequent drafts and the Convention refer to "juridical person" without a definition.

690 This indicates that legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify. In such a situation, the individuals' case might be brought under Art. 25(2)(a) or the juridical persons' case forming the association would have to be brought separately under Art. 25(2)(b).[910]

691 This has been confirmed by ICSID tribunals. In *LESI-DIPENTA* v. *Algeria*, the Tribunal declined jurisdiction to hear a claim brought by a consortium of companies.[911]

692 The Tribunal in *Impregilo* v. *Pakistan* also held that the Claimant was not permitted to submit a BIT claim to ICSID on behalf of all of its partners in an unincorporated joint venture. The unincorporated consortium did not qualify as a legal person for ICSID purposes.[912] The Tribunal added that it was not permissible for the Claimant alone to bring claims on behalf of partners that did not have the nationality of a Contracting State to the BIT, notwithstanding the companies' agreement that the Claimant could represent the group. It was not permissible to expand the scope of consent set out in the BIT by way of private contract (see para. 334 *supra*).[913]

693 It would thus appear that the entity appearing as claimant must have legal personality under some legal system. Normally this would be the law of the State whose nationality is claimed (see Art. 42, paras. 157–159).[914] The idea that "the term may encompass juridical persons which do not have that status under the law of either the host State or the other Contracting State"[915] would seem to go too far. Some bilateral investment treaties include associations without legal personality in their definitions of "investor".[916] But for purposes of the Convention the quality of legal personality is inherent in the concept of "juridical person" and is part of the objective requirements for jurisdiction.[917]

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909 See also *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 242/3.

910 This passage from the First Edition of this Commentary was quoted in *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 133.

911 *LESI-DIPENTA* v. *Algeria*, Award, 10 January 2005, paras. 37–41.

912 *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, paras. 131–139.

913 *Ibid.*, para. 151.

914 See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 209.

915 *Amerasinghe*, Interpretation of Article 25(2)(b), p. 244.

916 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 37, 38. See especially the German Model BIT of 2005, Article 1(3), *Dolzer/Schreuer*, Principles of International Investment Law, at p. 369.

917 The final sentence of this paragraph contained in the First Edition of this Commentary was quoted in *Impregilo* v. *Pakistan*, Decision on Jurisdiction, 22 April 2005, para. 133.

2. Determination of Corporate Nationality

a) Incorporation, Seat or Control

694 Under traditional international law, there are several possible criteria for the determination of a juridical person's nationality.[918] The most widely used test looks at the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat (*siège social*) is considered decisive. Incorporation or seat have become the accepted tests in the area of diplomatic protection. This excludes the possibility of piercing the corporate veil and looking at the nationality of the controlling interest, notably that of the shareholders.[919] On the other hand, a control test has been accepted for other purposes, notably for the treatment of enemy aliens in time of war.[920]

695 The Preliminary Draft to the Convention offered two possible criteria for the nationality of a company: nationality under the domestic law of a Contracting State or a "controlling interest" of the nationals of such a State (History, Vol. I, p. 122; Vol. II, pp. 170, 260, 537). Nationality under a State's domestic law was later explained to mean that the company either had its seat in that country or was incorporated under the law of that country (at p. 446). In the subsequent debates, there was much doubt on the feasibility of a control test (at pp. 286, 287, 359, 360, 446, 448). It was suggested that it might be more reasonable to afford protection directly to the individual shareholders (at pp. 446, 447, 538, 581). Some delegates pointed out that the search for a controlling interest would be extremely difficult (at pp. 361, 447/8, 538, 581). On the other hand, it was felt that companies of a non-Contracting State should be covered by the Convention if nationals of a Contracting State had a majority holding of their capital (at p. 447).

696 The subsequent First Draft is silent on the possible criteria for corporate nationality and merely refers to a possible agreement on nationality between the parties (History, Vol. I, p. 124). Although there was some reference to the fact that the criteria for the nationality of a juridical person remained to be determined (History, Vol. II, pp. 669, 671), no serious effort to do so was made. A United States attempt to reintroduce the criterion of a "controlling interest" in the definition of "national of another Contracting State" was defeated by a large majority (at pp. 837, 871). The Revised Draft and the Convention are silent on the method to be employed for the determination of a juridical person's nationality.

697 A systematic interpretation of Art. 25(2)(b) would militate against the use of the control test for a corporation's nationality. The second clause of Art. 25(2)(b)

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918 See *Acconci, P.*, Determining the Internationally Relevant Link between State and Corporate Investor, 5 Journal of World Investment & Trade 139 (2004).

919 See especially the decision of the International Court of Justice in the *Barcelona Traction* case, 1970 ICJ Reports 3, 42.

920 More generally see *Sacerdoti, G.*, Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law, *in*: International Law in a Time of Perplexity – Essays in Honour of Shabtai Rosenne (*Dinstein, Y.* ed.) 699 (1989).

provides that a juridical person, even though it possesses the nationality of the host State, may be treated as a foreign investor by way of a special agreement "because of foreign control". By relying on control for the exception to host State nationality, the provision implies that host State nationality is not based on control. Therefore, it is clear that the control test cannot be applied to explain the word "nationality" in the second clause of Art. 25(2)(b). It is unlikely that the word "nationality" used earlier on in the same sentence in a more general context has a different meaning. It is improbable that the nationality of a Contracting State other than the host State should be determined differently from nationality of the host State. Practice does not demonstrate any convincing reasons to the contrary. Therefore it must be assumed that the word appearing twice in the same sentence has the same meaning in both instances.

698 Scholarly opinion is divided on whether incorporation or seat are the only permissible criteria for the determination of nationality under Art. 25(2)(b). According to *Delaume*, it is generally agreed that, within the framework of the ICSID Convention, the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation.[921] He is supported by a number of other authors.[922] By contrast, *Amerasinghe* has questioned the relevance of the criteria for corporate nationality, as developed in the context of diplomatic protection, for purposes of ICSID's jurisdiction. He pleads in favour of an extremely flexible approach that would merely require some adequate connection between the juridical person and the State, including control by nationals of that State.[923] *Broches* has adopted a more cautious approach. In his view, the Convention clearly assumes that the company's place of establishment will or may be held to determine its nationality.[924] But he warns against a mechanical application of the criteria developed for diplomatic protection. An agreement to submit to ICSID's jurisdiction should be upheld unless it would lead to a use of the Convention for purposes for which it was clearly not intended.[925] In giving effect to such an agreement,

921 *Delaume, G. R.*, ICSID Arbitration and the Courts, 77 AJIL 784, 793/4 (1983); *Delaume, G. R.*, ICSID Arbitration in Practice, 2 International Tax and Business Lawyer 58, 62 (1984); *Delaume*, ICSID Arbitration, p. 111.

922 *E.g.*, *Hirsch*, The Arbitration Mechanism, p. 85; *Laviec*, Protection et promotion, p. 282; *Sutherland, P. F.*, The World Bank Convention on the Settlement of Investment Disputes, 28 International and Comparative Law Quarterly 367, 384/5 (1979); *Alexandrov, S.*, The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis, 4 The Law and Practice of International Courts and Tribunals 19, 36/7 (2005).

923 *Amerasinghe, C. F.*, The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation, 9 Vanderbilt Journal of Transnational Law 793, 807/8 (1976); *Amerasinghe*, The Jurisdiction of the International Centre, pp. 212–214, 222; *Amerasinghe*, Interpretation of Article 25(2)(b), p. 241. See also *Szasz*, The Investment Disputes Convention, p. 33, and *Vuylsteke, C.*, Foreign Investment Protection and ICSID Arbitration, 4 Georgia Journal of International and Comparative Law 343, 356 (1974).

924 *Broches, A.*, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, *in*: The Art of Arbitration, Liber Amicorum Pieter Sanders (*Schultz, J./van den Berg, A.* eds.) 63, 70 (1982).

925 See also *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 109.

a commission or tribunal should take account not only of formal criteria such as incorporation but also of economic realities such as ownership and control[926] (see also para. 716 *infra*).

699 ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of claimants that are juridical persons. In *Kaiser Bauxite* v. *Jamaica*, the Tribunal held that the Claimant was a national of another Contracting State on the basis of the finding that "Kaiser is a private corporation organized under the laws of the State of Nevada in the United States of America."[927] In *SPP* v. *Egypt*, the Tribunal consistently referred to both Claimants as Hong Kong corporations.[928] Documents filed by the Claimants satisfied the Tribunal that they were, in fact, "Hong Kong corporations domiciled in Hong Kong".[929]

700 Findings that a juridical person had the nationality of the host State, for the purposes of the second clause of Art. 25(2)(b), were also based on the corporations' head offices or places of incorporation (see para. 765 *infra*).[930] In *SOABI* v. *Senegal*, the Tribunal said:

> As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company's shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances. Thus, a "juridical person which had the nationality of the Contracting State party to the dispute", the phrase used in Article 25(2)(b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, has its head office or has been incorporated in that State.[931]

701 In *Tokios Tokelės* v. *Ukraine* the majority observed that ICSID tribunals have consistently applied a test of incorporation or seat, when determining the nationality of a corporate person, and, of these, "reference to the state of incorporation is the most common method of defining the nationality of business entities under modern BITs and traditional international law".[932]

702 At times, tribunals will determine corporate nationality by reference to both the place of incorporation and effective seat.[933]

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926 *Broches*, The Convention, pp. 360/1.
927 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, para. 19.
928 *SPP* v. *Egypt*, Decision on Jurisdiction I, 27 November 1985, para. 46.
929 *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 54. See also the Dissenting Opinion at para. 3.
930 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(ii); *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 351–354.
931 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 29. See also *e.g.*, *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 108, citing the quoted passage from *SOABI*.
932 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 63, and see para. 42; also *Rompetrol* v. *Romania*, Decision on Jurisdiction, 18 April 2008, para. 83.
933 *E.g.*, *Lanco* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, para. 46; *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 43.

703 Yet another context in which tribunals apply the traditional test is the nationality of the foreign control under the second clause of Art. 25(2)(b). In *Amco* v. *Indonesia*, the Tribunal simply relied on the classical concept of nationality based on incorporation and the social seat (see para. 841 *infra*).[934] In *SOABI* v. *Senegal*, the Tribunal examined the nationality of the controlling company by looking at its place of incorporation and at the location of its head office. But it found that for the special purposes of the exception contained in the second clause of Art. 25(2)(b), control could be traced beyond the first controlling corporation (see paras. 843, 844 *infra*).[935]

704 Tribunals have denied that the Convention requires any investigation into a Claimant company's controllers for purposes of establishing nationality.[936] The reference to foreign control in Art. 25(2)(b) does not change this basic conclusion. This provision, and provisions like it in treaties and legislation, are intended to expand ICSID jurisdiction, not limit jurisdiction where a foreign company is controlled by nationals of the host State. This has been confirmed in several cases. It was said in *Wena Hotels* v. *Egypt* to be "rather convincingly" established.[937] In *CMS* v. *Argentina*, the Tribunal said that "the Convention does not really make such a requirement [*i.e.* control] a central tenet of jurisdiction but only an alternative for very specific purposes".[938]

705 In *Tokios Tokelės* v. *Ukraine*, the Tribunal held, by a majority, that the second clause of Art. 25(2)(b), referring to control, applies only in the context of an agreement of the parties. Its effect is to extend the scope of ICSID jurisdiction to companies incorporated in the host State that are controlled by nationals of another Contracting State. It does not apply to limit ICSID jurisdiction.[939]

706 The same point was expressed in similar terms in *Enron* v. *Argentina*[940] and in *CMS* v. *Argentina*.[941] It was also explained clearly in the Decisions on Jurisdiction in *Sempra* v. *Argentina* and *Camuzzi* v. *Argentina I*:

> 40. The structure of the provision leaves no room for doubt. The first situation is that of a company having the nationality of a contracting State different from the one that is a party to the dispute. To the extent that it meets the requirements of the Convention and of the respective Treaty, that company is eligible to resort to ICSID on the basis of its nationality.
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> 41. The second situation is different. It relates to a company which has the nationality of the State that is a party to the dispute and which, for that reason, could be prevented from claiming against its own State; in such a case, the foreign

934 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(iii).
935 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 35/6. See also Dissenting Opinion to the Award of 25 February 1988, at paras. 61/2. See also *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, denying jurisdiction because behind the Claimant's immediate Dutch owner was a natural person having the nationality of the host State.
936 *E.g.*, *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 28; *ADC* v. *Hungary*, Award, 2 October 2006, paras. 358/9.
937 *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 82.
938 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 58.
939 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 45/6.
940 *Enron* v. *Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, paras. 40–46.
941 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 51, 58.

> control criterion enables it to complain as if it were a company of the nationality of the other contracting Party . . .[942]

707 The overwhelming weight of the authority, outlined above, points towards the traditional criteria of incorporation or seat for the determination of corporate nationality of claimants under Art. 25(2)(b). It follows that the reference to foreign control in Art. 25(2)(b) does not impose a further general requirement upon investors having the requisite foreign nationality in order for them to submit a dispute to ICSID.

b) Agreement on Nationality

708 The question of the corporate investor's nationality may be clarified through an agreement between the host State and the investor. The First Draft contained a clause whereby the parties could have agreed freely to treat any juridical person as a "national of another Contracting State" (History, Vol. I, p. 124). Although designed mainly to deal with companies incorporated in the host State, this provision was drafted in broad terms and would have applied to agreements on corporate nationality in general. It was criticized in subsequent discussions (History, Vol. II, pp. 658, 840) and dropped. The Revised Draft and the Convention refer to an agreement between the parties only in the context of the exception to host State nationality contained in the second clause of Art. 25(2)(b).

709 Model Clause 6 (see para. 293 *supra*) suggests that the host State and the investor clarify the investor's nationality through a special stipulation in the investment agreement. Such a stipulation should be distinguished from the agreement under the second clause of Art. 25(2)(b) concerning host State nationals (see paras. 768–812 *infra*). The Model Clause suggests that the particular nationality be specified in an agreement on nationality. Such a specification is advisable though not necessary (see paras. 289–296 *supra*).

710 An agreement between the parties on the investor's nationality will carry much weight, but it cannot create a nationality that does not exist. For instance, a corporation that clearly has only the nationality of a non-Contracting State, cannot be made a national of a Contracting State by agreement. On the other hand, it has been suggested convincingly that any reasonable criterion supporting the agreement should be accepted.[943] In particular, mere control of the corporation should be sufficient in such a case.[944] (On the form and extent of control see paras. 850–870 *infra*.)

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942 *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 40, 41; also *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 30/1.

943 *Amerasinghe*, Submissions to the Jurisdiction, p. 228; *Amerasinghe*, The Jurisdiction of the International Centre, pp. 217 *et seq.*, 222/3; and see *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 120.

944 *Broches*, The Convention, p. 361; *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 77 (1974); *Delaume*, Le Centre International, pp. 790/1; *Sutherland, P. F.*, The World Bank Convention on the Settlement of Investment Disputes, 28 International and Comparative Law Quarterly 367, 385 (1979).

711 An agreement on nationality became relevant in *MINE* v. *Guinea*. A 1975 agreement between the parties provided for the settlement of their dispute by ICSID arbitration. The ICSID consent clause stated that "[t]he parties hereby precise [*sic*] that the investor is Swiss".[945] In fact, MINE was incorporated in Liechtenstein but was apparently under Swiss control. Since Switzerland had ratified the Convention but Liechtenstein had not, MINE's nationality was decisive for ICSID's jurisdiction.

712 MINE did not, at first, pursue proceedings before ICSID but obtained an *ex parte* award under the auspices of the American Arbitration Association (AAA). In proceedings to confirm that award before US Federal Courts, Guinea filed a motion to dismiss for lack of jurisdiction arguing that ICSID had exclusive jurisdiction.[946] In appeal from the District Court,[947] MINE argued that the 1975 agreement was inadequate to confer jurisdiction on ICSID since MINE was incorporated in Liechtenstein, a non-Contracting State, and that the nationality of a juridical person was to be determined exclusively by its place of incorporation. In opposition, Guinea argued for a more flexible approach, permitting agreement on a nationality based on substantial contacts.[948] A brief submitted on behalf of the United States suggested that an ICSID tribunal would not necessarily be precluded from taking jurisdiction over the dispute between MINE and Guinea under these circumstances and suggested that the Court should withhold its decision pending a ruling by an ICSID tribunal.[949] The Court of Appeals found for Guinea but based its decision on considerations of sovereign immunity[950] (see also Art. 26, paras. 9–11, 115, 149–153, 167, 168).

713 MINE's next step was to institute ICSID proceedings in September 1984. At the time of registration, MINE argued that the real interest in the company was Swiss and the Secretary-General registered the application "without prejudice to the question whether the condition of nationality is satisfied".[951] Before the Tribunal, neither party raised jurisdictional objections and the Tribunal did not issue a formal decision on the question of MINE's nationality.[952] But by assuming

945 *Delaume, G. R.*, ICSID Arbitration and the Courts, 77 American Journal of International Law 784, 786/7 (1983); *Shifman, B. E.*, Maritime International Nominees Establishment v. Republic of Guinea: Effect on U.S. Jurisidiction of an Agreement by a Foreign Sovereign to Arbitrate before the International Centre for Settlement of Investment Disputes, 16 George Washington Journal of International Law and Economics 451, 461/2 (1982).

946 *Delaume, loc. cit.*, pp. 787–789.

947 505 F. Supp. 141 (1981), 20 ILM 666 (1981), 4 ICSID Reports 3.

948 See Brief for the United States of America as Intervenor and Suggestion of Interest, 20 ILM 1436, 1480 (1981). See also *Delaume, loc. cit.*, p. 794.

949 At p. 1481.

950 693 F. 2nd 1094 (1982), 72 ILR 152 (1987), 21 ILM 1355 (1982), 4 ICSID Reports 9.

951 News from ICSID, Vol. 2/1, p. 3 (1985). See also *Hirsch*, The Arbitration Mechanism, p. 88.

952 The Tribunal makes reference to MINE's justification for going to the US courts to compel AAA arbitration in the context of a claim for reimbursement of legal fees. But the denial of this claim is inconclusive for the question of nationality. *MINE* v. *Guinea*, Award, 6 January 1988, 4 ICSID Reports 76.

jurisdiction, the Tribunal implicitly accepted MINE's Swiss nationality. A subsequent application for annulment did not raise the issue.[953]

714 The Tribunal appears to have accepted the view that an agreement on nationality based on actual control is decisive. The fact that the parties raised no objections to the Centre's jurisdiction constituted no obstacle to a finding on this issue. Under Arbitration Rule 41(2) the tribunal may consider questions of jurisdiction on its own initiative. The circumstances of the case make it obvious that the Tribunal could not have been ignorant of the questions surrounding the claimant's nationality.[954]

715 The loan and sovereign guarantee agreements at issue in *CDC* v. *Seychelles* contained an agreement that CDC was a national of another Contracting State for the purposes of Art. 25 of the Convention.[955] The Concession Agreement in *Soufraki* v. *UAE* described Mr. Soufraki as a Canadian national.[956] In neither case did the agreement on nationality play a decisive role in the tribunals' reasoning.

716 An agreement on the investor's nationality need not be made in the form of an express stipulation. Consent to ICSID's jurisdiction expressed in a direct agreement between the parties implies an understanding that the investor fulfils the Convention's nationality requirements.[957] This would hold true only if two conditions are fulfilled: the host State must have expressed its consent specifically with respect to the particular investor. Normally, this would be the case only if the consent is expressed in a single instrument. A general offer of consent contained in national legislation or a treaty that is taken up by the investor would not carry this implication. Additionally, the parties must have been fully aware of the circumstances surrounding the investor's nationality. In particular, if mistake, deception or misrepresentation can be shown to have existed, no inferences as to an agreement on nationality can be drawn from the fact of consent.

717 The consequence of such an implicit agreement on nationality would be the easing of the criteria for the existence of nationality (see para. 710 *supra*). Any reasonable connection to a Contracting State, including control, would be acceptable. For instance, if the host State entered into a consent agreement with an investor that is incorporated in a non-Contracting State but is controlled by nationals of a Contracting State, the host State could not subsequently challenge jurisdiction on the ground that the nationality requirements of Art. 25(2)(b) were not met, provided the circumstances surrounding the investor's nationality were fully known. By contrast, if consent is based on an offer, contained in host State legislation or in a treaty, which is simply taken up by the investor, no inferences as to agreed nationality can be drawn. Unless provided otherwise by the legislation or treaty, the

953 *MINE* v. *Guinea*, Decision on Annulment, 22 December 1989, footnote 1 to para. 1.02.
954 For a critical evaluation see *Hirsch*, The Arbitration Mechanism, pp. 88–91.
955 *CDC* v. *Seychelles*, Award, 17 December 2003, para. 4.
956 *Soufraki* v. *UAE*, Award, 7 July 2004, paras. 3, 41.
957 *Broches*, The Convention, p. 361; *Szasz*, The Investment Disputes Convention, p. 34.

host State may insist that the investor demonstrate its nationality of a Contracting State based on incorporation or *siège social*.

c) Legislation and Treaties

718 In the case of consent based on national legislation or treaties (see paras. 392–463 *supra*), the respective instruments often contain definitions or descriptions of foreign investors. Definitions in national investment legislation containing ICSID clauses are by no means uniform. Some national laws refer to a corporate foreign investor as a juridical person "incorporated or constituted under the law of a foreign country"[958] or as "incorporated outside the . . . Republic".[959] Other laws refer to corporations in which more than half of the registered capital is held by foreign persons or foreign corporations.[960]

719 Bilateral investment treaties (BITs) use a variety of criteria to determine the nationality of a company.[961] Many BITs use the traditional criteria of incorporation and/or seat.[962] For instance, the Chinese Model BIT of 2003 defines corporate investors in the following terms:

> legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party.[963]

720 Some Swiss treaties use the concept of a controlling interest.[964] BITs of other States such as the Netherlands,[965] the United States,[966] France[967] and Sweden[968] use a combination of the traditional criteria and of control.[969]

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958 Albania, Law on Foreign Investments, 1993, Art. 1 – see *Tradex* v. *Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review – FILJ 161, 171/2, 181/2 (1999); Kazakhstan, Law on Foreign Investments, 1995, Art. 1; Mozambique, Law of Investments, 1993, Art. 1(1)(q).

959 Tanzania, National Investment (Promotion and Protection) Act, 1990, sec. 2.

960 Uganda, Investment Code, 1991, sec. 10(1)(b); Zaire, Investment Code, 1986, Art. 1(c).

961 See *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 34–42.

962 See *e.g.*, Italy-Korea BIT (1989) Art. 2(3); Italy-Poland BIT (1989) Art. 1(4); Italy-Argentina BIT (1990) Art. 1(2); Italy-Algeria BIT (1991) Art. 1(3); Italy-Albania BIT (1991) Art. 1(2); Argentina-China BIT (1992) Art. 1(2); Chile-Norway BIT (1993) Art. 1(1).

963 China Model BIT 2003, *in*: *Dolzer/Schreuer*, Principles of International Investment Law, at p. 353.

964 See Article 1(b) of the Swiss Model Agreement, *Dolzer/Stevens*, Bilateral Investment Treaties, p. 219. See also, Switzerland-Poland BIT (1989) Art. 1(1); Switzerland-Jamaica BIT (1990) Art. 1(b); Switzerland-Chile BIT (1991) Art. 1(1).

965 *Dolzer/Stevens*, Bilateral Investment Treaties, p. 210. See also, Netherlands-Cape Verde BIT (1991) Art. 1(b); Netherlands-Argentina BIT (1992) Art. 1(b); Netherlands-Lithuania BIT (1994) Art. 1(b).

966 See *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 241/2; US-Bulgaria BIT (1992); US-Ecuador BIT (1993); US-Moldova BIT (1993).

967 See France Model BIT 2006, Art. 1(2)(b), *in*: *Dolzer/Schreuer*, Principles, p. 361. See also France-Kuwait BIT (1989) Art. 1(4); France-Nigeria BIT (1990) Art. 1(3); France-Chile BIT (1992) Art. 1(3).

968 See *e.g.*, Sweden-Tunisia BIT (1984) Art. 1(3); Sweden-Morocco BIT (1990) Art. 1(3).

969 *Parra, A. R.*, The Scope of New Investment Laws and International Instruments, *in*: Economic Development, Foreign Investment and the Law (*Pritchard, R.* ed.) 27 *et seq.* (1996).

More recent BITs combine incorporation with the exercise of substantial business activity in the country concerned.[970] The Norway Model BIT of 2007 defines a corporate investor as: **721**

> any entity established in accordance with, and recognised as a legal person by the law of a Party, and engaged in substantive business operations in the territory of that Party, such as companies, firms, associations, development finance institutions, foundations or similar entities irrespective of whether their liabilities are limited and whether or not their activities are directed at profit.

Some multilateral instruments containing ICSID consent clauses (see paras. 456–463 *supra*) follow the traditional criteria. For instance, the Energy Charter Treaty of 1994 in Art. 1(7)(a)(ii) describes a corporate investor as "a company or other organization organized in accordance with the law applicable in that Contracting Party".[971] Similarly, the 1994 Mexico-Colombia-Venezuela Free Trade Agreement in Art. 17–01 refers to a company constituted, organized or registered in conformity with the law of a Party. The NAFTA defines an "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there".[972] **722**

Definitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction are directly relevant to the determination of whether the nationality requirements of Art. 25(2)(b) have been met. They are part of the legal framework for the host State's submission to the Centre. Upon acceptance in writing by the investor (see paras. 416–426, 447–455 *supra*), they become part of the agreement on consent between the parties. Therefore, any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal (see also paras. 811, 812 *infra*). This conclusion was expressly confirmed in *Tokios Tokelės* v. *Ukraine*.[973] **723**

Host States have at times argued that the ICSID Convention implies additional conditions for the determination of an investor's nationality, besides the requirements set out in applicable investment treaties. **724**

In *Tokios Tokelės* v. *Ukraine*, Ukraine argued that whilst Tokios Tokelės was lawfully incorporated in Lithuania, it was not a "genuine entity" of Lithuania for the purposes of the Lithuania-Ukraine BIT and the Convention. Ukraine argued that the Tribunal should adopt either a "control test", and look to the company's ultimate owners, or determine its *siège social*, both of which, it said, pointed to Ukrainian, not Lithuanian, nationality. Ukraine emphasized that Tokios Tokelės **725**

970 See Article 1 of the 2004 US Model Agreement, defining "enterprise of a Party", *in*: *Dolzer/Schreuer*, Principles, p. 386.

971 34 ILM 360, 384 (1995). See also MERCOSUR Protocol of Colonia for the Reciprocal Protection of Investments, 1994, Art. 1(2)(b).

972 Art. 1139 NAFTA, 32 ILM 605, 647; *Dolzer/Schreuer*, Principles, p. 348.

973 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 26, quoting the corresponding passage in the First Edition of this Commentary.

was 99% owned by Ukrainian nationals, who also comprised two-thirds of its management. Ukraine also argued that Tokios Tokelės conducted no substantial business activities in Lithuania, and that its administrative headquarters were based in Ukraine, although these allegations were disputed.

726 Ukraine argued that the Tribunal ought not to uphold its jurisdiction for policy reasons. It said that the object and purpose of the Lithuania-Ukraine BIT and the Convention did not permit nationals of the host State to submit claims against their own State to international arbitration, albeit through a foreign-incorporated entity. Ukraine argued that the Lithuania-Ukraine BIT and the Convention both contemplated only the settlement of international investment disputes involving a Contracting State and a foreign investor.[974]

727 The Tribunal held, by a majority, that the Convention leaves the task of choosing the applicable test by which to determine whether a legal person qualifies as a national of a Contracting State to the "reasonable discretion of the Contracting Parties".[975] Article 1(2)(b) of the BIT defined Lithuanian "investors" to mean "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations".[976] The Tribunal further held that the legal place of incorporation was the only relevant consideration to determine whether the Tribunal had jurisdiction *ratione personae.* Nothing in the Convention or the BIT required any further or substantial connection between Tokios Tokelės and Lithuania, including the locus of the underlying controllers, in order for it to qualify for protection under the treaty and to submit a claim to ICSID.[977] As it was not disputed that Tokios Tokelės was a legal entity duly established under the laws of Lithuania, the majority concluded that Tokios Tokelės qualified as a Lithuanian "investor" for the purposes of the BIT and a "national of another Contracting State" for the purposes of the Convention.[978] The majority explained the rationale for its approach as follows:

> We emphasize here that Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended.[979]

728 Some States require a further bond between a company and their territory if the company is to be entitled to benefit from treaty protection. They express qualifications on the standing of companies or reserve the right to deny protection to entities that lack a substantial connection to the State in which they are incorporated if

974 Ukraine further argued that Tokios Tokelės did not make an investment in Ukraine as defined by the BIT. Ukraine argued that both the Lithuania-Ukraine BIT and the Convention protected only international, cross-border investments and asserted that Tokios Tokelės had failed to prove that its capital investment originated from outside Ukraine. On the issue of the origin of the investment see paras. 182–187 *supra.*

975 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 24.

976 *Ibid.*, para. 28.

977 *Ibid.*

978 *Ibid.*, paras. 29, 38.

979 *Ibid.*, para. 39.

they are controlled by nationals of a third State.[980] The majority in *Tokios Tokelės* v. *Ukraine* regarded the absence of such qualifications as "a deliberate choice of the Contracting Parties".[981]

729 The Tribunal also appears to have been persuaded by the fact that there was no evidence that Tokios Tokelės had been established for the very purpose of attracting the protection of the Lithuania-Ukraine BIT and obtaining access to ICSID. As with the cases that have queried the "effective" nationality of natural persons, the majority held that this was not a case involving a nationality of convenience.[982]

730 The President of the Tribunal dissented from the majority decision, stating that he disagreed with the very "philosophy of the decision".[983] In the President's opinion the Convention imposes certain objective jurisdictional requirements on the Centre. These requirements form the "outer limits" of ICSID's jurisdiction, which the parties to a dispute may not "dispose at will".[984] It followed that:

> while the Contracting Parties to the BIT are free to confer to the ICSID tribunal a jurisdiction narrower than that provided for by the Convention, it is not for them to extend the jurisdiction of the ICSID tribunal beyond its determination in the Convention.[985]

731 The President observed, relying in part on the Preamble, that the Convention was established as a mechanism for arbitrating "international investment disputes, that is to say, for disputes between States and foreign investors", not for "investment disputes between states and their own nationals".[986] According to the President,

> . . . the ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing – even less encouraging – nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect – and thus *encourage* – *international* investment.[987]

732 Although the President acknowledged that it would be necessary to establish criteria to identify the controllers of a corporate entity, in the instant case it was clear to his mind that in effect Tokios Tokelės was a Ukrainian entity. The President observed that "[i]n the present case . . . where Tokios Tokelės is indisputably and totally in the hands of, and controlled by, Ukrainian citizens and interests, there is no evading the issue of principle".[988] Thus, in his view, Tokios Tokelės was not a

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980 On the interpretation and application of "denial of benefits" clauses, see *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paras. 15.1–15.9; *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras. 143–178; *Petrobart* v. *Kyrgyz Republic* (SCC), Award, 29 March 2005, p. 63. See also *Sinclair, A. C.*, The Substance of Nationality Requirements in Investment Treaty Arbitration, 20 ICSID Review – FILJ 357, 378–387 (2005). On the substance of criteria that exist in some treaties to qualify for protection, see also *Yaung Chi Oo* v. *Myanmar* (ASEAN), Award, 31 March 2003, 42 ILM 540 (2003).

981 *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 36.

982 *Ibid.*, paras. 53–56.

983 Dissenting Opinion, para. 1.

984 *Ibid.*, para. 28

985 *Ibid.*, para. 13.

986 *Ibid.*, para. 5.

987 *Ibid.*, para. 30 (emphasis original).

988 *Ibid.*, para. 10.

"national of another Contracting State", it was a national and investor of Ukraine, and he would have declined to uphold jurisdiction accordingly.[989] The President felt moved to express his dissenting view, and subsequently resign from the case, out of concern for "the future of the institution".[990]

733 The President's Dissenting Opinion reflects a particular appreciation of the ICSID Convention's object and purpose. But it is not supported by the text of Art. 25. The majority decision, on the other hand, is respectful of the clear terms of the parties' consent to use ICSID as expressed in the Lithuania-Ukraine BIT. The majority declared that they would be loath to undermine the basic principle that the cornerstone of ICSID's jurisdiction is party consent.

734 For the most part, commentators have sided with the majority.[991] They disagree with the President and see no risk of "unwarranted encroachment" on domestic jurisdiction since both Ukraine and Lithuania had agreed to ICSID jurisdiction and had not specified a control test for nationality.[992]

735 But there are some critics of the majority decision and voices in support of the President's approach. They have described the majority decision as illogical[993] and have pointed to the Convention's apparent object and purpose.[994] They have described the majority decision in *Tokios Tokelės* as "flawed, both in terms of law and policy",[995] and have described it as an unwarranted extension of jurisdiction opening the door to treaty shopping.[996]

736 Subsequent tribunals have followed the majority decision in *Tokios Tokelės* rather than the approach of the President. *ADC* v. *Hungary* concerned a claim, brought by two companies incorporated in Cyprus, pursuant to the Cyprus-Hungary BIT. The Respondent objected to jurisdiction, alleging that the Claimants were shell companies controlled by Canadians, which it said were the true investors.[997] It also said that the Claimants lacked a "genuine link" with Cyprus.

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989 *Ibid.*, para. 21.

990 *Ibid.*, para. 1.

991 *E.g.*, *Alexandrov, S.*, The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis, 4 The Law and Practice of International Courts and Tribunals 19, 36/7 (2005); *Kjos, H. E.*, *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction of April 29, 2004, 1(3) TDM (2004); *Fouret, J./Khayat, D.*, Chronique de Règlement Pacifique des Différends Internationaux (2004–1) 3(5) TDM (2006); *Mouawad, C./Karam, L.*, *Tokios Tokelės*: Home Is Where Control Is? *in*: American Arbitration Association (ed.), ADR and the Law 259 (New York, 2007).

992 *Wisner, R./Gallus, N.*, Nationality Requirements in Investor-State Arbitration, 5 The Journal of World Investment & Trade 927, 943 (2004).

993 *Schlemmer, E. C.*, Investment, Investor, Nationality, and Shareholders, *in*: The Oxford Handbook of International Investment Law (*Muchlinski, P./Ortino, F./Schreuer, C.* eds.) 49, 79 (2008).

994 *Kröll, S./Griebel, J.*, Protecting Shareholders in Investment Law: To Pierce or Not to Pierce the Veil, That is the Question!, 2 Stockholm International Arbitration Review 93, 113 (2005).

995 *Burgstaller, M.*, Nationality of Corporate Investors and International Claims against the Investor's Own State, 7 The Journal of World Investment & Trade 857, 860 (2006).

996 *Prujiner, A.*, L'arbitrage unilatéral: un coucou dans le nid de l'arbitrage conventionnel?, 1 Revue de l'arbitrage 63, 80 (2005).

997 *ADC* v. *Hungary*, Award, 2 October 2006, para. 335.

The Tribunal dismissed these objections.[998] The Cyprus-Hungary BIT, which contained the relevant definition of nationality, did not require a "genuine link" or require that the Claimants' controllers should also be Cypriot.[999] In doing so, the Tribunal expressly disagreed with the Dissenting Opinion in *Tokios Tokelės* v. *Ukraine* and referred to the majority decision as "good law".[1000]

737 In *Rompetrol* v. *Romania*, Romania objected to the jurisdiction of the Centre, alleging that the investment was in reality domestic in nature, since it was owned by a Romanian national and since the source of the funds was also domestic and not foreign. Romania argued that the Request for Arbitration was really an inappropriate attempt to clothe a domestic investment with Dutch nationality.[1001] Romania conceded that the Claimant satisfied the formal requirements of Dutch nationality for the purposes of ICSID and the Netherlands-Romania BIT, but alleged that, based on ownership and control, effective seat and source of funds, the Claimant's "real and effective" nationality was that of Romania.[1002]

738 The Tribunal rejected these objections. Its starting premise was that the Convention left it to the Contracting States to define the conditions for nationality. The Tribunal was guided by the definition of nationality in the Netherlands-Romania BIT:

> 81. In the Tribunal's view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their "nationals" for the purposes of enjoying the benefits the BIT is intended to confer.[1003]

739 The Tribunal noted that the Contracting Parties to the BIT were entitled to adopt incorporation under their own law as a "necessary and also sufficient criterion of nationality for purposes of ICSID jurisdiction", and that they had done so. This was sufficient for the purposes of Art. 25(2)(b). The Contracting Parties had not stipulated any further examination of ownership and control, of the source of investment funds, or of the corporate body's effective seat. The Tribunal held that the definition of national status given in the Netherlands-Romania BIT was decisive for the purpose of establishing its jurisdiction.[1004] The parties had specifically consented to ICSID jurisdiction brought by Dutch companies, "without regard to the incidents of control or source of capital".[1005] The Tribunal was unable to accept Romania's argument drawing upon the President's Dissenting Opinion in *Tokios Tokelės* v. *Ukraine*, the effect of which would be "tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion".[1006] Where the Tribunal's jurisdiction was governed by

998 *Ibid.*, paras. 336–341.
999 *Ibid.*, paras. 358/9.
1000 *Ibid.*, para. 360.
1001 *Rompetrol* v. *Romania*, Decision on Jurisdiction, 18 April 2008, para. 71.
1002 *Ibid.*, para. 78.
1003 *Ibid.*, para. 81.
1004 *Ibid.*, para. 83.
1005 *Ibid.*, para. 101.
1006 *Ibid.*, para. 85.

the ICSID Convention and the BIT, there was no basis to import alleged international law rules of "real and effective nationality" or "non-opposability" to defeat jurisdiction:

> . . . the Tribunal is clear in its mind that there is simply no room for an argument that a supposed rule of "real and effective nationality" should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.[1007]

740 Therefore, ICSID practice repeatedly confirms that in the absence of a definition of nationality in a treaty or law imposing further, more substantial connections than mere incorporation or seat, it is both permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection and, thus, the right to submit disputes to ICSID.[1008]

3. Nationality of a Contracting State

741 The juridical person must have the nationality of a Contracting State other than the host State. Therefore, a corporation that only has the nationality of a non-Contracting State is excluded. A proposal to exclude juridical persons that do not have the nationality of any Contracting State was put to the vote in the Legal Committee and adopted with a large majority (History, Vol. II, p. 868) (see also para. 285 *supra*).

742 Juridical persons may be treated as having multiple nationalities where the criteria of incorporation, seat and control do not coincide. A company may be incorporated in State A, have its main seat of business in State A or B and may be controlled by nationals of State C. Additionally, if control is an admissible criterion for nationality, it may be shared by nationals of several States.

743 If all possible nationalities linked the juridical person to Contracting States, no problem would arise. The Convention's phrasing in the singular ("a Contracting State") would not preclude two or several nationalities of Contracting States even if no clear decision can be made between or among them. At the time of a request for conciliation or arbitration a specific nationality must be stated (see para. 294 *supra*). Rule 2(1)(d)(i) of the Institution Rules requires that the request shall indicate the investor's "nationality on the date of consent". No problem is likely to arise if a nationality of a Contracting State based on one of the accepted criteria is indicated or even if several nationalities, all of Contracting States, are indicated.

744 The situation is more complicated if one of the possible nationalities is that of a non-Contracting State. The possession of the nationality of a non-Contracting State in addition to that of a Contracting State would not as such be a bar to becoming a party to ICSID proceedings (see para. 661 *supra*). The decisive test would then be whether the nationality of a Contracting State, other than the host State, can be

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1007 *Ibid.*, para. 93.

1008 *E.g.*, *Champion Trading* v. *Egypt*, Decision on Jurisdiction, 21 October 2003, sec. 3.4.2; *Soufraki* v. *UAE*, Award, 7 July 2004, para. 83; *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 330.

established with the help of the accepted criteria described above (paras. 694–707 *supra*). The concurrent possession of the nationality of a non-Contracting State, established on the basis of these same criteria, would not exclude jurisdiction.[1009]

745 It has even been suggested that, in a situation of this kind, a commission or tribunal would not have to search for the dominant or most effective nationality. The simple existence of the nationality of a Contracting State based on acceptable criteria would suffice. For instance, if the investor is incorporated in a non-Contracting State but controlled by nationals of Contracting States, jurisdiction should be upheld if the host State, in full knowledge of the relevant facts, has consented to jurisdiction and has thereby implicitly agreed that the investor possesses the required nationality (see para. 716 *supra*). If control is exercised by nationals of Contracting States as well as of non-Contracting States, the question of form and extent of control should be treated with flexibility (see paras. 850–870 *infra*). In view of the agreement on nationality, any reasonable degree of control by nationals of Contracting States should be accepted under this theory.[1010]

746 The above solution incurs the risk of diplomatic protection on behalf of the investor by a non-Contracting State. A non-Contracting State is not bound by the prohibition of diplomatic protection under Art. 27(1) of the Convention (see Art. 27, paras. 10–12). This is the inevitable consequence of accepting criteria for corporate nationality for purposes of ICSID's jurisdiction that differ from those used for diplomatic protection. A juridical person that has access to the Centre on the basis of incorporation or seat may be protected by a non-Contracting State whose nationality it has on the basis of control.

747 In *Autopista* v. *Venezuela*, Mexico, the State of the Claimant's ultimate controllers, sought to facilitate a settlement between the Claimant and Venezuela. Mexico is not a Contracting State. The Tribunal found Mexico's interest in the outcome of the case "somewhat disturbing" but held that it did not affect its jurisdiction.[1011]

748 Investors may be precluded from adopting tactics that will enable them to benefit from ICSID jurisdiction and from diplomatic protection. In *Banro* v. *DR Congo* the Tribunal found that an investor cannot manipulate its investments through subsidiaries incorporated in different jurisdictions so as to be able simultaneously to invoke ICSID arbitration as a national of a Contracting State and benefit from the diplomatic protection of another Contracting State in respect of the same dispute.[1012]

1009 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 213–216; *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 241/2.

1010 *Amerasinghe*, The Jurisdiction of the International Centre, p. 222.

1011 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 135–140.

1012 *Banro* v. *DR Congo*, Award, 1 September 2000, para. 103; and see *Lalive, P.*, Some Objections to Jurisdiction in Investor-State Arbitration, ICCA (2002); *Cremades, B. M./Cairns, D. J. A.*, The Brave New World of Global Arbitration, 3 Jurnal of World Investment 173, 200–201 (2002).

749 In *Mihaly* v. *Sri Lanka*, the Tribunal also referred to the harm that would be done to the scheme of the Convention if investors, not having the nationality of a Contracting State, were permitted to assign a claim to an affiliated company incorporated in another State which was a party to the ICSID Convention and so facilitate ICSID jurisdiction, but at the same time not exclude the right of the State of the assignor from espousing a claim in diplomatic protection.[1013]

750 The likelihood of complications arising from the nationality of non-Contracting States depends on the degree to which the Convention is ratified by more and more States. To the extent that the list of ratifications approaches universality, the entire problem of the investor's nationality becomes increasingly insignificant.

751 All the above considerations concerning multiple nationalities are premised on the assumption that the juridical person does not have the nationality of the host State. Nationality of the host State leads to the applicability of the second clause of Art. 25(2)(b) requiring a special agreement based on foreign control (see paras. 760–902 *infra*).

4. Critical Date

752 The requirement that the juridical person must have the nationality of a Contracting State other than the host State only applies at the date of consent. The double test of time, which is valid for natural persons (see paras. 679–687 *supra*), does not apply to juridical persons.

753 The Working Paper for the Convention linked the nationality requirement to the date of the submission of the dispute to the Centre without distinguishing between natural and juridical persons (History, Vol. I, p. 120). The Preliminary Draft took the date of consent as the critical date, also without distinguishing between the two types of investors (at p. 122). In the subsequent discussion, there was some concern that the investor might change its nationality subsequently (History, Vol. II, pp. 287, 395) (see also para. 680 *supra*). Mr. *Broches* favoured a double test of time for natural persons but did not think it necessary to apply this principle to companies since he thought it unlikely that a company could become incorporated in another country without being dissolved (at pp. 538, 869). Consequently, the First Draft retained the single test at the date of consent for juridical persons (History, Vol. I, p. 124). This solution was confirmed in subsequent debates (History, Vol. II, pp. 837, 868, 881) and found entry into the Revised Draft and into the Convention.

754 The effective date of consent is the day on which all the conditions for a valid consent have been met (see paras. 468–474 *supra*). This day may be the date on which the Convention entered into force for the investor's State of nationality but it will normally be a later date (see para. 682 *supra*). It may be the date on which proceedings are instituted if the investor takes up a general offer by the host State in legislation or a treaty to submit to ICSID jurisdiction (see paras. 417, 469 *supra*). The Tribunal in *Rompetrol* v. *Romania* rightly observed that the "critical

1013 *Mihaly* v. *Sri Lanka*, Award, 15 March 2002, para. 24.

date" in investment treaty arbitration is the date of the Request for Arbitration,[1014] or more precisely, the date it is transmitted to the Centre. There is no support in the text of the Convention for the critical date to be the acquisition or making of an investment, as suggested by the dissenting arbitrator in *Siag* v. *Egypt*.[1015]

755 Any change in the juridical person's nationality after the date of consent is immaterial for jurisdiction.[1016] Subsequent to consent, a juridical person may lose the nationality of the original Contracting State and may acquire the nationality of a non-Contracting State or that of the host State without losing access to ICSID.[1017] As the Tribunal in *Vivendi* v. *Argentina II* observed: "once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events."[1018]

756 This may not be the case in respect of specific investment treaties, such as the NAFTA. In *Loewen* v. *United States*, the Tribunal held that, under NAFTA Chapter 11, a claimant must demonstrate its continuous nationality until the date of any award, and must not acquire the nationality of the host State.[1019] The correctness of that conclusion as a matter of general international law has been questioned by commentators.[1020] It is certainly not a requirement of the ICSID Convention. Art. 25 spells out the applicable rules on nationality for the purposes of ICSID's jurisdiction.

757 Some have cast doubt on this conclusion where the later nationality is that of a non-Contracting State. It is argued that the enforcement of an arbitral award against the investor might be jeopardized if the investor is not a national of a Contracting State. In addition, the prohibition of diplomatic protection would not apply to the investor's new home State.[1021]

758 Both arguments are unconvincing. Under Art. 54, recognition and enforcement are obligations that are incumbent on all Contracting States. There is no particular obligation of the investor's home State. The change of nationality of a corporation does not necessarily go hand in hand with a relocation of assets. The problem of concurrent diplomatic protection may arise even if no change of nationality has occurred (see paras. 746–749 *supra*). Most importantly, the Convention's

1014 *Rompetrol* v. *Romania*, Decision on Jurisdiction, 18 April 2008, para. 79.
1015 *Siag* v. *Egypt*, Decision on Jurisdiction, Dissenting Opinion, 11 April 2007, p. 4 (see paras. 674, 683 *supra*).
1016 *Amerasinghe*, The Jurisdiction of the International Centre, p. 223.
1017 This passage, contained in the First Edition of this Commentary, was endorsed in *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, para. 64.
1018 *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, para. 63.
1019 *Loewen* v. *United States* (AF), Award, 26 June 2003, para. 220.
1020 *E.g.*, *Paulsson, J.*, Continuous Nationality in *Loewen*, 20 Arbitration International 213 (2004); *Duchesne, M. S.*, The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes, 36 Geo. Wash. Intl. L. Rev. 783 (2004); *Mendelson, M.*, The Runaway Train: The "Continuous Nationality Rule" from the *Panavezys-Saldutiskis Railway* case to *Loewen*, *in*: International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law (*Weiler, T. J.* ed.) 97 (2005); *Rubins, N.*, The Burial of an Investor-State Arbitration Claim, 21 Arbitration International 1 (2005).
1021 *Hirsch*, The Arbitration Mechanism, pp. 95/6.

wording is quite unambiguous on this point. The contrast between the provisions on critical dates in Arts. 25(2)(a) and 25(2)(b) makes it abundantly clear that different solutions are intended for natural and for juridical persons. The double test of time was chosen for individuals and a single test at the time of consent was chosen for corporations.

759 Institution Rule 2(1)(d)(i) provides that the request for conciliation or arbitration shall indicate the investor's nationality on the date of consent (see para. 686 *supra*). The Secretary-General will decide *inter alia* on the basis of this information whether or not the request is manifestly outside the jurisdiction of the Centre in accordance with Arts. 28(3) and 36(3) of the Convention. No documentation of the investor's nationality is required at that time (Institution Rule 2(2)) but evidence to this effect may have to be produced at a later stage.[1022]

N. "... and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

1. General Significance

760 The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals. The latter type of dispute is to be settled by domestic procedures, notably before domestic courts. On the other hand, host States frequently require that investment operations are carried out through companies organized under local law. The purpose of this requirement is a better supervision of the investors' activities. Incorporation in the host State makes the investor technically a national of that State according to the most common test for nationality of juridical persons (see paras. 694–740 *supra*). This would exclude all investors that operate through local companies from the ambit of the ICSID Convention. A large and important part of foreign investment would then be outside the Convention's scope. The second clause of Art. 25(2)(b) is designed to accommodate this problem by creating an exception to the diversity of nationality requirement.[1023]

761 The Preliminary Draft specifically foresaw standing for investors who had the nationality of the host State in addition to that of another Contracting State. The nationality of companies was defined not only through establishment under national law but also by way of a controlling interest (History, Vol. I, p. 122). The idea of giving host State nationals standing if they have the concurrent nationality of another Contracting State soon ran into strong opposition and was abandoned

1022 See Note D to Rule 2 of the 1968 Institution Rules, 1 ICSID Reports 53/4.

1023 For discussion see *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 102; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 31; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 41; *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 213. And see *Broches*, The Convention, pp. 358/9; *Delaume*, ICSID Arbitration, p. 112.

(see para. 665 *supra*). Similarly, "controlling interest" as a criterion for corporate nationality was cast into doubt and later dropped (see para. 695 *supra*). While there was some resistance to the idea of giving locally incorporated companies the possibility to sue the host State (History, Vol. II, pp. 449, 580, 581), a majority of delegates found that it would be unwise to exclude locally incorporated but foreign controlled companies (at pp. 287, 325, 359, 360, 361, 394, 397, 400, 449, 581). A suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners (at pp. 360, 396, 397, 446, 447, 449, 538, 705, 709, 871) was discarded. It was soon realized that this would not be feasible where shares are widely scattered and their owners are insufficiently organized (at pp. 449, 539, 581). Mr. *Broches* maintained throughout that in view of the Convention's optional character it should be left to the host State whom it wished to treat as a foreign national (at pp. 256, 284, 287, 359, 360, 361, 450, 539, 580) (see also para. 638 *supra*).

762 The First Draft provided that the parties could agree to treat a juridical person as a "national of another Contracting State". There was no reference to the objective requirement of control (History, Vol. I, p. 124). Delegates from developing countries strongly opposed this purely consensual solution (History, Vol. II, pp. 658, 706, 709, 710, 840, 869, 870). At the same time, the representatives of the United States expressed their preference for the reintroduction of the criterion of control (at pp. 703, 837, 871). Intensive deliberations in a Working Group produced no clear decision in favour of a solution based either on agreement or on control (at pp. 874/5). Two votes in the Legal Committee did not yield a majority for the restrictive view to prevent access to juridical persons that are nationals of the host State under any circumstances (at pp. 869, 870). Eventually, Mr. *Broches* introduced a draft that combined the elements of agreement and foreign control by permitting agreement to treat a corporation of host State nationality as a national of another Contracting State because of foreign control. This solution was adopted by a narrow majority (at pp. 871, 881, 937/8). In view of the continuing divergence of opinion evidenced by these votes, Mr. *Broches* stated that he would report the views expressed to the Executive Directors (at pp. 938, 957/8). The draft, as adopted, was accepted without discussion at a meeting of the Executive Directors (at p. 1027).[1024]

763 The Report of the Executive Directors, after referring to the provision in Art. 25(2)(a) on natural persons (para. 667 *supra*), offers the following comment:

> 30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

1024 See also *Broches, A.*, Development of International Law by the International Bank for Reconstruction and Development, 59 American Society of International Law Proceedings 33, 37 (1965).

2. Host State Nationality

764 For purposes of finding that the corporate investor has the host State's nationality, the criterion of control cannot be applied. The exception for juridical persons under foreign control only makes sense if the initial test is based on the traditional criteria of incorporation or *siège social* (see para. 697 *supra*).[1025] The drafting history also indicates clearly that the second clause of Art. 25(2)(b) was designed for situations in which the foreign investor had established a corporation under the host State's law (see paras. 761, 762 *supra*).

765 This conclusion is confirmed by the cases in which ICSID tribunals have applied the second clause of Art. 25(2)(b).[1026] In *Amco* v. *Indonesia*, the Tribunal found that PT Amco had the nationality of Indonesia due to its place of incorporation and the place of its registered seat as well as of its actual seat.[1027] In *Klöckner* v. *Cameroon*, SOCAME was established as a Cameroonian limited liability company.[1028] In *SOABI* v. *Senegal*, the Claimant was a joint stock company with its head offices in Dakar, which under the local law made it a national of Senegal.[1029] In that case, the Tribunal confirmed in general terms that the criteria of the location of the head office or the place of incorporation were decisive for corporate nationality (see para. 700 *supra*). In *LETCO* v. *Liberia*, the Claimant was found to be a juridical person with Liberian nationality because it was incorporated and registered in Liberia.[1030] In *Vacuum Salt* v. *Ghana*, the Claimant was a corporation organized under the 1963 Companies Code of Ghana.[1031] In *Cable TV* v. *St. Kitts and Nevis*, the parties requesting arbitration were corporations under the Companies Act of St. Kitts and Nevis.[1032] In *Autopista* v. *Venezuela*, the Claimant was a corporation incorporated under the laws of Venezuela.[1033] In *Aguas del Tunari* v. *Bolivia*, the Claimant was incorporated in Bolivia.[1034] In *Vivendi* v. *Argentina*, the second Claimant was incorporated in Argentina.[1035]

766 A concurrent nationality of another State would not detract from a finding of host State nationality. Therefore, even if the host State's nationality is one of several nationalities, the second clause of Art. 25(2)(b) would come into operation requiring an agreement on nationality based on foreign control.[1036]

1025 See also *Amerasinghe*, The Jurisdiction of the International Centre, p. 211; *Hirsch*, The Arbitration Mechanism, p. 84.
1026 See also *Holiday Inns* v. *Morocco*, *Lalive*, The First "World Bank" Arbitration, p. 138 note 1.
1027 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(ii). See also the reference to the terms of the Indonesian Foreign Investment Law, 1967, in the Award of 20 November 1984, para. 14.
1028 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15, 18.
1029 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 30.
1030 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 351.
1031 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 28.
1032 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 5.13.
1033 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 1.
1034 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 1.
1035 *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 1.
1036 See, however, *Amerasinghe*, The Jurisdiction of the International Centre, p. 213.

The Convention speaks of the nationality of the Contracting State party to the dispute. If the party to the dispute is not the host State itself but one of its constituent subdivisions or agencies (see paras. 230–267 *supra*), a literal interpretation may lead to the result that the rule concerning host State nationals does not apply. But this result would be contrary to the idea underlying that rule. There is no evident reason why a host State national should be able to take a constituent subdivision or agency before ICSID more easily than the host State itself. **767**

3. Agreement to Treat the Investor as a National of Another Contracting State

a) Form of Agreement

The Convention does not require any specific form for an agreement to treat a juridical person that has the host State's nationality as a national of another Contracting State because of foreign control. An agreement is essential, however. Without it, the Centre will not have jurisdiction. The Secretariat has declined to register requests for arbitration by parties that could not identify an agreement to treat a locally incorporated company as foreign. In some cases parties withdrew voluntarily.[1037] **768**

Since such an agreement is closely linked to consent, it will normally be recorded in the consent agreement.[1038] The Model Clauses offer the following formula for this purpose: **769**

> **Clause 7**
>
> It is hereby agreed that, although the Investor is a national of the Host State, it is controlled by nationals of name(s) of other Contracting State(s) and shall be treated as a national of [that]/[those] State[s] for the purposes of the Convention.[1039]

Clauses of this kind are used in actual practice.[1040]

Contracts may contain more complex provisions. In *Tanzania Electric* v. *IPTL*, the clause stated that for the purposes of consenting to the jurisdiction of the Centre it was agreed that IPTL was a foreign-controlled entity, unless the amount of the voting stock in IPTL held by non-Tanzanian investors should decrease to less than 50% of its voting stock.[1041] **770**

In *Autopista* v. *Venezuela*, the Tribunal accepted that the parties may conclude a conditional agreement for the purposes of Art. 25(2)(b). At the time the relevant agreement was signed, the Claimant was a Venezuelan company controlled by **771**

1037 *E.g.*, *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 8; *Tokios Tokelės* v. *Ukraine*, Award, 26 July 2007, para. 19; *Suez et al*. v. *Argentina*, Decision on Jurisdiction, 16 May 2006, para. 40.

1038 This was the case in *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 30/1; *Santa Elena* v. *Costa Rica*, Award, 17 February 2000, paras. 1, 16, 26; *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 133/4.

1039 4 ICSID Reports 362. See also Clause VI of the 1968 Model Clauses, 7 ILM 1159, 1167 (1968) and Clause VIII of the 1981 Model Clauses, 1 ICSID Reports 197, 202.

1040 For examples see *Delaume*, How to Draft, p. 176.

1041 *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 10.

Mexicans. Mexico is not a Contracting State. By the time a dispute arose, the Claimant was directly controlled by investors of the United States, which is a Contracting State. The nationality of the Claimant's immediate shareholders satisfied the parties' conditional agreement to treat the Claimant as a foreign national because of foreign control as of such time as it came to be controlled by nationals of another Contracting State.[1042] That agreement provided:

> Both The Republic of Venezuela, acting by means of the MINISTRY, and THE CONCESSIONAIRE, agree to attribute to THE CONCESSIONAIRE, a legal person of Venezuela subject to foreign control for the date when this clause enters into force, the character of "National of another Contracting state" for the purpose of applying this Clause and the provisions of the Convention.[1043]

772 Alternatively, the agreement on nationality may be made independently of a consent agreement, such as in a *compromis* or a joint request under Institution Rule 1(2).

773 National legislation and treaties providing for ICSID's jurisdiction may grant access to locally established but foreign controlled corporations (see paras. 806–812 *infra*). If the investor takes up the offer contained in the legislation or treaty, the provisions on access of locally established but foreign controlled companies become part of the agreement between the parties (see paras. 811, 812 *infra*). This was the form of agreement found in cases such as *Vivendi* v. *Argentina*,[1044] *Genin* v. *Estonia*,[1045] *MTD* v. *Chile*,[1046] *Lucchetti* v. *Peru*[1047] and *Aguas del Tunari* v. *Bolivia*.[1048]

774 The Institution Rules require that the agreement on nationality is to be "indicated" at the time of the request (Rule 2(1)(d)(iii)). This information must be supported by documentation (Rule 2(2)). This need to supply documentation at the time of the request is stricter than the requirement for showing the investor's nationality. Evidence of nationality may be developed at a later stage (see paras. 759 *supra*, 795 *infra*). Failure to produce documentation concerning the agreement on nationality may lead to the Secretary-General's refusal to register the request based on a finding that the dispute is manifestly outside the jurisdiction of the Centre in accordance with Arts. 28(3) and 36(3). But once the request is registered, any lack of appropriate documentation at the time of filing is not fatal and the documentation may be provided to the Tribunal.[1049]

b) Implicit Agreement

775 The agreement to treat a juridical person with the host State's nationality as a national of another Contracting State because of foreign control should normally

1042 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 83, 89–91, 117, 142.
1043 At para. 83.
1044 *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 24.
1045 *Genin* v. *Estonia*, Award, 25 June 2001, para. 328.
1046 *MTD* v. *Chile*, Award, 25 May 2004, paras. 93/4.
1047 *Lucchetti* v. *Peru*, Award, 7 February 2005, para. 15.
1048 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 280/1.
1049 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 5.15.

be explicit. The Model Clauses recommend an unambiguous stipulation to this effect (see para. 769 *supra*) and it seems generally prudent to be as clear as possible also on this point.

776 During the Convention's drafting the expectation seems to have been that the agreement on nationality would be expressed in a separate clause. But at one point it was also suggested that consent to proceed under the Convention implied recognition by the host State of the foreign nationality of the other party (History, Vol. II, pp. 450, 582). A comparison of Art. 25(1) with Art. 25(2) of the Convention shows that while consent to the Centre's jurisdiction must be "in writing" (see paras. 379–381 *supra*), there is no such requirement for the agreement on nationality. This would indicate that the standard of formality is somewhat lower for the agreement on nationality than for consent.[1050] On the other hand, the need to submit documentation on the agreement to the Centre at the time of the request (see para. 774 *supra*) would not support the idea that the agreement can be inferred from the general circumstances.

777 Writers on the ICSID Convention have argued that an agreement under Art. 25(2)(b) constitutes an exception to the general rule that a State cannot be brought before an international forum by its own nationals. They assert that such an exception should be admitted only if it is expressed in the most unambiguous terms.[1051]

778 The practice of ICSID tribunals shows an increasing readiness to accept an implicit agreement to treat a juridical person as a foreign national because of foreign control. In *Holiday Inns* v. *Morocco*, the request for arbitration was made also on behalf of four locally organized subsidiaries of the foreign investors, the H.I.S.A. Companies. The local subsidiaries had not been parties to the original agreement containing consent to arbitration. In fact, they had not yet existed at the time. Nor had the rights arising from the original agreement ever been assigned to them (see paras. 337, 338 *supra*).[1052] It was undisputed that there was no express consent to treat them as foreign nationals.[1053] The Moroccan Government insisted that "clear and express consensus was essential".[1054] The Claimants argued that the four local companies had been set up in the interest and upon the request of the Government. Moreover, the Government had always considered the H.I.S.A. Companies as totally foreign controlled and had treated them as such. It followed that the Government had "agreed" to treat them as nationals of another Contracting State.[1055]

1050 See also *Lalive*, The First "World Bank" Arbitration, p. 140; *Hirsch*, The Arbitration Mechanism, p. 99.

1051 *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 76 (1974); *Lalive*, The First "World Bank" Arbitration, pp. 139/40; *Amerasinghe*, The Jurisdiction of the International Centre, p. 220; *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 233–235; *Delaume, G. R.*, ICSID Arbitration in Practice, 2 International Tax and Business Lawyer 58, 63 (1984).

1052 *Lalive*, The First "World Bank" Arbitration, pp. 137 *et seq.*

1053 At p. 139.

1054 At p. 140.

1055 At p. 141.

779 The Tribunal found that an implied agreement could only be accepted in very special circumstances, which were not present in the case before it. It said:

> 33. The question arises, however, whether such an agreement must be expressed or whether it may be implied. The solution which such an agreement is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here.[1056]

In the particular situation of this case, the parties had no intention at all in this respect. Therefore, the Tribunal held that "the H.I.S.A. Companies cannot be Parties to the present proceedings before ICSID".[1057] In addition, the Tribunal cited the Model Clauses as indicating that the host State's willingness to treat a local company as a national of another Contracting State should generally be expressed in the form of a "subsidiary agreement".[1058]

780 In *Amco* v. *Indonesia*, the arbitration clause named the local subsidiary, PT Amco, as a potential party to ICSID proceedings. Also, Amco Asia, the party to the original consent agreement, had transferred its contractual rights to PT Amco (see paras. 324–326 *supra*). But the Respondent still argued that there was no jurisdiction with respect to PT Amco since Indonesia had not expressed its agreement to treat it as a national of another Contracting State.[1059] The Claimants argued that there was no formal requirement on the way in which such an agreement should be expressed.[1060]

781 The Tribunal found that there was indeed no formal requirement as long as the agreement was expressed clearly:

> 14. . . . (ii) Nothing in the Convention, and in particular in Article 25, provides for a formal requisite of an express clause stating that the parties have decided to treat a company having legally the nationality of the Contracting State, which is a party to the dispute, as a foreign company of another Contracting State, because of the control to which it is submitted.
>
> What is needed, for the final provision of Article 25(2)(b) to be applicable, is (1) that the juridical person, party to the dispute be legally a national of the Contracting State which is the other party and (2) that this juridical person being under foreign control, to the knowledge of the Contracting State, the parties agree to treat it as a foreign juridical person.[1061]

In this particular case, the Tribunal held that the documents containing consent had indicated in several ways that PT Amco was an Indonesian company under

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1056 *Holiday Inns* v. *Morocco*, Decision on Jurisdiction, 1 July 1973; *Lalive*, The First "World Bank" Arbitration, p. 141; 1 ICSID Reports 663. The passage is quoted in *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 5.24.
1057 *Lalive*, The First "World Bank" Arbitration, p. 142.
1058 *Tupman*, Case Studies, p. 819.
1059 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 12.
1060 At para. 13.
1061 At para. 14.

foreign control: PT Amco was referred to as a "foreign business". There was provision that all of the capital would represent "foreign capital". There was to be a gradual transfer of shares to Indonesian citizens or businesses. Therefore, the Government had agreed to the arbitration clause in full knowledge of PT Amco's foreign control. It followed that the Government had agreed to treat PT Amco as a national of another Contracting State for purposes of the Convention.[1062]

782 The Tribunal countered Indonesia's reference to *Holiday Inns* by declaring that its own conclusions were actually based on an explicit agreement:

> To refer to the *Holiday Inns* award – in spite of the same not being a binding precedent in this case – here, this agreement is by no means *implied*; it is expressed, and clearly expressed, no formal or ritual clause being provided for in the Convention, nor needed in order for such an agreement to be binding on the parties.[1063]

783 In *Klöckner* v. *Cameroon*, the foreign investor had participated in the establishment of a joint venture company, SOCAME, in Cameroon. An Establishment Agreement of 1973 between SOCAME and Cameroon contained an ICSID clause. At the time, Klöckner owned 51% of SOCAME's shares and Cameroon 49% (see para. 327 *supra*). The validity of the ICSID clause was challenged, *inter alia*, because SOCAME was a Cameroonian company. The Tribunal reinforced the approach expressed in *Amco* by holding that the mere existence of an ICSID arbitration clause indicated an agreement on foreign nationality:

> The insertion of an ICSID arbitration clause by itself presupposes and implies that the parties were agreed to consider SOCAME at the time to be a company under foreign control, thus having the capacity to act in ICSID arbitration. This is an acknowledgment which completely excludes a different interpretation of the parties' intent. Inserting this clause in the Establishment Agreement would be nonsense if the parties had not agreed that, by reason of the control then exercised by foreign interests over SOCAME, said Agreement could be made subject to ICSID jurisdiction.[1064]

784 In *LETCO* v. *Liberia*, the French investors had incorporated the company in Liberia. They owned 100% of its capital stock. A Concession Agreement between LETCO and the Government of Liberia provided for dispute settlement by ICSID but did not record an agreement to treat LETCO as a foreign national.[1065] The Tribunal confirmed the reasoning of the previous cases by holding that the mere fact of an ICSID clause constituted an agreement to treat LETCO as a national of another Contracting State. To conclude otherwise would have amounted to imputing bad faith to Liberia in that it had never intended to honour the ICSID clause. The Tribunal said:

1062 At para. 14(ii).

1063 At para. 14(ii). Emphasis original. See also *Lamm*, Jurisdiction of the International Centre, pp. 471/2; *Rand/Hornick/Friedland*, ICSID's Emerging Jurisprudence, pp. 48/9; *Sornarajah, M.*, ICSID Involvement in Asian Foreign Investment Disputes: The AMCO and AAPL Cases, 4 Asian Yearbook of International Law 69, 74/5 (1994).

1064 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 16.

1065 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 350.

> When a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State, the Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the Contracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.[1066]

This approach, based purely on logical reasoning, is somewhat mitigated by a subsequent reference to factual evidence. The Tribunal found that Liberia had actually treated LETCO as a foreign national in several contexts. This indicated that, even if there was no express agreement, there was at least an implied agreement.[1067]

785 In *Vacuum Salt* v. *Ghana*, there was also no agreement to treat the locally incorporated company as a foreign national. The Tribunal, citing Model Clause 7 (see para. 769 *supra*), suggested that the better practice would be for the parties to at least make some reference to foreign control. But it admitted that the reported cases suggest that such has not been the practice.[1068] Ultimately, the Tribunal found the previous cases distinguishable since in none of them was the issue of the agreement on foreign nationality separated from that of control (see also paras. 820, 821 *infra*).[1069]

786 In *Cable TV* v. *St. Kitts and Nevis*, the Tribunal found that there was no expressed or implied agreement on consent with the Respondent (see paras. 249, 381 *supra*). But it indicated that recognition as a national of another State could be inferred from the granting of privileges that are reserved to foreign investors. These were currency convertibility, a tax holiday, recruitment of foreign nationals as well as customs and duty exemptions.[1070]

787 The tribunals' flexibility should not induce drafters of ICSID clauses to be careless about the investors' nationality requirements. Imprecise clauses are liable to lead to complications and additional costs. A clear and unambiguous stipulation on nationality along the lines of Model Clause 7 (see para. 769 *supra*) must be recommended strongly.

788 Even so, the cases on the second clause of Art. 25(2)(b) demonstrate that the tribunals have been generous in construing an agreement on foreign nationality. Basically, all that is needed is an agreement to consent to ICSID's jurisdiction concluded with a national of the host State. Since the consent clause is only valid if the Convention's nationality requirements are met, the necessary agreement on nationality was inferred. The effect of this practice is that the standards for an implicit agreement on nationality are no stricter for corporations with the host State's nationality than for other corporations (see paras. 716, 717 *supra*).

1066 At p. 352.
1067 At p. 353.
1068 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 31.
1069 At para. 31.
1070 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 5.17, 5.18.

This result has drawn criticism from authors who insist that the agreement on nationality under Art. 25(2)(b) is designed as a distinct requirement in addition to the consent needed under Art. 25(1). Therefore, according to these authors, the satisfaction of the second requirement should not simply be inferred from the satisfaction of the first.[1071] **789**

Not every expression of consent to jurisdiction can serve as a basis for the conclusion that the host State has acknowledged the investor's foreign nationality. This conclusion only makes sense where the investor and the host State have been in immediate contact and have entered into a direct agreement. The conclusion that there is an implied agreement on nationality is impossible where consent to jurisdiction is based on the host State's legislation or on a treaty. If the investor simply accepts a standing offer by the host State to submit to jurisdiction, no agreement to treat that particular investor as a foreign national can be imputed to the host State.[1072] A company incorporated in the host State will not qualify as an investor entitled to protection under investment treaties or laws and will not be able to bring a claim unless there is clear evidence of an agreement to treat it as a foreign national.[1073] **790**

The question of a need for an agreement on nationality for local subsidiaries should also be seen from another perspective. ICSID tribunals have developed a practice of looking beyond the investors' subsidiaries and of granting party status to parent companies even if the latter are not named in the consent agreement. In a number of cases the controlling foreign owners were given standing despite the fact that they were not the formal parties to the ICSID clauses (see paras. 319–335 *supra*). This practice reduces the significance of an agreement to treat the local subsidiary as a foreign national. If the foreign investors controlling the local company are given direct access, ICSID's jurisdiction no longer depends on the existence of an agreement to treat the subsidiary as a foreign national. **791**

Recognition of shareholding as investments in most investment protection treaties has led many parent companies to bring claims in their own names, as shareholders (see para. 150 *supra*). This course of action is usually preferred over proceedings brought by a locally incorporated company under Art. 25(2)(b). Indeed, the Tribunal in *CMS* v. *Argentina* observed that the offer of treaty protection for non-controlling or minority shareholders can achieve a similar result to the mechanism in Art. 25(2)(b).[1074] In *Sempra* v. *Argentina*, the alternative of claiming as a US company and shareholder was said to have been preferred **792**

1071 *Hirsch*, The Arbitration Mechanism, pp. 99/100. See also *Toope, S. J.*, Mixed International Arbitration. Studies in Arbitration Between States and Private Persons, 228 (1990); *Tupman*, Case Studies, pp. 834/5.

1072 See also *Amerasinghe*, Interpretation of Article 25(2)(b), p. 235.

1073 *E.g.*, *Tokios Tokelės* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 8.

1074 *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, para. 51. See also *Sinclair, A. C.*, ICSID's Nationality Requirement, *in*: Investment Treaty Arbitration and International Law (*Grierson-Weiler, T. J.* ed.) (2008).

because it was thought to simplify the requirements for registration of the request for arbitration.[1075]

793 Occasionally, cases also involve claims brought by joint claimants: the locally incorporated company having standing based on an agreement to treat it as foreign because it is foreign controlled, and the foreign shareholders themselves pursuant to an applicable treaty's provisions for the protection of shareholders as investors. Thus, in *Vivendi* v. *Argentina*, *MTD* v. *Chile* and *Lucchetti* v. *Peru*, the first claimants had standing under the respective BITs as foreign investors by virtue of their shareholdings, while the second claimants did so as a company incorporated locally but controlled by the former.[1076] The situation involves no contradiction. As the *Sempra* Tribunal explained:

> It is conceivable that where various investor companies resort to arbitration, some can do so as shareholders and others as companies of the nationality of the State that is a party to the dispute, on the basis of the various corporate arrangements and control structures.[1077]

794 The conferral upon the foreign shareholders in local companies of both substantive protection and a direct access to arbitration for harm suffered by the local companies (see para. 150 *supra*) may lead to the relative disuse of the mechanism under Art. 25(2)(b).

c) Identification of the Other Contracting State

795 Art. 25(2)(b) does not indicate whether the agreement on nationality must relate to a particular foreign State. Institution Rule 2(1)(d) would suggest that the agreed nationality need not be specified. Whereas the investor's primary nationality under Art. 25(2)(a) and under the first clause of Art. 25(2)(b) must be indicated in the request (see paras. 289–296 *supra*), the nationality to which the host State has agreed with respect to a juridical person of its own nationality need not be identified. Institution Rule 2 provides in relevant part:

> (1) The request shall:
> . . .
> (d) indicate with respect to the party that is a national of a Contracting State:
> (i) its nationality on the date of consent; and
> (ii) if the party is a natural person:
> (A) his nationality on the date of the request; and
> (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or

1075 *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 43.
1076 *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 24; *MTD* v. *Chile*, Award, 25 May 2004, paras. 93/4; *Lucchetti* v. *Peru*, Award, 7 February 2005, para. 15.
1077 *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 44.

> (iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;

It will be noted that whereas Institution Rule 2(1)(d)(i) and (ii) refer to "its nationality" and "his nationality" respectively, Rule 2(1)(d)(iii) speaks of "a national of another Contracting State" in more general terms. However, if the nationality(ies) of the foreign controller(s) is (are) not specified in the request for arbitration, the ICSID Secretariat will require the requesting party to provide this information before registering the request.

796 Model Clause 7 (see para. 769 *supra*) suggests that the State in question should be actually named in the agreement. This is clearly preferable and is more likely to forestall subsequent uncertainties and challenges. Therefore, the foreign State should be clearly identified. There should be a statement that the local company is controlled by nationals of that State and that, consequently, the local company shall be treated as a national of that State. If the local company is jointly controlled by nationals of several Contracting States, the controlling nationalities may be listed and the agreement may specify that the local company is to be regarded as a national of these States.[1078] Model Clause 7 is designed to accommodate controllers of several nationalities and treatment as a national of several States.

797 Some agreements on nationality contain all the relevant details.[1079] Others merely state an agreement that the Convention's nationality requirements are fulfilled (see para. 801 *infra*). An even less precise formula states that the investor "shall be deemed to be a national of that state of which it or its respective controlling shareholder is a national".[1080] Clauses thus lacking in precision may lead to complications. The identity of the controlling interest, the nationality of the controllers and the status of their home States as Contracting States may all have to be determined before jurisdiction *ratione personae* can be established.

798 ICSID tribunals have also shown flexibility on this point. In *Holiday Inns* v. *Morocco*, the Government argued that an agreement on nationality had to be not only clear and express (see para. 778 *supra*) but that it also had to be specific as to the local company's other nationality.[1081] In that case, the Tribunal does not appear to have reached this question.

1078 See *Amerasinghe*, Submissions to the Jurisdiction, p. 228; *Amerasinghe*, The Jurisdiction of the International Centre, pp. 219/20; *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 76/7 (1974); *Delaume*, How to Draft, p. 176; *Szasz*, A Practical Guide, p. 20.

1079 For examples see *Delaume*, How to Draft, pp. 176/7.

1080 See Article 7.3 of the Participation Agreement of 12 February 1982 between New Zealand and Mobil Oil NZ Ltd., cited in *Attorney-General* v. *Mobil Oil NZ Ltd.*, New Zealand High Court, 1 July 1987, 4 ICSID Reports 123.

1081 *Lalive*, The First "World Bank" Arbitration, p. 140.

799 In *Amco* v. *Indonesia* (see paras. 780–782 *supra*), the Respondent also argued that there was no formal and express indication as to the Contracting State in respect of which the parties would have agreed to treat PT Amco as a national. In Indonesia's view such an indication was indispensable for a valid agreement under Art. 25(2)(b). The Government also claimed that this lack of a clear and formal indication resulted in ignorance by Indonesia of the nationality of the persons who controlled PT Amco. The Claimants opposed this argument by saying that a formal indication of the nationality based on control in the arbitration clause itself was not needed. In addition, the Respondent knew PT Amco's situation in this respect.[1082]

800 The Tribunal rejected Indonesia's argument:

> . . . the Tribunal does not think that an objection to the binding character of the arbitration clause can be drawn, in the circumstances of the case, from the fact that the country of which the controlling shareholders of PT Amco were the nationals was not expressly mentioned in said clause, nor from the fact, alleged by the Respondent, that it did effectively not know which this country was.
>
> Taking first the legal point of view, and the contents of the agreement itself, the Tribunal will state, here again, that there is no provision in the Convention imposing a formal indication, in the arbitration clause itself, of the nationality of the foreign juridical or natural persons who control the juridical person having the nationality of the Contracting State, party to the dispute.
>
> On the other hand, in the instance case, that nationality was clearly indicated in the Application.[1083]

After citing several sentences from the investment application, which all pointed towards United States control, the Tribunal concluded:

> It thus appears that the nationality of the controller of PT Amco, the Indonesian juridical person to be established, was repeatedly and expressly stated in the Application to which the Indonesian Government agreed; under the circumstances, lacking any formal requirement in this respect in the Convention, there was no need for a particular statement of said nationality in the arbitration clause itself.[1084]

The Tribunal added, by way of a caveat, that the case "could have been different if there would have been fraud or misrepresentation on this issue" but found that this was not the case.[1085]

801 In *SOABI* v. *Senegal*, a Belgian national, acting on behalf of a corporation named Flexa, incorporated SOABI in Senegal in September 1975. All of the shares in SOABI were owned by Flexa, which was itself controlled by a Belgian national. In the papers filed for the incorporation, the head office of Flexa was stated to be in Geneva, although Flexa was, in fact, a Panamanian company.[1086] Switzerland

1082 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, paras. 12/3.
1083 At para. 14(iii). 1084 At para. 14(iii).
1085 At para. 14(iii). See also *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 127–132.
1086 *SOABI* v. *Senegal*, Award, 25 February 1988, footnote 1 to para. 2.13.

was a party to the ICSID Convention, but Panama was not.[1087] In November 1975, SOABI and Senegal entered into an Establishment Agreement containing an ICSID clause. The ICSID clause contained the following sentence:

> To this end, the Government agrees that the requirements of nationality set out in Article 25 of the IBRD Convention shall be deemed to be fulfilled.[1088]

The Tribunal found this sentence somewhat laconic but perfectly clear in its meaning. It meant that, notwithstanding its Senegalese nationality, SOABI could be deemed to be a national of another Contracting State by reason of its being controlled by foreign interests.[1089] It reached the result that SOABI was indirectly controlled by nationals of Belgium, a Contracting State (see paras. 818, 830, 843, 854 *infra*).

802 The Government argued that it had been misled by the description of Flexa as a company with its head office in Geneva. This misrepresentation had induced the Government to take positions it would not have taken had Flexa's Panamanian nationality been known to it. The Tribunal rejected this argument. It found that it had been evident that Flexa was merely a corporation of convenience. SOABI's capital could not possibly have come from Flexa's funds. Therefore, the Tribunal could not accept that Flexa's nationality could have affected the Government's consent to ICSID's jurisdiction.[1090] A declaration by the Tribunal's President (*A. Broches*) confirmed the position that it is not necessary to identify the agreed nationality of the locally incorporated company:

> Nor is it necessary that the compromissory clause indicate the nationality that is ascribed to the locally incorporated company. It is up to the party who contests the effect of its intention "to deem the requirement of nationality set out in Article 25 as fulfilled" to prove that that requirement could not be considered as having been fulfilled in accordance with the Convention.[1091]

803 In *Tanzania Electric* v. *IPTL*, it was sufficient that the parties had agreed to treat IPTL as a foreign-controlled entity, unless the amount of the voting stock in IPTL held by non-Tanzanian investors should decrease to less than 50%.[1092]

804 *Autopista* v. *Venezuela* was concerned with a claim brought by a Venezuelan company, which was immediately owned by Icatech, a corporation having United States nationality, which in turn was owned by ICA Holding, a Mexican company. The parties' agreement to treat the Claimant as a foreign national was conditional upon it becoming controlled by a national of a Contracting State. The Tribunal found this conditional agreement sufficiently certain to meet the requirements of Art. 25(2)(b).[1093]

1087 Panama has since become a Contracting State to the Convention in May 1996.
1088 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 23.
1089 At paras. 30, 31.
1090 At paras. 44–46. See also the Dissenting Opinion to the Award of 25 February 1988 at paras. 60–65, 74–77.
1091 *SOABI* v. *Senegal*, President's Declaration to Decision on Jurisdiction, para. 6. Footnote omitted.
1092 *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 10.
1093 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 83, 89–91, 117, 142.

805 It follows from the decisions in *Amco* and in *SOABI* that an identification of the nationality of the controlling interest in the arbitration clause is not necessary. In *Amco*, the Tribunal found that the Government had been informed of that nationality and that this knowledge was sufficient. *Tanzania Electric* and *Autopista* confirm that a conditional agreement will suffice. But *SOABI* went further in holding that even incorrect information on nationality did not affect the validity of the consent clause as long as it could not be shown that the false information had influenced the Government's decision to give its consent to ICSID's jurisdiction.

d) Legislation and Treaties

806 Some national investment laws providing for ICSID's jurisdiction extend access to the Centre to local companies that are under foreign control. The legislative techniques employed for this purpose are quite diverse. Some laws simply grant the right to require ICSID settlement to corporations with a majority of foreign capital.[1094] A more elaborate clause is contained in the Investment Code of Zaire, 1986, which provides in Art. 46 after referring to the ICSID Convention:

> In its request for admission to the General or Conventional Regime or Free Zone, or later by a separate instrument, the investor gives its consent to such arbitration pursuant to the said agreement, not only in its own name but in that of any Zairean company which it controls and by whose intermediary the investment is made. It accepts, moreover, that any such company shall be considered a "National of another Contracting State".[1095]

Other investment laws do not open access to ICSID for foreign controlled local companies directly but offer definitions of foreign investors in their definitions section that include locally established legal persons that are controlled by a majority of foreign capital.[1096]

807 A number of bilateral investment treaties provide that companies constituted in one State but controlled by nationals of the other State shall be treated as nationals of the other State for purposes of Art. 25(2)(b).[1097] For instance, Art. 8(2) of the United Kingdom Model Agreement runs as follows:

> A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.[1098]

1094 See Central African Republic, Code of Investments, 1988, Art. 30; Chad, Décret N° 446/PR/MCI/87 fixant la procédure d'octroi des avantages du Code des Investissements, 1987.

1095 See also Sri Lanka, Greater Colombo Economic Commission Law, 1978, sec. 26(2)(b); Senegal, Law Establishing the Industrial Free Zone of Dakar, 1974, Art. 31.

1096 Tanzania, National Investment (Promotion and Protection) Act, 1990, sec. 2; Mozambique, Law of Investment, 1993, Art. 1(1)(q); Uganda, Investment Code, 1991, sec. 10(1)(b).

1097 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 142–144; *Parra*, Provisions on the Settlement, p. 324; *Peters*, Dispute Settlement Arrangements, p. 144. See also *Micula* v. *Romania*, Decision on Jurisdiction, 24 September 2008, paras. 107–115.

1098 *Dolzer/Schreuer*, Principles of International Investment Law, at p. 380. See also UK-Turkey BIT (1991) Art. 8(2); UK-Nepal BIT (1993) Art. 8(1); UK-Estonia BIT (1994) Art. 8(2). For

The Argentina-US BIT uses the following formula in Art. VII(8): **808**

> For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.[1099]

Dutch[1100] and Swiss[1101] BITs also provide that a legal person that is a national **809** of one State but is controlled by nationals of the other State shall be treated as a national of the latter in accordance with Art. 25(2)(b). Article 1(2)(c) of the Argentina-France BIT refers to a legal person "effectively controlled" by nationals of the other State. It applies to:

> (c) Any body corporate effectively controlled, directly or indirectly, by nationals of one Contracting Party, or by bodies corporate having their registered office in the territory of one Contracting Party and constituted in accordance with that Party's legislation.[1102]

Multilateral instruments containing ICSID consent clauses (see paras. 456–463 **810** *supra*) also deal with the problem of locally incorporated but foreign controlled companies. One solution is to give standing not to the company established in the host State but to the controlling investor on behalf of the company. Art. 1117 of the NAFTA[1103] provides that an investor may submit to arbitration a claim against the host State on behalf of an enterprise constituted or organized under the host State's law, which the investor owns or controls directly or indirectly.[1104] The Mexico-Colombia-Venezuela Free Trade Agreement of 1994 contains a similar rule in its Art. 17–17. By contrast, the Energy Charter Treaty of 1994 adopts the ICSID Convention's classical solution in Art. 26(7):

> (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party,

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analysis, see *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 29 June 1999, 41 ILM 881, 888 (2002).

1099 See also US-Czechoslovakia BIT (1991) Art. VI(5); US-Romania BIT (1992) Art. VI(8). See also *Gann, P. B.*, The U.S. Bilateral Investment Treaty Program, 21 Stanford Journal of International Law 373, 419, 452 (1985). See also *Pan American* v. *Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 213, applying the clause in the Argentina-United States BIT.

1100 *Dolzer/Stevens*, Bilateral Investment Treaties, p. 214. See also, Netherlands-Argentina BIT (1992) Art. 10(6); Netherlands-Lithuania BIT (1994) Art. 9. On the interpretation of this aspect of the Netherlands-Argentina BIT, see *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, paras. 155–162.

1101 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 224/5. See also, Switzerland-Jamaica BIT (1990) Art. 9(7).

1102 A side letter to the BIT specifies several forms of control. See also *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 24, note 6; *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, paras. 47–50.

1103 32 ILM 605, 643 (1993). See also US Model BIT 2004, Art. 24(1)(b).

1104 See also *Waste Management* v. *Mexico II* (AF), Award, 30 April 2004, paras. 77–85.

> shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".[1105]

The MERCOSUR Protocol of Colonia for the Reciprocal Promotion and Protection of Investments of 1994 in Art. 1(2)(c) employs a slightly different technique. It extends the definition of investors, which are entitled to submit disputes to arbitration, to juridical persons constituted under the host State's law that are effectively controlled, directly or indirectly, by nationals of other Contracting States.

811 The second clause of Art. 25(2)(b) requires an agreement between the parties to the dispute; that is, the host State and the foreign investor. A provision in a treaty or in national legislation does not amount to an agreement between the parties to the dispute.[1106] A clause in a treaty or in national legislation providing for ICSID's jurisdiction is no more than an offer to the investor, which may be accepted by the latter (see paras. 416–426, 447–455 *supra*). The proviso that a local company, because of foreign control, would be treated as a national of another Contracting State is part of the terms of the offer made by the host State. When the offer to submit disputes to ICSID is accepted by the investor, that proviso becomes part of the consent agreement between the parties to the dispute (see also para. 723 *supra*), although it will not displace a tribunal's duty to confirm to its own satisfaction that foreign control in fact exists.

812 An additional clarification between the parties to the effect that the investor fulfils the conditions under the second clause of Art. 25(2)(b) therefore may not be amiss. If a dispute should arise over whether the condition of foreign control has, in fact, been met, a specific admission by the parties would strengthen the case in favour of foreign control and would, at the least, create a presumption to that effect (see paras. 815, 821 *infra*).

4. Foreign Control

a) Objective Requirement of Foreign Control

813 The Convention states that the agreement on nationality shall be "because of foreign control". These words indicate a causal connection between control and the agreement and suggest that control is an objective requirement that cannot be replaced by an agreement.

814 During the Convention's drafting, the emphasis shifted from the purely objective criterion of control in the Preliminary Draft to a purely consensual element of agreement on nationality in the First Draft (History, Vol. I, pp. 122, 124). Eventually, the objective requirement of control and the consensual requirement of an agreement were combined into the composite formula of "because of foreign control, the parties have agreed" (see paras. 761, 762 *supra*). The history of this provision would suggest that the existence of foreign control is a necessary element, which must exist independently of the terms of any agreement.

1105 34 ILM 360, 400 (1995).

1106 See also *Delaume*, Le Centre International, pp. 792/3; *Laviec*, Protection et promotion, p. 283.

815 Commentators on the Convention vary as to the emphasis they put on the objective requirement of foreign control. But there seems to be consensus that control is a factual element that may be examined by a tribunal independently of the agreement on nationality.[1107] On the other hand, it has been argued that an agreement on nationality would create a strong presumption in favour of foreign control that should be discarded only if it amounts to an unreasonable selection of nationality that cannot be sustained by any rational interpretation of the facts.[1108] Agreement to treat a local company as foreign may be conditional upon foreign control arising at some point in the future,[1109] or foreign control being vested in a national of another Contracting State.[1110]

816 ICSID tribunals have invariably examined the actual existence of foreign control over the local company and the nationality of that controller.[1111] In *Amco* v. *Indonesia*, the Tribunal, after considering the parties' agreement on nationality (see paras. 780–782, 799–800 *supra*), proceeded to examine the foreign control over PT Amco. By looking at the nationality of the immediate controller, Amco Asia (see paras. 841–842 *infra*), it came to the conclusion that the locally incorporated company was under United States control.[1112]

817 In *Klöckner* v. *Cameroon* (see para. 783 *supra*), the Tribunal pointed out that when the agreement containing the ICSID clause was concluded between the local joint venture company, SOCAME, and the host State, "SOCAME was a Cameroonian company, but subject to the majority control of foreign interests." This, to the Tribunal, was clear from another agreement that stipulated that Klöckner and its European partners would subscribe to 51% of SOCAME's capital.[1113]

818 In *SOABI* v. *Senegal*, much of the debate on jurisdiction turned on whether the local company was actually controlled by Panamanian, by Swiss or by Belgian interests. Flexa, a Panamanian company, was the immediate owner of all of SOABI's shares. But Panama was not a Contracting State. Flexa's nationality was stated as Swiss, but this statement appears to have been incorrect (see paras. 801, 802 *supra*). Eventually, the Tribunal found that control over Flexa was exercised

1107 *Gaillard*, Some Notes on the Drafting, p. 140; *Hirsch*, The Arbitration Mechanism, p. 102. See also *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, para. 142. In this case the majority declined to be bound by a protocol to the Netherlands-Argentina BIT indicating the facts that should be accepted as evidence of foreign control.

1108 *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 232/3, 235, 237/8, 240; *Broches*, The Convention, p. 361; *Szasz*, A Practical Guide, p. 20, cited with approval in *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 114.

1109 *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 10.

1110 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 83, 89–91, 117, 142. The Tribunal in *TSA Spectrum* v. *Argentina* declined jurisdiction where control was ultimately vested in a natural person having the nationality of the host State, Award, 19 December 2008, para. 162.

1111 For a discussion of whether the Claimant in *Santa Elena* v. *Costa Rica* was in fact controlled by US nationals, see *Brower, C. N./Wong, J.*, General Valuation Principles: The Case of *Santa Elena*, *in*: International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law (*Weiler, T. J.* ed.) 754 (2005). The Award dated 17 February 2000 does not explore these facts.

1112 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(iii).

1113 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15/16.

by nationals of Belgium, a Contracting State, and that, consequently, SOABI was under the indirect foreign control of nationals of a Contracting State (see para. 843 *infra*).[1114] A Declaration of the Tribunal's President (Mr. *Broches*) pointed out that where there was an agreement that the nationality requirements were fulfilled, the party that contested the effect of this agreement had the burden of proving that the requirement of control was not, in fact, fulfilled (see para. 802 *supra*).[1115]

819 In *LETCO* v. *Liberia*, the Tribunal had no problem in establishing that the locally incorporated company was under French control at the time of consent to ICSID's jurisdiction (see para. 855 *infra*). The Tribunal also went into the question of the relationship between foreign control and the agreement on nationality (see para. 784 *supra*). It said:

> Clearly the Convention's use of the word "because" in Article 25(2)(b) establishes a need to show that the agreement to treat LETCO as a French national was motivated by the fact that it was under French control. However, in most instances the virtually insurmountable burden of proof in showing what motivated a government's actions might well frustrate the purpose of the Convention. Therefore, unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is "because" of this foreign control.
>
> In the case at hand, there is no indication whatsoever that an agreement to treat LETCO as a French national resulted from anything other than the fact that it was under French control and we must therefore conclude that the necessary causal relationship exists.[1116]

Read together with the Tribunal's reasoning on an implicit agreement on nationality (see para. 784 *supra*), this means that all that is required for purposes of Art. 25(2)(b) is the objective fact of foreign control over the local company, the host State's awareness of this objective fact and an otherwise valid consent to ICSID's jurisdiction. The host State's agreement to treat the local company as a national of another Contracting State and the causal nexus expressed in the word "because" may then be construed from these elements.

820 In *Vacuum Salt* v. *Ghana*, the factual question of foreign control turned out to be decisive. In this case, there had been a Lease Agreement containing an ICSID clause.[1117] Vacuum Salt was a corporation organized under the 1963 Companies Code of Ghana.[1118] Ghana objected to ICSID's jurisdiction on the ground that the Claimant "essentially is a Ghanaian Company" that "is not foreign controlled and there has been no agreement between the parties that it should be treated as a national of another contracting state".[1119]

821 The Tribunal noted the practice of previous tribunals to infer an agreement on nationality from the very existence of an ICSID arbitration clause (see

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1114 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 35–38.
1115 President's Declaration, 25 February 1988, para. 6.
1116 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 352.
1117 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 2.
1118 At para. 28.
1119 At para. 12.

paras. 775–794 *supra*).[1120] But it found that these cases were distinguishable from the case before it since in each of them "the objective existence of foreign control was presumed".[1121] The Tribunal's decision had to turn on whether or not "foreign control" existed as a matter of fact on the date of consent:

> . . . the parties' agreement to treat Claimant as a foreign national "because of foreign control" does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.[1122]

After citing authors to the effect that the parties' agreement on foreign nationality raised a strong presumption that there was adequate foreign control (see para. 815 *supra*), the Tribunal continued:

> 38. Nevertheless the words "because of foreign control" have to be given some meaning and effect. These words are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host State as a foreign national: They may only do so "because of foreign control". The Tribunal concludes that the existence of consent to an arbitration clause such as paragraph 36(a) of the 1988 Lease Agreement in circumstances such that jurisdiction could be premised only on the second clause of Article 25(2)(b) raises a rebuttable presumption that the "foreign control" criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent.[1123]

A review of the relevant facts and circumstances (see paras. 856–857 *infra*) led the Tribunal to conclude that this presumption was rebutted. The factual requirements of the second clause of Art. 25(2)(b) were not satisfied on the date of consent. The Tribunal concluded that it did "not find here indications of foreign control of Vacuum Salt such as to justify regarding it as a national of an ICSID Contracting State other than Ghana". To assume jurisdiction under these circumstances would have been contrary to the purpose of the Convention, which was designed for the settlement of disputes between States and nationals of other States.

822 In *Cable TV* v. *St. Kitts and Nevis*, the Tribunal declined jurisdiction since the Respondent had not consented to jurisdiction (see paras. 249, 381, 786 *supra*). But it still examined the question of control over the locally incorporated companies concluding that ownership of the Claimant companies by nationals of the United States had been established for purposes of Art. 25(2)(b).[1124]

823 Although the parties in *Tanzania Electric* v. *IPTL* at no stage contested jurisdiction, the Tribunal nevertheless independently observed that at all times IPTL, a national of the Contracting State to the dispute, had been 70% owned and controlled by nationals of Malaysia.[1125]

1120 At para. 31.
1121 At para. 31. See also *Broches, A.*, Denying ICSID's Jurisdiction: The ICSID Award in Vacuum Salt Products Limited, 13 Journal of International Arbitration 21, 25/6 (1996).
1122 At para. 36. 1123 At para. 38.
1124 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 5.16–5.22.
1125 *Tanzania Electric* v. *IPTL*, Award, 12 July 2001, para. 13.

824 In *Autopista* v. *Venezuela*, the immediate controller of the Claimant was a US company which was controlled by a Mexican company. Venezuela argued that the Claimant was not, in fact, controlled by nationals of the United States, a Contracting State, but was in fact controlled by nationals of Mexico, which is not a Contracting State. The Tribunal did not accept the premise that Art. 25(2)(b) of the Convention requires *effective* control. It said that Art. 25(2)(b) "does not specify the nature, direct, indirect, ultimate or effective, of the foreign control".[1126] It also noted that the parties had agreed in their contract that direct shareholding would suffice as evidence of control.[1127]

825 These cases, especially *Vacuum Salt*, make it abundantly clear that foreign control at the time of consent is an objective requirement which must be examined by the tribunal in order to establish jurisdiction. Whereas an agreement on foreign nationality may be readily inferred from a consent agreement, no such inference is possible with regard to foreign control. An agreement on foreign nationality will create a presumption that its factual condition of foreign control exists, but no more. This presumption is rebuttable. Foreign control must actually exist and cannot be construed by the parties or implied from an agreement between the parties.

b) Nationality of Foreign Control

826 The second clause of Art. 25(2)(b) refers to "foreign control" without specifying any nationality requirements in this respect. It is clear from the wording and from the context that control exercised by nationals of the host State is not "foreign control" and that juridical persons controlled by such nationals are excluded from ICSID's jurisdiction.

827 The lack of "foreign control" was the decisive element in *Vacuum Salt* v. *Ghana*. The Tribunal found that at the relevant time only 20% of the company's shares were in Greek hands, whereas 80% were in Ghanaian hands.[1128] An examination of other possible elements of control, notably management, failed to dispel the impression that the company was under Ghanaian control[1129] (see also paras. 856–857 *infra*). This evident absence of foreign control led the Tribunal to find that it lacked jurisdiction.[1130]

828 The question whether "foreign control" means control by nationals of another Contracting State or control by nationals of any State other than the host State is not so clear at first sight. A literal interpretation could suggest that "foreign" has a different and wider meaning than "of another Contracting State". But a number of considerations strongly suggest that control by nationals of non-Contracting States would not qualify for purposes of Art. 25(2)(b). The drafting history of the

1126 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 110. The Tribunal in *TSA Spectrum* v. *Argentina* took a different approach, finding by a majority that it was appropriate to pierce the corporate veil of the immediate controlling entity: Award, 19 December 2008, paras. 152/3.

1127 At para. 117.

1128 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 41. See also *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, para. 162.

1129 At paras. 42–55.

1130 At paras. 54/5.

second clause of Art. 25(2)(b) suggests that what the delegates had in mind was control by nationals of other Contracting States (see paras. 761, 762 *supra*). In addition, a conscious decision was made to exclude nationals of non-Contracting States, including juridical persons, from access to the Centre (see paras. 285, 741 *supra*).

829 This result is also borne out by a more careful interpretation of the second clause of Art. 25(2)(b) itself. The fact of foreign control is linked to the agreement to treat the investor as a national of another Contracting State by the word "because". This causal connection suggests that the foreign control must correspond to the agreed nationality. It would be illogical to accept an agreement to treat the investor as a national of another Contracting State because of foreign control by a national of a non-Contracting State.

830 In *SOABI* v. *Senegal*, jurisdiction turned on whether the foreign control over the local company was exercised by Flexa, a Panamanian company, or, indirectly, by Flexa's Belgian owner (see paras. 801, 818 *supra*). Belgium was a Contracting State but Panama was not. The Tribunal had no doubts that the "foreign control" had to be exercised by nationals of Contracting States:

> 33. The Tribunal is of the opinion that it follows from the structure and purpose of the Convention that the foreign interests which might serve as a basis for according "foreign status" to a company established under local law, should be those of nationals of Contracting States.[1131]

The Tribunal was able to uphold jurisdiction only by finding that control, in the sense of the second clause of Art. 25(2)(b), was exercised indirectly by the Belgian controller of Flexa (see para. 843 *infra*). Therefore, it is clear that control must be exercised by nationals of Contracting States other than the host State. The Award of 19 December 2008 in *TSA Spectrum* v. *Argentina* takes this proposition further by insisting that control through an intermediate holding company is insufficient for Art. 25(2)(b) if ultimate control is vested in a person having the nationality of the host State.

831 The nationality of foreign controllers is relevant not only to ensure that they are nationals of a Contracting State but also to ensure that a local company is entitled to avail itself of the protection of an investment treaty. In *Aguas del Tunari* v. *Bolivia*, a claim was brought by a Bolivian company under the Bolivia-Netherlands BIT. Article 1(b)(iii) of that treaty defines investors of a Contracting Party to mean "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party". There was no dispute that the Claimant was foreign controlled. The question was whether it was controlled by Dutch investors such that the Claimant qualified for the protection of the BIT.

832 The Tribunal found control to be vested in the hands of one or more tiers of Dutch holding companies, which held 55% of the shares in the Claimant via a

1131 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 33. This view is shared by the Dissenting Opinion to the Award of 25 February 1988, paras. 61–63, 76/7. See also the President's Declaration at paras. 2–4.

Luxembourg company, which was its immediate shareholder. The Tribunal did not pierce the corporate veil of these Dutch companies, as Bolivia argued it should, to attribute control to their ultimate US or Italian parent companies, neither of which could have benefited from the protection of the BIT in question.

833 Complications may arise if control is exercised by investors of different nationalities. This is not liable to lead to difficulties if all possible controllers are nationals of Contracting States. Thus, in *Amco* v. *Indonesia*, the debate on whether the true controller of PT Amco was an American company, a Dutch individual or a Hong Kong company[1132] was ultimately moot since all nationalities concerned were those of Contracting States at the time of consent.

834 If control is exercised jointly by shareholders of several Contracting States it is still possible to regard the local company as being under foreign control for purposes of the second clause of Art. 25(2)(b). Even if the nationals of one Contracting State cannot be said to be in a position of control, it would be sufficient if they can exercise control together with nationals of other Contracting States. The agreement on nationality may take this situation into account (see para. 796 *supra*). The mere existence among the shareholders of nationals of non-Contracting States or of nationals of the host State would not by itself oust the Centre's jurisdiction. But it must be shown that the combined influence of the nationals of Contracting States other than the host State can be described as controlling.[1133]

835 Again, investment treaty arbitration can present particular difficulties. The Tribunals in the related cases of *Camuzzi* v. *Argentina I* and *Sempra* v. *Argentina* discussed, *obiter*, the circumstances in which a company incorporated in the host State might be considered to be foreign controlled, and especially the possibility of foreign control deriving from the joint interests of multiple parties of different foreign nationalities. In the case of an agreement on foreign control deriving from an investment treaty, it seems unobjectionable that such control be vested in more than one national of the other Contracting Party to a bilateral treaty.[1134] The same cannot be said if a Claimant sought to argue that it was foreign controlled by reference to underlying investors of different nationalities some of whom may be entitled to protection under separate BITs or no treaty protection at all. The problem was explained in *Camuzzi* v. *Argentina I* and *Sempra* v. *Argentina* in the following (identical) terms:

> The problem arises in the case of foreign investors of different nationalities acting, as in this case, under different treaties. The Argentine Republic is right when it argues that the consent is expressed in each treaty individually, with a different personal and normative import, in such a way that the combination of various participations could result in situations that that consent did not have in mind and might not have intended to include. In such an alternative the control could not be exercised jointly for the purposes of the Convention and of the Treaty and would have to be measured on the basis of the individual intents.

1132 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(iii).

1133 See also *Broches, A.*, Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case, *in*: Commercial Arbitration, Essays in Memoriam Eugenio Minoli 69, 77 (1974).

1134 *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 38.

> The assertion of the Claimant to the effect that the shareholders' nationality is not relevant inasmuch as they are nationals of a State that is a contracting party to the Convention is not convincing. It could, for instance, result in a shareholder protected by a treaty adding his participation to that of another shareholder who is a national of a State that is a party to the Convention but does not have a bilateral treaty with the host State that would protect him.[1135]

836 At the same time, the *Camuzzi* v. *Argentina I* and *Sempra* v. *Argentina* Tribunals recognized that in the particular circumstances of a case it may be shown that different shareholders having different nationalities had collaborated together from the outset in making and operating their investment, to the knowledge of the host State. On this basis it was possible to find that the locally incorporated claimant was foreign controlled, and thus a "national of another Contracting State", by reference to the consolidated interests of its shareholders, notwithstanding their different nationalities. The Tribunals said that:

> . . . if the context of the initial investment or other subsequent acquisitions results in certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible for these participations to be combined for purposes of control or to make the whole the beneficiary [*sic*].[1136]

837 Camuzzi and Sempra had entered into their investment together, pursuant to a shareholders' agreement that reflected their joint venture and assigned to them both managerial responsibilities in relation to the operating companies, such that "when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes".[1137] In such circumstances, the Tribunals held that it was possible to consider two foreign nationalities together to establish foreign control in a company incorporated in the host State, without identifying one or the other nationality as controlling.

838 *Amerasinghe* has argued that Art. 25(2)(b) does not refer to effective control but simply to control so that any reasonable amount of control should be accepted. Therefore, even though nationals of non-Contracting States or of the host State may have greater control, there would be good reasons for not rejecting an agreement on nationality as long as there is an adequate control by nationals of Contracting States.[1138] It does not seem likely that ICSID tribunals will follow this course. The cases thus far decided show a clear tendency to ascertain control independently of an agreement on nationality (see paras. 813–825 *supra*). The *Vacuum Salt* case, in particular, suggests that control means effective control or a dominant position and not merely a degree of participation (see paras. 820–822, 827 *supra*; paras. 856–857 *infra*).

1135 *Ibid.*, paras. 39–40; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 52–53.

1136 *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 41; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, para. 54.

1137 *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, para. 43.

1138 *Amerasinghe*, The Jurisdiction of the International Centre, pp. 219, 221; *Amerasinghe*, Interpretation of Article 25(2)(b), pp. 236–240.

839 Joint venture corporations in which the foreign investor as well as the host Government or a local investor participate may be designed specifically to exclude foreign control over the enterprise. In a situation of this kind it is advisable to make the foreign shareholder and not just the joint venture corporation the party to the agreement containing the ICSID clause.

c) Indirect Control

840 A foreign corporate investor controlling a company in the host State may, in turn, be controlled by nationals of other States. ICSID tribunals have reached conflicting answers to the question of whether only immediate control or also indirect control should be taken into consideration to determine the nationality of the foreign controller.

841 In *Amco* v. *Indonesia*, the Respondent contended that the true controller of the local company, PT Amco, was not Amco Asia, a United States national, as had been indicated by the Claimant (see paras. 799, 800 *supra*). Rather, it was alleged that Amco Asia itself was controlled by a Dutch citizen, Mr. Tan, residing in Hong Kong, through a Hong Kong company of which Mr. Tan was the sole or the main shareholder. The Tribunal refused to go beyond the first level of control:

> To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth or xth degree.
>
> Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing – which is not at all clearly stated in the Convention – that the fact that the controller is the national of one or another foreign State is to be taken into account . . .[1139]

842 In this particular case, a determination of the controlling nationality was of no immediate interest since all the countries concerned, the United States, the Netherlands and the United Kingdom, were Contracting States at the relevant date (see paras. 826–839 *supra*). But the Tribunal added a remark that gives some relevance to the controller's nationality in addition to its status as a national of a Contracting State: the true nationality of the controller would have to be taken into account where, for political or economic reasons, it matters for the host State to know the nationality of the controller and where the host State, had it known

1139 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(iii).

this nationality, would not have agreed to the arbitration clause. This, however, was neither alleged nor proven in the instant case.[1140]

843 In *SOABI* v. *Senegal*, the local company's immediate owner was a Panamanian company, Flexa, which itself was controlled by Belgian nationals. Since Belgium was a Contracting State but Panama was not, the issue of direct or indirect control was decisive (see paras. 801, 818, 830 *supra*). The Government argued that SOABI did not meet the requirements of Art. 25 since its sole shareholder, at the relevant time, had Panamanian nationality. The Tribunal rejected this argument:

> 35. . . . The nationality of this company, which held in 1975 all of SOABI's subscribed capital shares, could only be determinative of the nationality of the foreign interests if the Convention were concerned only with direct control of the company. However, the Tribunal cannot accept such an interpretation, which would be contrary to the purpose of Article 25(2)(b) *in fine*. This purpose, it is hardly necessary to observe, is to reconcile, on the one hand, the desire of States hosting foreign investments to see those investments managed by companies established under local law and, on the other hand, their desire to give those companies standing in ICSID proceedings. . . .
>
> 37. It is obvious that, just as a host State may prefer that investments be channelled through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct shareholders of the latter.
>
> 38. For the above reasons, the Tribunal concludes that, at the date of the conclusion of the Establishment Agreement, control over Flexa was exercised by nationals of Contracting States, notably the Kingdom of Belgium.[1141]

844 The solution adopted in *SOABI* has found support among commentators.[1142] But it leaves a number of questions unanswered. Was the Tribunal's objective to be realistic by piercing the veil of the first controller's corporate identity? Could this search for the true controller go on indefinitely beyond the first controller? Or was it the Tribunal's intention to search until it could find a foreign control that had the nationality of a Contracting State? Put differently, how would a tribunal decide if the situation in *SOABI* were to be reversed? If the immediate controller is a national of a Contracting State which is, in turn, controlled by nationals of non-Contracting States or even by nationals of the host State? Realism would militate against jurisdiction in such a case. On the other hand, the endeavour to find control of a nationality that is favourable to ICSID's jurisdiction would exclude the second level of control.

1140 *Loc. cit.*

1141 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 35–38. For the contrary view see the Dissenting Opinion to the Award of 25 February 1988 at paras. 62–64, 74–77. See also the Declaration of the Tribunal's President (Mr. *Broches*) in support of the Tribunal's decision, describing the finding on this point in *Amco* v. *Indonesia* as an *obiter dictum*, paras. 2–5.

1142 *Amerasinghe*, Interpretation of Article 25(2)(b), p. 236; *Delaume*, How to Draft, p. 178; *Hirsch*, The Arbitration Mechanism, p. 104.

845 The issue also arose in *Autopista* v. *Venezuela*. The parties had entered into a contract which provided that they agreed to attribute to the Claimant "the character of 'national of another Contracting State'" for the purposes of the parties' ICSID arbitration agreement and for the application of the Convention, if the Claimant's majority shareholders came to be nationals of a Contracting State.[1143] The same clause went on to refer to the "country of citizenship of the majority shareholder or shareholders of the Concessionaire".[1144]

846 The Claimant argued that the criterion of foreign control was satisfied because its immediate shareholder was a US company and the US is a Contracting State. Venezuela objected to the jurisdiction of the Centre because the Claimant's "ultimate and actual" controller was a Mexican company, Mexico not being a Contracting State.[1145] The Tribunal held that the parties' agreement to submit disputes to ICSID was not subject to the Claimant's "ultimate" controller or parent being a national of a Contracting State. To the contrary, the agreement had referred to the "majority shareholder . . . of the Concessionaire", meaning its direct shareholder.[1146] The Tribunal concluded that the parties had consented to ICSID jurisdiction in the event that the Claimant's majority shareholder or shareholders came to be a national of another Contracting State.[1147] As a result of an internal corporate restructuring, 75% of the Claimant's shares came to be held by a US company. This was done in an orderly fashion and with Venezuela's knowledge and approval.[1148] As the Convention does not define foreign control as used in Art. 25(2)(b),[1149] the Tribunal held that "given the autonomy granted to the parties by the ICSID Convention, an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the Convention".[1150] The parties' agreement to define the term "foreign control" only by reference to the Claimant's direct shareholding, and not for example by more sensitive economic criteria, was "certainly a reasonable test for control", and not inconsistent with the Convention. The Tribunal therefore found the Claimant to be controlled by a national of another Contracting State by virtue of its shares being held by a US company, notwithstanding that the latter was in turn owned by a national of a non-Contracting State.[1151]

847 The issue in *Aguas del Tunari* v. *Bolivia* was slightly different. The identity of the controllers was relevant primarily for the question of whether the Netherlands-BIT applied, not whether the Claimant was controlled by a national of another Contracting State (see paras. 831, 832 *supra*, 859–863 *infra*). Ownership by intermediate holding companies, albeit active in the management of the project, was

1143 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 83.
1144 *Ibid.*, para. 84.
1145 *Ibid.*, para. 85.
1146 *Ibid.*, para. 86.
1147 *Ibid.*, para. 87.
1148 *Ibid.*, paras. 93, 124.
1149 *Ibid.*, para. 105.
1150 *Ibid.*, para. 114.
1151 *Ibid.*, paras. 117–121, 133/4.

held to be sufficient for these purposes.[1152] But this conclusion was also determinative of the question of jurisdiction under Art. 25(2)(b).[1153]

Amco and *SOABI* may be reconciled by adopting *Amerasinghe*'s suggestion that **848**
the search should be pursued until foreign control by nationals of a Contracting State can be established. Once the appropriate foreign control has been found, the search should end.[1154] In other words, the method that works best in favour of ICSID's jurisdiction is to be adopted in the particular case. *Autopista* is also in line with this method. But the Tribunal in that case stressed that its decision was dictated by the parties' own agreement as to the criteria for foreign control and, as such, that it did not purport to lay down a test of general application for the purposes of Art. 25(2)(b).[1155]

The idea of adopting the solution that works best in favour of ICSID's juris- **849**
diction has a certain degree of attractiveness but leads to further questions. Is it sufficient for nationals of non-Contracting States or even of the host State to set up a company of convenience in a Contracting State to create the semblance of appropriate foreign control? The flexibility in the application of the first part of Art. 25(2)(b), as exemplified by the majority decision in *Tokios Tokelės* (paras. 701, 705, 725–735 *supra*), might suggest a similar approach for the determination of the nationality of the controllers of locally incorporated companies. But there are weighty arguments against such an approach. Whereas the first part of Art. 25(2)(b) merely refers to the investor's nationality, the second part specifically refers to control. This would indicate an approach that is governed less by formal aspects of corporate nationality than by economic realities. Therefore, on balance, the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State.[1155a]

d) Form and Extent of Control

Control over a juridical person is not a simple phenomenon. Participation in the **850**
company's capital stock or share ownership, while relatively simple to ascertain, is not necessarily a reliable indicator of control.[1156] Different voting rights attached to different types of shares, decision-making procedures and the exercise of management all contribute to a complex picture of control.[1157] For instance, a joint venture in which the foreign investor and local interests hold equal shares may be

1152 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, paras. 319/20. For the question of interpretation arising under the terms of the BIT, the Tribunal distinguished ICSID jurisprudence on the meaning of "control" for the purposes of Art. 25(2)(b): at paras. 275–286.
1153 *Ibid.*, paras. 280/1.
1154 *Amerasinghe*, Interpretation of Article 25(2)(b), p. 236.
1155 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 142.
1155a In this sense: *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, paras. 114–162.
1156 See also *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 119.
1157 See also *Amerasinghe*, Interpretation of Article 25(2)(b), p. 240; *Masood*, Jurisdiction of International Centre, p. 139.

under the effective control of the foreign partner due to the latter's management and know-how.

851 During the Convention's drafting there was some debate on the meaning of "control" after its first introduction (see paras. 761, 762 *supra*). It was pointed out that a mere majority holding of shares would not necessarily be decisive (History, Vol. II, pp. 359, 360, 396, 447, 447/8, 538), that actual holdings would be difficult to trace in the case of bearer shares (at pp. 361, 539, 581) and that even a minority holding of as little as 25% or even 15% might amount to control through a capacity to block major changes or otherwise (at pp. 447, 448, 538). Mr. *Broches* stated that there was no uniform view of what constituted "foreign control" but that the matter could be left to the appreciation of each State (at p. 870).

852 ICSID tribunals have developed an increasing awareness of the necessity to take a differentiated approach when examining actual control. In *Amco* v. *Indonesia*, Amco Asia's control over PT Amco was simply accepted as a fact although there was some reference to a sole or main shareholding in the context of PT Amco's indirect control (see para. 841 *supra*).[1158]

853 In *Klöckner* v. *Cameroon*, the Tribunal pointed out that on the critical date SOCAME, the local company, was subject to the majority control of foreign interests by virtue of the fact that Klöckner and its European partners had subscribed to 51% of SOCAME's capital (see also paras. 783, 817 *supra*). The Tribunal also mentioned that a change occurred subsequently when the foreign investors lost majority control over the Company because they refused to subscribe to a capital increase.[1159] There is no reference to any element of control other than shareholding in these cases.

854 In *SOABI* v. *Senegal*, the immediate controller, Flexa, was the sole shareholder of the local corporation. But the Tribunal found that Flexa was, in turn, controlled by nationals of Belgium (see paras. 801, 818, 830, 843 *supra*). It reached this result primarily by establishing that a Belgian national owned all of Flexa's shares but also by reference to the fact that at least one of the three members of Flexa's Board of Directors was of Belgian nationality.[1160]

855 In *LETCO* v. *Liberia*, the question of control over the locally incorporated company did not raise any factual problems in view of its 100% French ownership (see paras. 784, 819 *supra*). But the Tribunal still found it appropriate to base its finding also on the company's decision-making structure and management:

> The evidence provided by LETCO clearly indicates that it was under French control at the time the Concession Agreement was signed. This control is not only a result of the fact that LETCO's capital stock was 100% owned by French nationals as indicated by both LETCO and official documents of the Liberian Government, it also results from what appears to be effective control by French nationals; effective control in the sense that, apart from French shareholdings, French nationals dominated the company decision-making structure. It appears

1158 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(iii).
1159 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15/16.
1160 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, paras. 38–41.

> from the evidence presented that a majority, if not all, of LETCO's directors, as well as the General Manager, were at all times French nationals.[1161]

856 In *Vacuum Salt* v. *Ghana*, foreign control over the locally incorporated company was the central issue in the Tribunal's decision. After dismissing the idea that foreign control could be inferred from the existence of an ICSID clause (see paras. 820–821 *supra*), the Tribunal undertook a detailed examination of control over the company. The request for arbitration had contended that Vacuum Salt was controlled by a Greek national, Mr. Panagiotopulos, who at the relevant date held 20% of its shares.[1162] The Tribunal noted that while 20% of the shares were in the hands of the Greek national, Ghanaian nationals held the remaining 80%.[1163] In addition, the Greek national and his wife were directors of Vacuum Salt. The Tribunal prefaced its investigation with the following general observation:

> 43. The Tribunal notes, and itself confirms, that "foreign control" within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no "formula". It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is "enough", however, cannot be determined abstractly.[1164]

The Tribunal added that reasonable criteria other than shareholding, such as voting rights or management, may be considered but that "it must be true that the smaller . . . the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements". Therefore, it was necessary to examine Mr. Panagiotopulos' personal role in Vacuum Salt at the critical date.[1165]

857 This examination[1166] led the Tribunal to conclude that while Mr. Panagiotopulos served in a significant technical capacity, there was no evidence that he had acted or was materially influential in a truly managerial function:

> Nowhere in these proceedings is it suggested that Mr Panagiotopulos, as holder of 20 percent of Vacuum Salt's shares, either through an alliance with other shareholders, through securing a significant power of decision or managerial influence, or otherwise, was in a position to steer, through either positive or negative action, the fortunes of Vacuum Salt.[1167]

It followed that there was no foreign control in the sense of Art. 25(2)(b). Therefore, jurisdiction had to be declined.[1168]

858 In *Cable TV* v. *St. Kitts and Nevis* (see also paras. 249, 381, 786, 822 *supra*), the Tribunal noted that the Claimants were 99.9% owned and therefore controlled by nationals of the United States. Nevertheless, it also noted that the directors and

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1161 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 351.
1162 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, footnote 22 to para. 35.
1163 At para. 41.
1164 At para. 43.
1165 At para. 44.
1166 At paras. 47–53.
1167 At para. 53. Footnotes omitted.
1168 At paras. 54/5. See also *Broches, A.*, Denying ICSID's Jurisdiction: The ICSID Award in Vacuum Salt Products Limited, 13 Journal of International Arbitration 21, 27/8 (1996).

other persons acting on behalf of the Claimant companies were nationals of the United States.[1169]

859 In *Aguas del Tunari* v. *Bolivia*, the Tribunal noted in the context of interpreting the provisions of the Bolivia-Netherlands BIT that the ordinary meaning of "control" can "encompass both actual exercise of powers or direction and the rights arising from the ownership of shares".[1170] As to the legal meaning, the Tribunal concluded that this refers to the power to control and not the actual exercise of control.[1171] The Tribunal was satisfied that where there is 100% ownership, or a majority of voting rights, there is almost inevitably control. Thus, the Tribunal concluded that the phrase in the BIT "directly or indirectly controlled"

> . . . means that one entity may be said to control another entity (either directly . . . or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.[1172]

860 Boliva argued that control could not be established purely through evidence of ownership but required proof of actual control,[1173] but it could not articulate a workable test. The Tribunal thought that it is almost impossible to discern precisely at what stage mere formal control through ownership might transform and become actual or effective control. It thought any such test would be impracticable,[1174] and would engender uncertainty contrary to the object and purpose of investment promotion and protection treaties.[1175]

861 The Tribunal concluded that control is a quality that accompanies ownership, and can exist in the absence of its overt exercise.[1176] Aguas del Tunari was held to be controlled, for the purpose of the BIT, by the Dutch holding companies, the topmost of which, far from being a "mere shell", was the joint venture company through which the ultimate US and Italian investors worked together to manage their project.[1177]

862 The Tribunal nevertheless dealt with Bolivia's argument that the BIT required proof of "actual control" at some length. This objection was rejected by a majority of the Tribunal.[1178] Instead, the majority held that an entity may be said to control another entity if it possesses the legal capacity to control it. The percentage of voting shares was a reliable test to identify control in the absence of evidence of particular restrictions on the exercise of the rights attaching to them.[1179]

1169 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, paras. 5.13–5.22.
1170 *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005, para. 227.
1171 *Ibid.*, para. 232.
1172 *Ibid.*, para. 264.
1173 *Ibid.*, para. 223.
1174 *Ibid.*, para. 246 citing in support the Claimant's argument in *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, para. 69 (see paras. 824, 845–846 *supra*).
1175 *Ibid.*, para. 247.
1176 *Ibid.*, para. 242.
1177 *Ibid.*, paras. 319–320.
1178 Arbitrator José Luis Alberto-Semerena issued a dissenting opinion, arguing that proof of actual control was required by the BIT and concluding that the Claimant had not satisfied this test.
1179 *Ibid.*, para. 264.

863 The Tribunal concluded by considering whether this definition of control was compatible with the objective jurisdictional requirements in Art. 25(2)(b). In the absence of a definition of control in the Convention, and the importance attributed to party autonomy, the Tribunal noted that it is not at all surprising that the drafting history, commentary and arbitral awards all point to "foreign control" being "flexible" so that reasonable definitions in referring instruments may pass through the jurisdictional keyhole.[1180] It was clear to the Tribunal that the definition of control as used in the BIT was an agreement as to "foreign control" that satisfied "the flexible and deferential requirement of Article 25(2)".[1181]

864 On the basis of the Convention's preparatory works as well as the published cases, it is possible to conclude that the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone.

865 An argument has been made that what matters in terms of control is not absolute control but merely a reasonable amount of control. Therefore, a controller might be said to exercise foreign control despite the fact that another controller exercises an even higher degree of control.[1182] The Tribunal in *Vacuum Salt* mentioned the problem of whether control in Art. 25(2)(b) means exclusive control or whether more than one shareholder or group of shareholders may enjoy control, but finds that it need not address the problem.[1183] Admittedly, for purposes of ICSID's jurisdiction, the concept of control should be treated with some flexibility. Thus, joint control by different shareholders from different Contracting States should be admitted in principle (see paras. 796, 833, 834 *supra*). The *Sempra* v. *Argentina* and *Camuzzi* v. *Argentina I* cases confirm this possibility, but note the problem that may arise in treaty arbitrations if not all shareholders are nationals of a Contracting Party to the treaty (see paras. 297, 835–837 *supra*).[1184] On the other hand, not every substantial minority participation should be accepted as control (see para. 838 *supra*). The combined control of nationals of Contracting States other than the host State should, at least, outweigh the combined control of nationals of non-Contracting States and of the host State.

866 A number of national investment laws containing ICSID clauses extend access to the Centre to host State corporations that are under foreign control (see para. 806 *supra*). Where an explanation of foreign control is offered, it is nearly always in terms of a majority interest in the local company's share capital.[1185]

1180 *Ibid.*, paras. 280, 283.

1181 *Ibid.*, para. 285.

1182 *Amerasinghe*, Interpretation of Article 25(2)(b), p. 240.

1183 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 43.

1184 *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 52–53; *Camuzzi* v. *Argentina I*, Decision on Jurisdiction, 11 May 2005, paras. 39–40.

1185 See Central African Republic, Code of Investments, 1988, Art. 30; Chad, Décret N° 446/PR/MCI/87 fixant la prodédure d'octroi des avantages du Code des Investissements, 1987, Art. 17(4); Mozambique, Law of Investment, 1993, Art. 1(1)(q)(2); Uganda, Investment Code, 1991, sec. 10(1)(b); Zaire, Investment Code, 1986, Art. 1(c).

867 Bilateral investment treaties that address the second clause of Art. 25(2)(b) (see paras. 807–809 *supra*) refer to foreign control in varying terms.[1186] The Netherlands and Swiss BITs merely reiterate the Convention's terminology by referring to control by nationals of the other Contracting Party.[1187] By contrast, United Kingdom agreements refer to majority share ownership (see para. 807 *supra*). The provisions in these BITs and most of the provisions in national legislation are narrower than the Convention would permit. Their effect is to restrict the parties' agreement on nationality (see para. 811 *supra*) to cases of majority equity ownership.[1188]

868 United States BITs refer to a local company that is "an investment of nationals or companies of the other Party" (see para. 808 *supra*). This formula is open to conflicting interpretations. The phrase "investment of" may be read as including a minority participation in the local company. This would probably go beyond the concept of foreign control as used in the Convention.[1189] The formula in the United States BITs may also be interpreted in the opposite way. A local company that is an investment of nationals of the other Party may be seen to require close to 100% ownership. Obviously this would be narrower than required by the Convention.

869 Multilateral instruments containing ICSID consent clauses (see paras. 456–463 *supra*) deal with the question of foreign control over host State companies in several ways (see para. 810 *supra*). Art. 1117 of the NAFTA refers to direct or indirect control by an investor of a Party, which can exist even in the case of a minority shareholding provided that the shareholder can demonstrate effective or "de facto" control over the local company.[1190] The Mexico-Colombia-Venezuela Free Trade Agreement of 1994 in Art. 17–17 speaks of a company owned or under the effective control of an investor.

870 The Energy Charter Treaty of 1994 in Art. 26(7) simply speaks of control by investors of another Contracting Party (see para. 810 *supra*). But an "understanding", adopted together with the Energy Charter Treaty, offers the following definition of control:

> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
> (a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and

1186 *Peters*, Dispute Settlement Arrangements, p. 144.
1187 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 214, 224/5. See also *Aguas del Tunari* v. *Bolivia*, Decision on Jurisdiction, 21 October 2005 (paras. 831–832, 847, 859–863 *supra*); *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, paras. 155–162.
1188 *Dolzer/Stevens*, Bilateral Investment Treaties, p. 143.
1189 *Ibid.*, p. 144.
1190 *Thunderbird* v. *Mexico* (UNCITRAL), Award, 26 January 2006, paras. 96–110.

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.[1191]

The MERCOSUR Protocol of Colonia for the Reciprocal Promotion and Protection of Investments of 1994 in Art. 1(2)(c) covers juridical persons that are effectively controlled, directly or indirectly, by nationals of other Contracting States.

5. Critical Dates

871 The second clause of Art. 25(2)(b) refers back to the first clause as far as the critical date is concerned. "On that date" means "the date on which the parties consented to submit such dispute to conciliation or arbitration" (see paras. 752–759 *supra*). The conclusion that the critical date is the date of consent is irrefutable as far as the relevant date for the host State's nationality is concerned. ICSID tribunals applying the second clause of Art. 25(2)(b) have never cast this principle into doubt and have in some cases specifically pointed out that the host State's nationality of the foreign controlled corporation existed on the date of consent.[1192]

872 The situation is less clear when it comes to the critical date for the foreign control. During the Convention's drafting, there was some concern about a change of control over the locally established company (History, Vol. II, pp. 287, 445) but no definite solution was offered. The Convention's wording is not without ambiguity on this point. The words "on that date" relate to "the nationality of the Contracting State party to the dispute". But they do not relate to the subsequent words dealing with foreign control. To express this meaning the words "on that date" would have to be repeated after the words "because of foreign control". Therefore, a strictly grammatical interpretation leaves open the question at what time foreign control over the local company must have existed. On the other hand, the agreement to treat the local company as a national of another Contracting State must be "because of foreign control". Therefore, foreign control must have existed at the time of the agreement. Since the agreement to treat the local company as a national of another Contracting State is closely linked to consent between the parties (see paras. 768–771 *supra*), the foreign control must have existed at the time of consent.

873 This conclusion does not answer the question as to the effect of subsequent changes in control. In other words, does the disappearance of foreign control after the date of consent affect jurisdiction? The simpler answer would be to adopt a uniform test for all of Art. 25(2)(b) taking the time of consent as the only critical

1191 Understanding with respect to Article 1(6), 34 ILM 375 (1995).

1192 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15; *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 29; *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 351.

date. This would also be in line with the different rules on relevant dates in Art. 25(2)(a) and (b). Whereas the first provision, dealing with natural persons, looks at two distinct critical dates (see paras. 679–687 *supra*), the second provision, dealing with juridical persons, only looks at the time of consent (see paras. 752–759 *supra*). This would mean that the company's situation would be fixed at the time of consent and subsequent changes in control would be irrelevant for purposes of ICSID's jurisdiction.[1193]

874 On the other hand, it would seem somewhat anomalous to maintain ICSID's jurisdiction if all objective elements for the investor's foreign nationality have disappeared by the time the proceedings are instituted. A strict adherence to the time of consent as the only critical date would mean that a locally incorporated company which is entirely controlled by local interests could avail itself of an ICSID clause on the basis of previous foreign control that has since disappeared. Since many host States require a transfer of ownership to their own nationals over a stated period of time, this situation is quite likely to occur. Less likely but still possible is a situation where control over the local company passes from nationals of Contracting States to nationals of non-Contracting States after the date of consent. It has been argued with some persuasiveness that upholding ICSID's jurisdiction under these circumstances would be contrary to the purposes of the Convention.[1194]

875 ICSID tribunals dealing with the critical date for foreign control have generally favoured the date of consent but have also shown some concern for subsequent developments.[1195] In *Amco* v. *Indonesia*, the Tribunal, after recalling the two elements for the application of the second clause of Art. 25(2)(b), namely nationality of the host State and agreement to treat the company as a national of another Contracting State because of foreign control, stated:

> Now, in the Tribunal's view, these two conditions were fulfilled in the instance case, at the date on which the parties consented to submit possible future disputes to arbitration (which date is relevant, according to Article 25(2)(b)), and as a matter of fact, are still fulfilled today.[1196]

876 In *LETCO* v. *Liberia*, the Tribunal first confirmed French control at the time the Concession Agreement was signed, but shortly thereafter emphasized the fact of French management "at all times"[1197] (see para. 855 *supra*).

877 The ambivalence towards the critical date for control is also evident in *SOABI* v. *Senegal*. The Tribunal first determined that at the date of the agreement containing consent to ICSID's jurisdiction, control over Flexa, the company controlling

1193 *Amerasinghe*, How to Use the International Centre, p. 541; *Amerasinghe*, Jurisdiction Ratione Personae, pp. 266/7.
1194 *Tupman*, Case Studies, p. 836.
1195 This observation contained in the First Edition of this Commentary is echoed in *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, para. 65. See also *TSA Spectrum* v. *Argentina*, Award, 19 December 2008, para. 160.
1196 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 14(ii).
1197 *LETCO* v. *Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 351.

the local company (see paras. 843, 854 *supra*), was exercised by nationals of a Contracting State, notably of Belgium. It added:

> 41. As has been observed above, the "national of another Contracting State" criterion must be fulfilled as of the date on which the parties agree to submit the dispute to the Centre. Changes or modifications after this date thus have no effect on whether the condition is satisfied.[1198]

Having made this categorical statement, the Tribunal continued that "it is nevertheless of some interest" to look into the question of shareholding immediately before the institution of the ICSID proceedings. It proceeded to a detailed analysis of the nationality of the shareholders on the day before the submission of the application for arbitration, which led to the result that over 99% of the shares were still in Belgian hands at that date.[1199]

878 In *Vacuum Salt* v. *Ghana*, the Tribunal declined jurisdiction because there was no foreign control over the local company in the sense of Art. 25(2)(b) (see paras. 856–857 *supra*). It made this finding on the basis of the premise that "the conditions of the second clause of Article 25(2)(b) must be fulfilled, at least initially, on the date of consent, in this case 22 January 1988".[1200] Nevertheless, the Tribunal in a lengthy footnote dealt with the Respondent's argument that the requirements of Art. 25(2)(b) must be satisfied also on the date of registration. The Tribunal looked at the available evidence, including previous ICSID decisions, and reached the result that only the date of consent is relevant for the fulfilment of the corporation's nationality requirements. In doing so, the Tribunal did not differentiate between continued control and the possession of the host State's nationality. It added the following argument in favour of looking at foreign control only at the time of consent:

> [A] municipal corporation of the host State which is granted foreign status under the second clause of Article 25(2)(b) of the Convention, however, could be deprived involuntarily of all foreign ownership through expropriation, and thus, were there a requirement of continuous nationality, could be deprived of its right to ICSID arbitration by the very act which it presumptively would wish to challenge in such a proceeding. *See* Convention, History, Vol. II, 400–01.[1201]

879 Having said all this, the Tribunal admitted that a change of control after the date of consent could have a profound impact on ICSID's jurisdiction after all:

> It cannot be denied, on the other hand, that the prospect would be deeply unsettling, for example, of a State being required to submit to international arbitration under the auspices of ICSID a dispute with a municipal corporation all of whose shares had been freely transferred from aliens to nationals of that State in the interim between the conclusion of an investment agreement including an ICSID clause premised on the second clause of Article 25(2)(b) and the registration of a request for arbitration. In that circumstance the issue is raised as to whether in

1198 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 41.
1199 At para. 41.
1200 *Vacuum Salt* v. *Ghana*, Award, 16 February 1994, para. 29.
1201 *Ibid.*, footnote to para. 29.

> light of the object and purpose of the Convention an interpretation of the second clause of Article 25(2)(b) permitting the Centre to exercise jurisdiction would lead to a result which is "manifestly absurd or unreasonable". *See* Art. 31(1) and 32(b) of the Vienna Convention on the Law of Treaties, . . .
>
> The Tribunal need not resolve this troubling issue, however, given the further terms of this Award.[1202]

880 In later passages of the Award, the Tribunal repeatedly referred to developments concerning control over the Claimant subsequent to consent without reaching a clear result.[1203] After examining a shareholders' meeting on 14 May 1992, two weeks before the institution of ICSID arbitration, in which the alleged foreign controller did not even participate, the Tribunal made the following statement:

> The Tribunal is conscious, of course, that the date as of which the existence or absence of "foreign control" initially is to be determined is 22 January 1988 and not 14 May 1992. Nonetheless, in the context of the entire record in this case the Tribunal finds the events of 14 May 1992 pertinent.[1204]

881 In *Autopista* v. *Venezuela*, the relevant change in the nationality of control occurred after the conclusion of the contract that contained the parties' consent to ICSID jurisdiction. This was not an obstacle to the Tribunal's jurisdiction, since the parties' consent was expressly conditional upon the Claimant coming to be controlled by a national of a Contracting State (see paras. 474, 771, 804, 805, 845, 846 *supra*).[1205]

882 In the *Vivendi* case, Argentina had objected to jurisdiction in respect of the first Claimant, CAA, which was an Argentinian company. Argentina alleged that at the date the parties concluded a concession contract CAA was an Argentine company and that it did not become controlled by French investors until after the dispute had arisen. As such, it would be a "fraud on the treaty" if CAA was entitled to claim under the Argentina-France BIT.[1206] In the original proceedings, the Tribunal had held that CAA was controlled by the second Claimant, CGE, a national of France, from the effective date of the contract.[1207] The *ad hoc* Committee found that CGE controlled CAA at the date of the commencement of proceedings under the BIT; in other words, on the date of consent. It followed that there was no question that the Tribunal lacked jurisdiction over CAA as one of the Claimants in the arbitration.[1208] In the resubmitted proceedings, the Tribunal accepted that this conclusion was *res judicata*.[1209] In any event, there had not been any change in control of CAA from the date of the contract through to the date of consent.[1210]

1202 *Ibid*. See also *Broches, A.*, Denying ICSID's Jurisdiction: The ICSID Award in Vacuum Salt Products Limited, 13 Journal of International Arbitration 21, 24/5 (1996).
1203 At paras. 43–44, 51–53.
1204 At footnote 31 to para. 53.
1205 *Autopista* v. *Venezuela*, Decision on Jurisdiction, 27 September 2001, paras. 83, 89–91, 117, 142.
1206 *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, para. 21.
1207 *Vivendi* v. *Argentina*, Award, 21 November 2000, para. 24 note 6.
1208 *Vivendi* v. *Argentina*, Decision on Annulment, 3 July 2002, paras. 48, 50.
1209 *Vivendi* v. *Argentina*, Resubmitted Case: Decision on Jurisdiction, 14 November 2005, paras. 71, 97.
1210 *Ibid.*, para. 65.

883 None of the above cases involved a decisive change of control after the date of consent. Therefore, the Tribunals' comments on the relevant dates for control are of somewhat limited authority. It is still worth noting that the statements to the effect that the only relevant time is the date of consent are disaffirmed by a concern for subsequent developments and an unease towards the idea of opening ICSID jurisdiction to juridical persons that have since come under the control of host State nationals.

884 In *Klöckner* v. *Cameroon* a change of control occurred between the date of consent and the institution of the arbitration. In 1973, an Establishment Agreement, containing an ICSID clause, was concluded between SOCAME, a joint venture company of Cameroonian nationality, and the Government. At the time, 51% of SOCAME's shares were in the hands of the European investors, whereas 49% were held by the host State. In 1978, the European partners lost majority control over SOCAME after a capital increase. When ICSID proceedings were instituted in 1989 by the foreign investor on the basis of an ICSID clause in another contract, SOCAME was named as a co-respondent with the Government and was designated as a constituent subdivision of the State of Cameroon in the course of the proceedings (see paras. 260, 317 *supra*).

885 Before the Tribunal, the Government relied on the Establishment Agreement of 1973 between itself and SOCAME to press its counterclaim against Klöckner. Klöckner contested jurisdiction based on the Establishment Agreement since it was, after all, an agreement between the two Respondents. Moreover, SOCAME should not be accepted as a national of another Contracting State but simply as a Cameroonian company.[1211]

886 The Tribunal held that the relevant question was not whether it had jurisdiction *ratione personae* as regards SOCAME but whether it had jurisdiction *ratione materiae* to rule on the application and interpretation of the Establishment Agreement. It found that it had jurisdiction over Klöckner also in respect of the Establishment Agreement, which "reflected the contractual relationship between a foreign investor, acting through a local company, and the host country"[1212] (see para. 327 *supra*). The Tribunal concluded that:

> In these conditions, it would be inequitable to accept that Klöckner, having benefited from 1973 to 1978 from the existence of the ICSID arbitral clause, underlying the legal, economic, financial, and fiscal advantages and guarantees granted in the Establishment Agreement, be allowed today to contest ICSID jurisdiction with respect to questions relating to the application of the same Agreement, at least during the 1973–1978 period, when the arbitration clause is invoked by the Government which consented to it.[1213]

887 By substituting the foreign controller for the local company, the Tribunal bypassed the entire question of nationality and hence of foreign control. A tendency of tribunals to look beyond the identity of the company named in the

1211 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15.
1212 At p. 17. 1213 *Loc. cit.*

consent agreement and to accept jurisdiction in respect of unnamed parent companies (see paras. 319–335 *supra*) could make the question of control over a local company at a particular time largely irrelevant. In view of the Tribunal's technique of piercing the veil of the local company, it would be misleading to conclude that ICSID's jurisdiction over SOCAME survived the change of control after the date of consent. The Tribunal's reasoning was not based on the situation as it existed at the time of consent. Rather, it assumed jurisdiction directly in relation to the foreign controller in respect of the period during which control did, in fact, exist.

888 Some BITs provide that companies constituted in one State but controlled by nationals of the other State shall be treated as nationals of the other State for purposes of Art. 25(2)(b) (see paras. 807–809 *supra*). Interestingly enough, these BITs specify a relevant time for control other than the date of consent. Thus, the United Kingdom Model Agreement provides that foreign control must be exercised through majority ownership of shares "before such a dispute arises"[1214] (see para. 807 *supra*). Netherlands and Swiss BITs are similar in this respect in that they refer to foreign control "before such a dispute arises" and "prior to the origin of the dispute" respectively.[1215] The Argentina-United States BIT, in line with other current US BITs, is even more specific. It refers to a company constituted in one State that was an investment of nationals of the other State "immediately before the occurrence of the event or events giving rise to the dispute"[1216] (see also para. 808 *supra*). The choice of these dates was made with a view to compulsory changes of control by the host State, *i.e.* expropriations. It is not clear who would bring a claim to ICSID after such an event. It must be expected that the host State would exercise its newly acquired control to prevent this. But the tendency of ICSID tribunals to admit unnamed parent companies (see paras. 319–335 *supra*) and to admit shareholders as claimants (see para. 150 *supra*) would appear to make this problem surmountable.

889 The multilateral instruments containing ICSID clauses (see paras. 456–463 *supra*) also deal with the problem of host State companies under foreign control (paras. 810, 870 *supra*). Of these, only the Energy Charter Treaty addresses the time of control. Its Art. 26(7) extends the status of a "national of another Contracting State" under Art. 25(2)(b) of the ICSID Convention to companies that have the host State's nationality on the date of consent and that are controlled by the foreign investor "before a dispute . . . arises" (see para. 810 *supra*).

890 The solution chosen in these treaties appears to be rational and is clearly preferable to a rigid adherence to the date of consent only. If the locally incorporated investor expresses its consent by taking up a standing offer contained in host State legislation or a treaty, the date of consent is the date at which the request for conciliation or arbitration is submitted to the Centre (see paras. 417, 447, 469 *supra*).

1214 *Dolzer/Schreuer*, Principles of International Investment Law, at p. 380.
1215 *Dolzer/Stevens*, Bilateral Investment Treaties, pp. 214, 224.
1216 Argentina-US BIT, Art. VII(8).

In a situation of this kind the selection of a critical date for control before the outbreak of the dispute may be valuable if the dispute arises from a compulsory change of control. But even if consent was perfected before the events giving rise to the dispute, there is no convincing reason why the situation with regard to control over the locally constituted company must be frozen at the date of consent for purposes of ICSID's jurisdiction. Successive tribunals, while choosing the date of consent as the critical date, have expressed their unease about the rigidity of this rule and about its possible consequences. This is most evident in *Vacuum Salt* where the Tribunal, after adopting the date of consent as the only relevant date, admits that this may lead to a result that is manifestly absurd or unreasonable (see para. 879 *supra*).

891 The adoption by agreement of the parties (see para. 811 *supra*) of an additional date at which the requirement of foreign control must be fulfilled is perfectly admissible under the Convention. The parties are free to agree on conditions to their consent to ICSID's jurisdiction, in addition to those provided by the Convention, as long as these conditions are not contrary to the Convention's mandatory rules (see paras. 540–550 *supra*). The adoption of the requirement that "foreign control" in the sense of Art. 25(2)(b) must have existed immediately before the outbreak of the dispute is not only permissible but highly advisable. It can be recommended for incorporation in investment agreements between the parties.

892 Even without such an explicit clause naming a second relevant date for the existence of foreign control, ICSID tribunals will have to come to terms with the possibility of a decisive change of control after the date of consent. The starting point should remain the date of consent. An agreement to treat the local company as a national of another Contracting State should be accepted only if the local company was indeed under such foreign control at the time the agreement was made. But the investigation should not stop there. Subsequent changes in control should be taken into account under certain circumstances. A change of control should not be considered relevant if it takes place among nationals or groups of nationals of Contracting States other than the host State. The exact nationality of the foreign controlling interest is not material as long as there is control by nationals of "another Contracting State" or even of several Contracting States (see paras. 833, 834 *supra*). Even if the originally controlling nationality has been named in the agreement between the parties (see paras. 795–805 *supra*), such a change should not affect jurisdiction.

893 The situation is different if there is a voluntary change of control into the hands of nationals of the host State. The title of the Convention itself, the history of the Convention (see paras. 664–678 *supra*), the Preamble and the wording of Art. 25 all make it clear that the Centre will not be available for disputes between States and their own nationals. The exception for locally established corporations is conditioned on the existence of foreign control. As soon as the condition for the exception disappears, jurisdiction can no longer be sustained.

894 Similarly, a specific decision was made in the course of the Convention's preparation to exclude nationals of non-Contracting States from access to the Centre (History, Vol. II, p. 868) (see paras. 285, 741 *supra*). Therefore, foreign control in the sense of Art. 25(2)(b) means control by nationals of another Contracting State. Control by nationals of non-Contracting States does not qualify (see paras. 826–839 *supra*). It follows that a change of control to nationals of non-Contracting States would terminate ICSID's jurisdiction.

895 Despite the choice made in the treaties cited above (paras. 888–889 *supra*), the more logical date for the examination of foreign control would be the date of registration of the request for conciliation or arbitration. This is the last practical date for the commission or tribunal to examine the factual conditions for jurisdiction. Even if the company was still under foreign control until just before the dispute arose, there is no convincing reason to give it access to the Centre if control has since changed into the hands of host State or non-Contracting State nationals. But it must be understood clearly that forcible acquisition of control over the local company by the host State through expropriation or similar measures would not affect jurisdiction. This eventuality is covered by the last sentence of Art. 25(1), which prohibits direct as well as indirect withdrawal of consent (see para. 634 *supra*).

6. Consequences of Agreement on Nationality

896 The last part of Art. 25(2)(b) provides for treatment of the local company as a national of another Contracting State "for the purposes of this Convention". This phrase was not contained in the First Draft, which first provided for the possibility of an agreed foreign nationality for companies established in the host State (History, Vol. I, p. 124). It was added upon the suggestion of Mr. *Broches* "as a matter of drafting" without any further explanation or discussion (History, Vol. II, p. 869). The Executive Directors' Report refers to the second clause of Art. 25(2)(b) only in the context of eligibility to become a party to ICSID proceedings (see para. 763 *supra*).

897 Nevertheless, the words "for the purposes of this Convention" indicate that the consequences of the agreement on nationality based on foreign control extend beyond the confines of jurisdiction, as defined in Art. 25, to all provisions of the Convention in which nationality is relevant. Arts. 38, 39 and 52(3) exclude nationals and co-nationals of parties to the dispute from appointments as arbitrators or members of an *ad hoc* committee under certain circumstances.

898 In *SOABI* v. *Senegal*, the Tribunal clearly assumed that the nationality of the controllers was relevant for the constitution of the tribunal. The parties had appointed by agreement a Belgian, a Senegalese and a Swiss national as arbitrators. The Tribunal noted that, under Art. 39 of the Convention, an agreement on each individual member of a tribunal is only necessary if the majority of the arbitrators are nationals or co-nationals of the parties to the dispute. From the designation by mutual consent, it followed that the parties had recognized SOABI, a company

established in Senegal, as a national of Belgium due to its control by Belgian nationals.[1217]

899 The logic of this reasoning was the subject of some debate in the Dissenting Opinion and a Declaration of the Tribunal's President.[1218] But the underlying assumption of the relevance of the controller's nationality for the rules restricting or excluding certain nationals from appointment to tribunals or *ad hoc* committees was never cast into doubt.

900 The application of the exclusionary rules for appointments based on nationality also to co-nationals of controllers under Art. 25(2)(b) seems perfectly reasonable and in line with the spirit of these rules. Unfortunately, there are some practical problems. The nationality of the controllers may not be known with certainty at the time of the tribunal's constitution. There is no need to specify the controlling nationality in the agreement to treat the company established in the host State as a national of another Contracting Party (see paras. 795–805 *supra*). The parties frequently do not specify the controlling nationality and ICSID tribunals have held that there is no need to do so (see paras. 798–805 *supra*). The ICSID Secretariat will require the requesting party to specify the nationality(ies) of the foreign controller(s) before registering the request (see para. 795 *supra*). But registration is based on the submissions of the requesting party which may turn out to be incorrect. Tribunals have investigated the precise circumstances of control (see paras. 816–863 *supra*) but, obviously, this is possible only after a tribunal has been constituted.

901 The situation is further complicated by the fact that the local company may be controlled jointly by nationals of several States (see paras. 796, 833, 834, 865 *supra*). In addition, there may be several layers of control whereby the immediate controller is controlled by nationals of other States (see paras. 840–849 *supra*). Finally, control may have shifted from nationals of one State to nationals of another State between the date of consent and the institution of ICSID proceedings (see paras. 872–895 *supra*). All these factors make it impossible to determine the nationality of the controllers with absolute certainty at the time of the tribunal's constitution.

902 The only practical suggestion that can be made is to steer clear of co-nationals of possible controllers in the appointment of arbitrators when applying Arts. 38 and 39. The information available at the time of the tribunal's constitution may not permit an accurate determination of the controllers' nationality but will most probably offer some clues as to possible nationalities. These should be avoided as far as possible. The appointment of members of an *ad hoc* committee under Art. 52(3) would appear to be less problematical. By the time a case is ready for a request for annulment, the nationality of any foreign controllers should have been clarified.

1217 *SOABI* v. *Senegal*, Decision on Jurisdiction, 1 August 1984, para. 42.
1218 At paras. 67–73, 8–10.

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

1. Approval of Consent

a) Need for Approval

903 ICSID's jurisdiction in respect of a constituent subdivision or agency of the host State is subject to two requirements in addition to consent: the subdivision or agency must have been designated to the Centre in accordance with Art. 25(1) (see paras. 230–267 *supra*) and the consent to jurisdiction given by the subdivision or agency must have been specifically approved by the host State. The host State may waive the approval of consent by notifying the Centre to this effect.

904 The need to have the subdivision or agency's consent approved by the host State was perceived early on in the debate on the admission of government entities to party status (History, Vol. II, pp. 258, 288, 321, 396, 492, 502) (see paras. 238–239 *supra*). This was intended as "a screening process, so that governments could withhold their approval where the 'instrumentality' should really not be considered as a governmental agency but an ordinary company" (at p. 503). When access to the Centre by political subdivisions or agencies was included in the First Draft, there was no mention of a designation procedure (History, Vol. I, pp. 116, 126). After the adoption of the requirement for the designation to the Centre of a constituent subdivision or agency (see para. 247 *supra*), the question arose whether an additional approval of consent by a designated entity might not be dispensed with (History, Vol. II, pp. 657, 667, 859, 860, 867). In a show of hands, the view prevailed that approval would still be necessary since a designation would not necessarily imply approval in specific cases (at p. 858).

905 Therefore, it is clear that designation and approval are two distinct acts with different functions (see para. 230 *supra*). The existence of an approval cannot be inferred from the existence of a designation, although it is arguable that the approval of consent that is notified to the Centre may be interpreted as *ad hoc* designation of the constituent subdivision or agency (see para. 252 *supra*).

906 Practice on the approval of consent by a constituent subdivision or agency is scant. In *Cable TV* v. *St. Kitts and Nevis*, jurisdiction was denied because the constituent subdivision or agency had not been designated under Art. 25(1) (see para. 249 *supra*). The Tribunal added that there was also no approval of the constituent subdivision or agency's consent.[1219]

907 In *Noble Energy* v. *Ecuador*, CONELEC had been designated to the Centre as an agency of the State for purposes of Art. 25(1) (see paras. 244, 251, 263 *supra*).

1219 *Cable TV* v. *St. Kitts and Nevis*, Award, 13 January 1997, para. 2.33.

The Tribunal noted that CONELEC's consent to ICSID arbitration, contained in a concession contract, had also been approved by the State.[1220]

908 Once approval of consent by a constituent subdivision or agency has been given, such approval is protected by the prohibition to withdraw consent contained in the last sentence of Art. 25(1). In other words, consent, once approved, may not be invalidated through a retraction of the approval (see paras. 267, 612, 613 *supra*).

b) Form of Approval

909 The Convention does not require any particular form for the approval of consent. In particular, unlike designation of the constituent subdivision or agency (see para. 252 *supra*) and unlike waiver of approval (see paras. 916–918 *infra*), the approval need not be communicated to the Centre. In principle, approval is a unilateral act of the host State that need not be formally communicated to anyone. For practical reasons, it is desirable that the foreign investor and the constituent subdivision or agency are informed of the approval so that they may rely on the validity of consent.[1221] An investor will be well-advised to insist on approval by the State prior to or simultaneously with the consent agreement.

910 Approval may be contained in a separate agreement between the host State and the investor. Or the approval may be contained in an instrument of designation communicated to the Centre.[1222] It may be practical to obtain approval by way of making the host State a party to the consent agreement.[1223] Alternatively, written approval by the host State may be affixed directly to the agreement between the constituent subdivision or agency and the investor. In addition, the consent clause may confirm that the investor's partner is indeed a designated subdivision or agency. The Model Clauses of 1993 offer the following choices in regard to a constituent subdivision or agency:

Clause 5

> The name of constituent subdivision or agency is [a constituent subdivision]/[an agency] of the Host State, which has been designated to the Centre by the Government of that State in accordance with Article 25(1) of the Convention. In accordance with Article 25(3) of the Convention, the Host State [hereby gives its approval to this consent agreement]/[has given its approval to this consent agreement in citation of instrument in which approval is expressed]/[has notified the Centre that no approval [of this type of consent agreement]/[of consent agreements by the name of constituent subdivision or agency] is required].[1224]

1220 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 179–182.

1221 *Amerasinghe*, Submissions to the Jurisdiction, pp. 224 *et seq.*

1222 For a combined designation and approval clause see Art. 7.10 of the 1982 participation agreement between New Zealand and Mobil Oil NZ Ltd., cited in *Attorney General* v. *Mobil Oil NZ Ltd.*, New Zealand High Court, 1 July 1987, 4 ICSID Reports 123/4.

1223 *Delaume*, Le Centre International, p. 795; *Amerasinghe*, Jurisdiction Ratione Personae, pp. 236 *et seq.*

1224 4 ICSID Reports 361. See also Clause IV of the 1968 Model Clauses, 7 ILM 1159, 1165/6 (1968) and Clause VI of the 1981 Model Clauses, 1 ICSID Reports 197, 201/2.

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

912 In *Noble Energy* v. *Ecuador*, the Tribunal noted that the designated agency's director was entitled and authorized by Law to consent to arbitration. In addition, the concession contract containing the agency's consent to ICSID arbitration was signed by the President of Ecuador as a "witness of honour" thereby approving the agency's consent.[1225]

c) Time of Approval

913 The Convention does not specify at what time the host State's approval of consent, given by one of its constituent subdivisions or agencies, must be obtained. Approval may be given in advance of consent or thereafter. But it should be kept in mind that the validity of consent by a constituent subdivision or agency depends on its approval. Therefore, the actual date of consent is not before its approval (see para. 471 *supra*). The date of consent triggers a number of consequences under the Convention (see paras. 475–478 *supra*).

914 In *Noble Energy* v. *Ecuador*, approval of consent was given simultaneously with the consent. Both were contained in the same concession contract to which the State was also a party.[1226]

915 It is imperative that approval of consent has been given by the time ICSID proceedings are instituted. Institution Rule 2(1) requires that a request for conciliation or arbitration shall not only state that a constituent subdivision or agency has been designated to the Centre (see para. 258 *supra*) but shall also indicate information on the approval of consent (see para. 479 *supra*). Under Institution Rule 2(2), this information must be supported by documentation. Failure to provide this information in the request will lead to its rejection by the Secretary-General in accordance with his or her screening power under Arts. 28(3) and 36(3) of the Convention.

2. Waiver of Approval

916 The possibility of a notification to the Centre that no approval of consent to jurisdiction by a constituent subdivision or agency is required arose not from a feeling that such an approval might be unnecessary but rather from the perception that under some constitutions approval would be impossible. Several delegates pointed out that if matters are within the exclusive competence of a constituent subdivision, it would be unconstitutional to require the approval by the central government (History, Vol. II, pp. 289, 858, 859). In reaction to these misgivings, Mr. *Broches* suggested that the approval should be required except where the Contracting State notifies the Centre that no approval is required (at pp. 859,

1225 *Noble Energy* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 179–182.
1226 *Ibid.*, paras. 178–182.

860). This solution was adopted in the Revised Draft (History, Vol. I, p. 126) and remained unchanged in the Convention.

917 The notification that no approval is required would normally be made in general terms for the future in respect of a particular constituent subdivision or agency. It may be limited to certain types of consent agreements. A notification by the host State that no approval of a particular consent agreement is required is barely distinguishable from actual approval. But it may satisfy constitutional requirements in the host State if the subdivision or agency has exclusive competence under domestic law and if no advance notice has been given that approval is not required. Sometimes notifications that no approval is required are also used in respect of draft contracts.

918 The Centre has published a list of designated constituent subdivisions and agencies as document ICSID/8-C (see para. 253 *supra*). This document also indicates in respect of which subdivisions or agencies Contracting States have notified the Centre that approval of consent is not required. These notifications were made on the occasion of the designation of the respective subdivisions or agencies. The notifications were made by Australia, Peru, Portugal and the United Kingdom. In the case of Australia and the United Kingdom the notifications concern constituent subdivisions; that is, territorial units. In the case of Peru and Portugal the notifications concern agencies. The four countries have made the notifications with respect to all subdivisions or agencies designated by them. The countries that have not given notification that no approval of consent is necessary (Ecuador, Guinea, Kenya, Madagascar, Nigeria, Sudan and Turkey) have all designated agencies and not constituent subdivisions.

3. Consequences of Approval for the Host State

919 There was some debate during the Convention's drafting on whether the host State itself would assume responsibilities as a consequence of approving the consent by one of its constituent subdivisions or agencies (History, Vol. II, pp. 288, 289, 321). It was made clear that approval of consent would not amount to consent to jurisdiction by the host State itself. Therefore, even if the host State had interfered in the investment activity, it would be impossible to bring it before the Centre without independent consent (at pp. 410, 411, 564, 704). The host State's obligation would be limited to ensuring the enforcement of an award against its constituent subdivision or agency (at pp. 858, 859, 990) (see paras. 311, 312 *supra*).

920 The situation may be different if the host State abolishes or otherwise eliminates the procedural capacity under the ICSID Convention of a constituent subdivision or agency after having given approval of consent. In such a case an argument may be made that the host State is substituted for its constituent subdivision or agency for purposes of ICSID's jurisdiction (see paras. 313–316, 612, 613 *supra*).

P. "(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

1. Notification of Intent Concerning Classes of Disputes

921 The possibility for States to make known in advance which classes of disputes they would or would not consider submitting to ICSID's jurisdiction arose from the more general debate about the scope of the Centre's jurisdiction. Especially representatives of capital importing countries were in favour of a strict limitation of the types of disputes that the Centre might be allowed to take up (see para. 68 *supra*). Despite the insistence of Mr. *Broches* that States are entirely free to shape their consent to jurisdiction according to their own wishes and to withhold consent from matters they considered inappropriate (see paras. 5, 375 *supra*), there was a widespread feeling that participation in the Convention as such would suffice to create expectations and pressure on host States to give consent (History, Vol. II, pp. 57/8, 82, 83, 259, 260, 285, 471, 494, 499, 501, 540, 541, 548, 566, 653, 660, 700, 703, 704, 822). In response to these fears, Mr. *Broches* suggested that the States might make announcements in general terms as to the types of disputes in respect of which they would consider giving consent (at pp. 54, 59, 377, 497, 499, 541, 567, 711, 822; see also pp. 412, 665, 973). This suggestion found expression in the First Draft in the following terms:

> *Article 29*
>
> Any Contracting State may at any time transmit to the Secretary-General for purposes of information a statement indicating in general or specific terms the class or classes of dispute within the jurisdiction of the Center which it would in principle consider submitting to conciliation or arbitration pursuant to this Convention. Such statement shall not constitute, or be deemed to constitute, the consent required by Article 26.[1227]

922 This proposal did not meet with unqualified support. Some delegates felt that a general statement of this kind was superfluous in view of the necessity of consent in a particular case (History, Vol. II, pp. 69, 659, 710, 839). Others expressed the concern that general announcements might unnecessarily discourage foreign investments since they could adversely affect the investors' confidence (at pp. 504, 660, 704, 822, 824, 825). On the other hand, it was suggested successfully that States should be allowed to declare not only classes of disputes they were willing to submit but also the classes of disputes they would not consider submitting (at p. 830). A number of drafting proposals were submitted on the basis of these debates (at pp. 828, 831, 832, 833, 834, 835, 836, 840). Eventually, a British

1227 History, Vol. I, p. 128. In the First Draft the article dealing with consent had the number 26.

proposal was adopted (at pp. 821, 826, 880) subject to a number of minor modifications (at pp. 824, 825, 826). The Revised Draft comes close to the final version of the Convention. The only substantive addition after that stage was the Secretary-General's responsibility to transmit notifications to all Contracting States (at pp. 945, 973).

923 There was some debate in the Executive Directors' Committee of the Whole on whether the Report of the Executive Directors should expressly refer to the misgivings of some governments as to creating expectations of consent by adhering to the Convention (History, Vol. II, pp. 958, 1027/8). Eventually, the Report on Art. 25(4) was adopted in the following terms:

> *Notifications by Contracting States*
>
> 31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.[1228]

In addition, the section of the Report dealing with the term "investment" refers to the notification under Art. 25(4) as one of the reasons why a definition was ultimately found unnecessary (see para. 120 *supra*).

924 It is clear that a notification under Art. 25(4) does not amount to a reservation to the Convention. In fact, the debates leading to Art. 25(4) indicate that one of the purposes of this provision was to avoid reservations (History, Vol. II, pp. 57/8, 59, 377, 822). This conclusion is confirmed by the last sentence of the Executive Directors' Report on Art. 25(4), quoted above. A notification under Art. 25(4) does not exclude or modify the legal effect of a provision in the Convention.[1229] Moreover, Art. 25(4) permits notifications at any time after ratification, acceptance or approval of the Convention, whereas reservations are only permissible up to the moment of ratification, acceptance or approval but not thereafter.[1230]

1228 1 ICSID Reports 29.
1229 See Art. 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
1230 See Art. 19, Vienna Convention on the Law of Treaties. See also *Amerasinghe*, The Jurisdiction of the International Centre, pp. 225/6.

925 Therefore, notifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstandings.[1231] They do not have any direct legal consequences (see para. 934 *infra*). In particular, they do not bind the Contracting State making the notification, which may withdraw or modify its notification at any time.

926 A number of States have availed themselves of the opportunity to make notifications under Art. 25(4):[1232]

- *Jamaica* through its notification of 1974 intends to exclude legal disputes "arising directly out of an investment relating to minerals or other natural resources".
- *Papua New Guinea* made a notification in 1978 "that it will only consider submitting those disputes to the Centre which are fundamental to the investment itself" (see para. 105 *supra*).
- *Saudi Arabia* through a notification of 1980 "reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty".
- *Turkey* in 1989 notified the Centre that "only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that have effectively started" would be subject to the Centre's jurisdiction. At the same time, Turkey announced its intention to exclude "disputes, related to the property and real rights upon the real estates", which are to remain "totally under the jurisdiction of the Turkish courts".
- *China* has declared in 1993 that it "would only consider submitting . . . disputes over compensation resulting from expropriation and nationalisation".
- *Guatemala* submitted a notification in 2003 to the effect that it "does not accept submitting to the Centre's jurisdiction any dispute which arises from a compensation claim against the State for damages due to armed conflicts or civil disturbances".
- *Ecuador* sent a notification to the Centre on 4 December 2007 in the following terms:

> The Republic of Ecuador will not consent to submit to . . . ICSID the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others. Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date.

927 Guyana and Israel have notified the Centre of classes of disputes they would or would not consider submitting but have since withdrawn these notifications.

1231 *Broches*, Convention, Explanatory Notes and Survey, pp. 646/7.

1232 For a full list see Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre (Art. 25(4) of the Convention), Document ICSID/8-D: http://icsid.worldbank.org/ICSID/FrontServlet.

Costa Rica and Guatemala have notified the Centre that they would require the exhaustion of local remedies before the commencement of ICSID arbitration.

2. Consent and the Notification of Intent

928 Art. 25(4), last sentence, states explicitly that notifications given under its terms do not constitute the consent required under Art. 25(1). In the course of the drafting of what eventually became Art. 25(4), there was an Italian proposal to combine consent with the notification of classes of disputes that might be within the Centre's jurisdiction (History, Vol. II, pp. 823, 840). But this proposal was not accepted. The Executive Directors' Report reiterates the position that notifications under Art. 25(4) do not constitute consent.

929 The statement, contained in Art. 25(4), which affirms that a notification of classes of disputes considered suitable for submission to jurisdiction does not constitute consent, is cited as evidence in *SPP* v. *Egypt* for the indispensability of consent for the competence of an ICSID tribunal.[1233]

930 At the same time, a notification under Art. 25(4) does not stand in the way of consent.[1234] A host State may give consent in respect of a dispute even though the dispute does not fit into a class that was listed as one it would consider submitting. It may even give consent in respect of a dispute that belongs to a class that was listed as one it would not consider submitting. In fact, several countries that have made notifications under Art. 25(4) have concluded BITs that go beyond the limits indicated in their notifications.[1235] Control over consent remains entirely at the host State's discretion. Consent may be subjected to limitations (see paras. 513–539 *supra*) but the terms of consent are not restricted by the terms of a notification under Art. 25(4).

931 During the drafting of Art. 25(4), it was made clear that in case of a conflict between specific consent and a notification to exclude the type of dispute covered by the consent, the specific consent would govern (History, Vol. II, p. 824). Proposals to subject jurisdiction to the cumulative requirements of a general notification and of a specific consent failed (at pp. 831, 832).

932 In *PSEG* v. *Turkey*, the Respondent based a jurisdictional objection on its notification under Art. 25(4). In particular, Turkey relied on the requirement, expressed in its notification, that the investment activities must "have effectively started". The US-Turkey BIT, applicable in that case, does not reflect that requirement. The BIT was signed in 1985; the notification was made in 1989 when Turkey deposited its instrument of ratification of the ICSID Convention; the BIT entered into force in 1990.[1236]

1233 *SPP* v. *Egypt*, Decision on Jurisdiction II, 14 April 1988, para. 62.

1234 *Amerasinghe*, The Jurisdiction of the International Centre, p. 226; *Delaume*, How to Draft, p. 170.

1235 See *e.g.*, Jamaica-US BIT (1994) Arts. I, VI; Turkey-UK BIT (1991) Art. 1(a)(i); Papua New Guinea-Australia BIT (1990) Art. 14; China-Germany BIT (2003) Art. 9.

1236 *PSEG* v. *Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 125–130.

933 The Tribunal found that the purpose of notifications under Art. 25(4) was to give advance information on the types of disputes to which consent to arbitration might or might not be expected. It held that the notifications do not have an autonomous legal operation but express questions of policy as a matter of information. In order to be effective, the contents of a notification would have to be embodied in the consent, otherwise the consent stands unqualified by the notification.[1237] The Tribunal said:

> . . . States making notifications will always wish to remain free to either follow or not follow the terms of the notification when expressing their consent. No State would believe that by making a notification it has become bound by its terms as in that case there would be no difference between notification and consent, thus contradicting specific provisions of the Convention. In this context, the Contracting State is in fact claiming a right to later exclude certain disputes from consent, if it so wishes, and it is always free not to adhere to the terms of its notification.[1238]

934 While jurisdiction must thus be determined independently of the notifications under Art. 25(4), these notifications may have an indirect bearing on jurisdiction. A consent clause that is not entirely clear may be interpreted by reference to a prior notification of classes of disputes in respect of which the host State has expressed its intentions. In the absence of contrary evidence, it may be assumed that a State intended to remain within the limits of its notification when entering into the consent agreement.

935 Some tribunals have referred to the absence of notifications under Art. 25(4) when determining the meaning of "investment" in the cases before them. The Tribunal in *Fedax* v. *Venezuela* reached the conclusion that loans were covered by the term "titles to money" in the definition of investments under the Netherlands-Venezuela BIT. It added the following observation:

> It must also be noted that the Republic of Venezuela has not exercised its right under Article 25(4) of the ICSID Convention to notify the Centre of any class or classes of disputes it would or would not consider submitting to the jurisdiction of the Centre. This provision allows Contracting States to put investors on notice as to what class of disputes they would or would not consider consenting to within the broad meaning of investment under the Convention.[1239]

936 *CSOB* v. *Slovakia* also concerned the issue whether a loan constituted an investment. The Tribunal found that investment, as a concept under the Convention, should be interpreted broadly. In support of this conclusion it added:

> 65. It is worth noting, in this connection, that a Contracting State that wishes to limit the scope of the Centre's jurisdiction can do so by making the declaration provided for in Article 25(4) of the Convention. The Slovak Republic has not made such a declaration and has, therefore, submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention.[1240]

1237 At paras. 135–147.
1238 At para. 143.
1239 *Fedax* v. *Venezuela*, Decision on Jurisdiction, 11 July 1997, para. 33.
1240 *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 65.

In *Mitchell* v. *DR Congo*, the *ad hoc* Committee noted that the concept of investment was to be looked for in the parties' agreement or the applicable investment treaty. It added: **937**

> In doing so, the fact that a State has not made use of the notification option provided for under Article 25(4) of the Convention may not be understood to mean that that State has taken a certain position regarding the very concept of investment.[1241]

Consent, once validly given, may not be defeated by a subsequent notification under Art. 25(4). This is what the Government attempted in the three parallel cases against Jamaica[1242] (see para. 607 *supra*). The three Tribunals refused to accept the Government's notification under Art. 25(4) as a valid withdrawal of consent. They pointed out that the notification only operates for the future by way of information to the Centre and potential future investors[1243] (at para. 608 *supra*). **938**

Whether an offer of consent may be withdrawn or limited by way of a notification under Art. 25(4) depends on the instrument containing the offer. Ecuador's notification of 4 December 2007 seeks to withdraw its offer of consent, not yet accepted by an investor and contained in any instrument, to the extent that it relates to the exploitation of natural resources (see para. 926 *supra*). **939**

The effect of this declaration is subject to doubt. To start with, it is not in accord with the text of Art. 25(4). The terms of Art. 25(4) allow States to make notifications as to which disputes they "would or would not consider submitting" to ICSID's jurisdiction. The provision is not designed to withdraw offers of consent already made, even if these have not yet been accepted. **940**

A mere offer of consent, that has not been accepted, is not irrevocable under Art. 25(1), last sentence (see paras. 596–606 *supra*). But the instrument containing the offer of consent may be difficult or impossible to withdraw or to modify. Offers of consent contained in Ecuador's BITs are protected by the law of treaties. They cannot be withdrawn by a unilateral declaration.[1244] **941**

1241 *Mitchell* v. *DR Congo*, Decision on Annulment, 1 November 2006, para. 25.

1242 *Alcoa Minerals* v. *Jamaica*, *Kaiser Bauxite* v. *Jamaica*, *Reynolds* v. *Jamaica*. The *Alcoa* case is described by *Schmidt, J. T.*, Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID), Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 17 Harvard International Law Journal 90 (1976).

1243 *Kaiser Bauxite* v. *Jamaica*, Decision on Jurisdiction, 6 July 1975, paras. 23, 24.

1244 Article 26 of the Vienna Convention of the Law of Treaties (VCLT) reflects the traditional principle *pacta sunt servanda*. Under Article 39 VCLT a treaty may be amended by agreement between the parties. The possibilities for the termination and suspension of the operation of treaties under Articles 54–64 VCLT are limited.

Article 26

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.

OUTLINE

	Paragraphs
I. INTRODUCTION	1–5
II. INTERPRETATION	6–231
A. **"Consent of the parties to arbitration under this Convention . . ."**	6–16
B. **". . . unless otherwise stated, . . ."**	17–109
1. Concurrent Arbitration Clauses	20–43
a) Form of Concurrent Arbitration Clauses	20–32
b) Validity of Concurrent Arbitration Clauses	33–43
2. Concurrent Reference to Domestic Courts	44–54
3. "Fork in the Road" Clauses	55–72
4. Jurisdiction for Treaty Claims and Contract Claims	73–109
C. **". . . shall, . . . be deemed consent to such arbitration to the exclusion of any other remedy."**	110–186
1. Non-ICSID Arbitration	114–123
2. Consolidation and Identical Tribunals	124–131
3. Domestic Proceedings	132–148
4. Enforcement of Non-ICSID Awards by Domestic Courts	149–153
5. Intervention by Domestic Courts to Stay ICSID Arbitration	154–161
6. Provisional Measures by Domestic Courts in ICSID Arbitration	162–183
a) Judicial Practice	166–173
b) The Scholarly Debate	174–175
c) ICSID Arbitration Rule 39(6)	176–178
d) Provisional Measures under the Additional Facility	179–180
e) Clauses Permitting Provisional Measures by Domestic Courts	181–183
7. Non-Judicial Remedies	184–186