Variations around the Notion of Consent in Investment Arbitration

Boisson de Chazournes, Laurence

How to cite

BOISSON DE CHAZOURNES, Laurence. Variations around the Notion of Consent in Investment Arbitration. In: Consenting to International Law. Besson, Samantha (Ed.). Collège de France - Paris. Cambridge : Cambridge University Press, 2024. p. 223–247. (ASIL Studies in International Legal Theory) doi: 10.1017/9781009406444.014

This publication URL: https://archive-ouverte.unige.ch/unige:174690
Publication DOI: 10.1017/9781009406444.014

10

Variations around the Notion of Consent in Investment Arbitration

LAURENCE BOISSON DE CHAZOURNES*

10.1 INTRODUCTION

In the early twentieth century, the Permanent Court of International Justice (hereafter PCIJ) in the *Status of Eastern Carelia* held that '[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'.[1] Over the years, this principle has been reaffirmed consistently by international courts and tribunals[2] – whether permanent or *ad hoc* – in various cases, including both contentious and advisory matters.[3]

In the absence of a centralized power at the international level, all 'international adjudicatory bodies' are based on 'the consent and agreement of the subjects (i.e. the litigants, *les justiciables*)'.[4] The arbitral tribunal in the *Chevron* v. *Ecuador* case, while discussing the principle of consent, remarked that:

* The author wishes to thank Aditya Laddha for his very helpful assistance in the preparation of this chapter. This chapter was written in the framework of the project: *The International Judicial Function under Pressure: Do Courts and Tribunals Go Off the Rails?*, funded by the Swiss National Foundation.

1 *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Ser. B No. 5, p. 27.

2 Clément Marquet, *Le consentement étatique à la compétence des juridictions internationales* (Paris: Pedone, 2022); Tams, Chapter 3 in this volume.

3 *East Timor (Portugal* v. *Australia)* [1995] ICJ Rep. 90, para. 34; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) (first phase) [1950] ICJ Rep. 65, p. 71.

4 *Abaclat and Others (Case formerly known as Giovanna A. Beccara and Others)* v. *Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility (4 August 2011) Case No. ARB/07/5, 52 ILM 667, Dissenting Opinion of Georges Abi-Saab (28 October 2011), para. 7.

> [N]o international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, *no arbitration tribunal has jurisdiction over any person unless they have consented*. That may be called the 'consent' principle, and it goes to the question of the tribunal's jurisdiction.[5]

One would assume that given the clear terms in which international courts and tribunals have formulated and upheld the principle of consent, it would not evoke confusion or extensive discussion. The steady rise of varied international disputes, however, has generated significant debate about the interpretation and application of the principle of consent. In investor–State arbitration in particular (although not limited to it), the nature of consent is heavily discussed. International courts and tribunals are being increasingly criticized by States for committing jurisdictional overreach. The underlying problem may well be whether the contours of consent to arbitration are clear.

Investment arbitral tribunals, while dealing with the question of State consent have shown sharp divisions on the notion of consent. A stock-taking of the varied approaches taken by arbitral tribunals to State consent highlights the indeterminacy of the contours of consent in practice. This chapter begins by exploring consent in the context of arbitration under the Convention on the Settlement of Investment Disputes between States and nationals of other States (hereafter ICSID Convention),[6] which accounts for the majority of investor–State arbitrations, and the different means of expression of consent of a State and investor to arbitration contemplated in the ICSID regime (Section 10.2). It then deals with the theoretical underpinnings of the notion of consent to investment arbitration and the jurisprudential debates that surround it (Section 10.3). To illustrate the multiplicity of thoughts and varied techniques deployed in interpreting the notion of consent, possibly leading to the expansion of arbitral jurisdiction, the chapter will analyse the issue of State consent in the context of most-favoured nation (hereafter MFN) clauses as a case study (Section 10.4).

This chapter seeks to reveal that, when it comes to consent, its understanding and interpretation raise a fundamental question: Do we really know what

[5] *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador (II)*, PCA, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) Case No. 2009-23, para. 4.61 (emphasis added); Rejla Radović, *Beyond Consent: Revisiting Jurisdiction in Investment Treaty Arbitration* (Leiden: Brill, 2022), p. 13; *Fisheries Jurisdiction (Spain* v. *Canada)* (Jurisdiction of the Court: Judgment) [1998] ICJ Rep. 432, para. 37.

[6] Other issues relating to consent in investment arbitration are not covered in this contribution. They include, *inter alia*, issues relating to consent in non-ICSID arbitration, and issues of consent arising out of questions relating to mass claims, umbrella clauses, jurisdiction *ratione materiae*, jurisdiction *ratione personae* or jurisdiction *ratione temporis*.

it means? Throughout this chapter, it will be demonstrated that there are a number of uncertainties around the notion of consent, which are yet to be dealt with.

10.2 EXPRESSION OF STATE CONSENT TO INTERNATIONAL INVESTMENT ARBITRATION UNDER THE ICSID CONVENTION

Article 25(1) of the ICSID Convention sets out the jurisdictional requirements that must be satisfied to bring a claim before the International Centre for Settlement of Investment Disputes (hereafter the Centre). The jurisdiction of the Centre extends 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'.[7] Moreover, 'when the parties have given their consent, no party may withdraw its consent unilaterally'.[8]

Article 25(1) of the Convention underpins the idea of mutuality of consent. The investor must perform a reciprocal act of consent.[9] ICSID does not impose any technical requirements regarding how consent should be expressed. Consent to arbitration can be manifested by States in multiple ways.[10] However, in the framework of the ICSID Convention, 'parties to the dispute' must 'consent in writing to submit to the ICSID Centre'.[11]

Before turning to the issue of expression and interpretation of consent, it is necessary to outline how consent to arbitration should be determined. Consent can never be presumed by an arbitral tribunal. Consent to jurisdiction of international arbitral tribunals must always be established. Consent must be certain.[12] For arbitral tribunals, the interpretation of consent is fundamental as the principle of *compétence de la compétence* requires an

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted on 18 March 1965, entered into force 14 October 1966), 575 UNTS 159, Art. 25(1).

[8] Ibid.

[9] Yas Banifatemi and Elise Edson, 'Jurisdiction of the Centre', in Julien Fouret, Rémy Gerbay and Gloria M. Alvarez (eds.), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Cheltenham: Edward Elgar, 2019), pp. 102–255, p. 146.

[10] *Brandes Investment Partners, LP* v. *The Bolivarian Republic of Venezuela*, ICSID, Award (2 August 2011) Case No. ARB/08/3, para. 34.

[11] *Southern Pacific Properties (Middle East) Limited* v. *Arab Republic of Egypt*, ICSID, Decision on Jurisdiction (14 April 1988) Case No. ARB/84/3, para. 99.

[12] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* (Judgment) [2008] ICJ Rep. 177, paras. 60–62.

international court or a tribunal to establish the jurisdiction and its limits objectively, based on the title of jurisdiction, and should not go beyond it.[13]

Many arbitral tribunals have considered that the agreement to arbitrate between the parties should be 'clear and unambiguous'.[14] A few tribunals have embarked on the debate concerning the expansive or restrictive interpretation of consent.[15] But as rightly observed by Judge Rosalyn Higgins, 'there is no rule that requires a restrictive interpretation of compromissory clauses'.[16] She added that there is no doubt that the International Court of Justice (hereafter ICJ) 'has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses; they are judicial decisions like any other'.[17]

Under the ICSID regime, States enjoy flexibility regarding freedom of expression of consent to arbitration. Consent can be expressed either before or after the dispute has arisen. In the latter case, consent to arbitration could be expressed through a *compromis*, that is an agreement to arbitrate after the dispute between the host State and investor has arisen. Although such a means is not common in investment arbitration, it nevertheless remains a way to express consent.[18] This chapter, however, will primarily focus on the expression of consent prior to the materialization of the dispute between the host State and investor through State contracts (Section 10.2.1), national legislation on foreign investment (Section 10.2.2), and investment treaties (Section 10.2.3), and the issues arising therefrom.

[13] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Rep. 6, para. 88.

[14] *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID, Decision on Jurisdiction (8 February 2005) Case No. ARB/03/24, 44 ILM 717, para. 198; *Ambiente Ufficio S.P.A. and Others (formerly Giordano Alpi and Others)* v. *Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility (8 February 2013) Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez (2 May 2013), para. 346.

[15] *Mondev International Ltd.* v. *United States of America*, ICSID, Award (11 October 2002) Case No. ARB(AF)/99/2, 42 ILM 85, para. 43.

[16] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (Separate Opinion of Judge Higgins) [1996] ICJ Rep. 857, para. 35.

[17] Ibid.

[18] *Compañia del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica*, ICSID, Award (17 February 2000) Case No. ARB/96/1, para. 26. Additionally, it is controversial if the consent of the parties and jurisdiction of the tribunals can be established through the principle of *forum prorogatum*. On this point, see *Klöckner Industrie-Anlagen GmbH and Others* v. *United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID, Decision of the *ad hoc* Committee (3 May 1985) Case No. ARB/81/2, para. 9 (I translate).

10.2.1 *State Contracts*

Before the 1990s, investment arbitrations arising under contracts between States and investors dominated the workload of the ICSID.[19] Consent may be expressed by the host State and investor through a contract relating to the operation of investment between the host State and investor. In reality, an investment to a host State could involve negotiation and the conclusion of multiple complex contracts. In such cases, not every investment-related contract would contain a dispute resolution clause referring to arbitration. The arbitral tribunals, in practice, have not considered such contracts isolated from each other.[20] State contracts differ from national legislation on foreign investment and investment treaties in one aspect: there is a direct agreement to arbitrate between the State and investor as contracting parties. Moreover, such contracts raise different questions of interpretation.[21]

10.2.2 *National Legislation on Foreign Investment*

Another basis of consent may be through national legislation, which usually regulates foreign investment in the host State. However, in practice, reference to investment arbitration under national law may not always be clear or mandatory. By way of example, the Investment Code of Seychelles Act (2005) provides that:

> Disputes which cannot be resolved by the parties themselves *may be* [as opposed to shall be] settled: a) by an arbitration procedure whether local or international that is based on a previous agreement between the parties; or b) by legal proceedings in accordance with the Law of Seychelles.[22]

[19] ICSID, 'The ICSID Case Load – Statistics Issues 2022-1' (2022). Available at: https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf, last accessed 15 September 2022, p. 11 (in 2021, however, only around 15 per cent of cases submitted to the ICSID Centre for arbitration were based on such contracts); James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) *Arbitration International* 351–374.

[20] Christoph Schreuer, 'Consent to Arbitration', in Peter T. Muchlinski, Federico Ortino and Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), pp. 830–867.

[21] Laurence Boisson de Chazournes, 'The Blurring of the Line between Contract-Based and Treaty-Based Investment Arbitration' (2019) 1(2) *The Journal of the Institute of Transnational Arbitration* 98–106.

[22] Art. 13.2 of the Investment Code of Seychelles Act, 2005; Borzu Sabahi, Noah Rubins and Don Wallace Jr, *Investor-State Arbitration*, 2nd ed. (Oxford: Oxford University Press, 2019).

Another example is Article 8 of the Egyptian Law No. 43 of 1974, which provided various means, including the ICSID Convention, to settle investment disputes.[23] This provision was the basis of consent in the *SPP* v. *Egypt*, famously referred to as the *Pyramids* case. Egypt had *inter alia* argued that 'Article 8 contains no language expressly consenting to the jurisdiction … [and] of Article 8 is nothing more than a non-limitative list of possible methods of dispute settlement which may be negotiated by the investor and the Egyptian Government on a case-by-case basis'.[24]

Consequently, according to Egypt, a separate *ad hoc* expression of consent was required to establish the jurisdiction of the Centre.[25]

The claimants, on the other hand, argued that Article 8 established 'a mandatory, hierarchic sequence of dispute resolution procedures'. They also contended that:

> [I]f the investor and the Government of Egypt have not agreed on a means of dispute settlement (the first method of dispute resolution mentioned in Article 8), and if there is no applicable bilateral treaty in force between Egypt and the investor's State (the second method of dispute resolution mentioned in Article 8), legal disputes arising directly out of investments must be settled by the procedures specified in the [ICSID Convention].[26]

The tribunal observed that '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'.[27] As a result, the tribunal *inter alia* held that the text of Article 8 'does not import into a treaty additional requirements that the treaty does not contain'. The Convention makes no mention of a separate *ad hoc* consent. It says only that there must be 'consent in writing'.[28] Ultimately, the tribunal held that a separate agreement of consent to arbitration is not required under the aforementioned Egyptian Law. This case has been said to be the 'tipping point'[29] in the history of the ICSID, as it opened the door to investment arbitration based

[23] The 1974 Egyptian legislation has been replaced by Law No. 72 Promulgating the Investment Law (2017).
[24] *SPP* v. *Egypt*, fn. 11, para. 73.
[25] Ibid.
[26] Ibid., para. 72.
[27] Ibid., para. 61.
[28] Ibid., para. 99.
[29] Jan Paulsson, 'The Tipping Point', in Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres and Mairée Uran Bidegain (eds.), *Building International*

on national legislation, and on investment treaties which are explored in Section 10.2.3. In the context of domestic legislation, the question of interpretation of consent also gives rise to a related issue of applicable law governing its interpretation.[30]

10.2.3 *Investment Treaties*

Since the late 1950s, the international legal order has witnessed a 'big bang' of bilateral investment treaties (hereafter BITs). As a result, the most contemporary means to express consent, in practice, has been through BITs, or multilateral treaties such as the Energy Charter Treaty (hereafter ECT).[31] In practice, the basic mechanism of expressing consent through treaties – albeit with some exceptions – is similar to consent expressed in national legislation. States parties to the investment treaties include a dispute resolution provision that offers arbitration to the investors of one State party (home State of the investor) against the other State party to the treaty (host State). Unlike national legislation, in which an offer to arbitration is given to investors of all States, treaties are limited to investors of the other State party. For instance, Article 8(1) of the United Kingdom-Sri Lanka BIT, provided, as follows: 'Each contracting Party hereby consents to submit to [ICSID] ... for settlement by conciliation or arbitration under the [ICSID Convention] any legal disputes arising between [the State and an investor concerning investment].'[32]

The dispute settlement provisions in many BITs also provide for a range of forums for arbitration with ICSID being one of them. Other possibilities could range from settlement of disputes through the domestic courts of the host State, to arbitration under the International Chamber of Commerce (hereafter ICC) rules, the London Court of International Arbitration (LCIA) rules or under the United Nations Commission on International Trade Law (hereafter UNCITRAL) rules.

Investment Law: The First 50 Years of ICSID (The Hague: Kluwer Law International, 2015), pp. 85–96, p. 86.

[30] Laurence Boisson de Chazournes, 'Rules of Interpretation and Investment Arbitration', in Kinnear *et al.*, fn. 29, pp. 13–25, p. 18; Michele Potestà, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27(2) *Arbitration International* 149–170.

[31] According to the ICSID Statistics report, 60 per cent of the cases instituted in 2021 were based on the BITs: see ICSID, fn. 19, p. 11.

[32] *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka*, ICSID, Award (27 June 1990) Case No. ARB/87/3, 30 ILM 577, para. 2.

Moreover, BITs can contain clauses that offer unequivocal consent to arbitration. For instance, the wording of the clauses stipulates that parties 'hereby consents' or the dispute 'shall be submitted to arbitration'.[33] Other clauses, such as 'all disputes concerning investments' or 'any legal dispute concerning investments',[34] have seen the arbitral jurisprudence split on their interpretation.

The arbitral tribunal in *Salini* v. *Morocco*, while interpreting the clause – 'all disputes concerning investments' – held that not only claims concerning violations of the BITs fall within the jurisdiction of the tribunal but also claims based on contracts.[35] The arbitral tribunal, in *SGS* v. *Pakistan*, however, reached a different conclusion in its interpretation of a similar clause. The tribunal held that the expression 'disputes with respect to investments' does not necessarily imply that 'both BIT and purely contract claims are intended to be covered by the Contracting Parties'.[36] This shows that the drafting of jurisdictional clauses in BITs can open the door to multiple objections to jurisdiction.

These varied means of expressing consent to investment arbitration have in practice given rise to several questions, which, at the heart, remain questions of interpretation of the boundaries or confines of State consent. It also shows how the issue of interpretation of consent is a never-ending debate and in constant flux in investor–State arbitration. At times, the arbitral decisions are in contrast with each other, as the tribunals concerned do not agree on the canons of interpretation. On other occasions, the tribunals reach different conclusions on similarly worded provisions, despite applying the same rules of treaty interpretation.

10.3 PERSPECTIVES ON THE NOTION OF CONSENT

10.3.1 *'Arbitration without Privity'*

Consent to arbitration between host State and investor in a BIT is asymmetrical in nature as a BIT is a treaty concluded between States, and not between a State and an investor. Similarly, consent to arbitration in national legislation can be considered as a unilateral act by a State. On the contrary, in State

[33] Schreuer, fn. 20.
[34] Ibid.
[35] *Salini Construttori S.P.A.* v. *Kingdom of Morocco*, ICC Case No. 16550/ND, Award, 5 December 2011.
[36] *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID, Decision on Jurisdiction (6 August 2003) Case No. ARB/01/13, 42 ILM 1285.

contracts or *compromis*, the dispute resolution clauses are symmetrical, operating directly between an investor and a host State. This has led to an evolution of a distinct conceptual understanding of an arbitration agreement in investment arbitration, which is generally referred to as 'arbitration without privity'[37] or 'offer-acceptance theory'.[38] In the 1990s, the investment arbitration regime – based on treaties and legislation – was not regarded as a 'subgenre of an existing discipline' but as 'dramatically different from anything previously known in the international sphere'.[39]

According to the theory of 'arbitration without privity', consent of a State in national legislation or a treaty is merely an 'offer to agree to arbitration, rather than a full contractual *compromis* as one would find in an investment contract'.[40] An expression of consent by a State is insufficient to bestow jurisdiction on a tribunal as a reciprocal act on part of an investor is required. The unilateral offer of the State is 'consummated as a binding obligation to arbitrate only with the investor's acceptance of that offer'.[41] When an investor accepts the State's open offer to arbitrate, a valid and binding agreement is created between the parties. This is 'a manifestation of the maxim "*pacta sunt servanda*" and applies to undertakings to arbitrate in general'.[42] The direct action of international arbitration, being initiated by an investor, 'allows the true complainant to face the true defendant'.[43] The offer-acceptance model is also explained as a legal fiction that was necessary to avail the 'procedures and institutions of commercial arbitration [which] would not have been available to the investment treaties'.[44]

This theory has been endorsed by arbitral tribunals. The arbitral tribunal in the *Generation Ukraine* v. *Ukraine* case observed that '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

[37] Jan Paulson, 'Arbitration without Privity' (1995) 10(2) *ICSID Review – Foreign Investment Law Journal* 232–257.
[38] Radović, fn. 5, p. 49.
[39] Paulson, fn. 37, p. 256.
[40] *Tradex Hellas SA* v. *Republic of Albania*, Award (29 April 1999), 5 ICSID Reports 70, at paras. 132–205; Sabahi *et al.*, fn. 22.
[41] *Tradex Hellas SA* v. *Republic of Albania*, fn. 40.
[42] Schreuer, fn. 20.
[43] Paulson, fn. 37, p. 256.
[44] Thomas W. Wälde, 'The Specific Nature of Investment Arbitration', in Philippe Kahn and Thomas W. Wälde (eds.), *New Aspects of International Investment Law* (Leiden: Brill, 2007), pp. 42–119, p. 60.

in the BIT to suggest that the investor must communicate its consent in a different form directly to the State'.[45]

If a dispute resolution clause in domestic law or a treaty is merely an offer to arbitrate, which in turn is to be accepted by the investor, should the perfected consent or perfected arbitration agreement be regarded as a treaty between the investor and the host State?[46] If it is a treaty, the rules of treaty interpretation and international law could be considered in determining the scope of State consent. On the other hand, if it is construed as a contract or unilateral declaration (see Sections 10.3.2 and 10.3.3), other rules of interpretation could be applicable.[47] While 'arbitration without privity' is a commonplace in investment arbitration nowadays, it is not uncontroversial. Some authors have suggested that rather than treating State consent in a BIT or national legislation as an 'offer', it should be regarded as an 'invitation to treat' or 'invitation to bargain'.[48] According to this approach, a conclusion of a separate arbitration agreement between the host State and investor is required to initiate arbitration either under a treaty or national legislation. This approach is partly based on the understanding that the ICSID Convention, for instance, was originally meant to adjudicate matters of settlement of contractual disputes between States and foreign investors.[49]

10.3.2 *Arbitration Agreements as Contracts?*

The theory of offer-acceptance, as discussed in Section 10.3.1, is not the only one that has been discussed in understanding State consent in investment arbitration regime. Another view stipulates treating the perfected arbitration agreement, arising out of a BIT or national law, as a contract and not a treaty.[50] The Court of Appeal of England and Wales in *Occidental* v. *Ecuador* held that 'the agreement to arbitrate which results by following

[45] *Generation Ukraine Inc.* v. *Ukraine*, ICSID, Award (16 September 2003) Case No. ARB/00/9, 44 ILM 404, para. 12.2.

[46] Schreuer, fn. 20.

[47] See discussion on the *CEMEX* v. *Venezuela* case (*CEMEX Caracas Investments B.V and CEMEX Caracas II Investments B.V* v. *Bolivarian Republic of Venezuela*, ICSID, Decision on Jurisdiction (3 December 2010) Case No. ARB/08/15, 49 ILM 1195) in Boisson de Chazournes, fn. 30, p. 18.

[48] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015), p. 141.

[49] José Enrique Alvarez, 'The Public International Law Regime Governing International Investment' (Volume 344) *Collected Courses of the Hague Academy of International Law*, 2011, pp. 282–283.

[50] Radović, fn. 5, p. 49; Crawford, fn. 19, p. 361.

the Treaty route is not itself a treaty' but 'an agreement between a private investor on the one side and the relevant State on the other'.[51]

It could be said that the framework of understanding an arbitration agreement as a contract is not significantly different from the 'arbitration without privity' or offer-acceptance model as in both approaches consent of both the State and investor is required to form an arbitration agreement.[52] The point here is not whether there is any difference between State consent and investor consent but rather the requirement of consent of both the parties to form an arbitration agreement. But there is one difference between 'arbitration without privity' and arbitration agreement as contract approaches. If the contract avenue is followed, by necessary implication, it raises the question of the law governing the arbitration agreement.

The Court of Appeal in *Occidental* v. *Ecuador* held that such an arbitration agreement should be governed by international law as 'it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction'.[53] For Judge James Crawford, for pragmatic reasons, the approach in *Occidental* v. *Ecuador* was correct because if the arbitration agreement had been a treaty:

> it would have been unenforceable [under the New York Convention of 1958, which has no application to international law arbitrations, e.g. between states or other international legal persons] and issues arising under it would have been non-justiciable before an English court, which the Court of Appeal expressly denied. The investor has neither international legal personality nor treaty-making capacity, and it does not acquire either merely by accepting an offer to arbitrate made in a treaty.[54]

The two approaches – arbitration without privity and arbitration agreement as a contract – reveal that consent is indeterminate.

10.3.3 *Consent as a Unilateral Act?*

Another school of thought approaches the expression of State consent in BITs and national legislations as provisions constituting 'an agreement on their

[51] *Republic of Ecuador* v. *Occidental Exploration and Production Company* [2006] Q.B. 432, at 458.
[52] Radović, fn. 5, p. 49.
[53] Ibid.
[54] Crawford, fn. 19, p. 361.

own, usually with interrelated provisions'.[55] Unlike the aforementioned approaches, this could lead to a different conception of the investment arbitration regime. It has been suggested that theorizing the notion of State consent as a unilateral act would equate 'unilateral standing offers' stipulated in treaties and domestic law, to 'unilateral declarations recognising compulsory jurisdiction of the ICJ'.[56] The ICJ does not apply the rules of treaty interpretation codified in the Vienna Convention on Law of the Treaties to unilateral declarations or acts.[57] Accordingly, under this approach, it has been suggested that the 2006 Guiding Principles on Unilateral Acts of States of the International Law Commission (ILC) should be applied:

> [a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from *such a declaration, such obligations must be interpreted in a restrictive manner*. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[58]

This approach is advanced to consider a restrictive approach to the interpretation of State consent and jurisdiction of the arbitral tribunal.

It has also been explained that unilateral jurisdictional undertakings operate as a 'direct obligation to submit to a readily available dispute resolution and permits the investor unilaterally to serve the consenting state'.[59] To avail the benefit of consent, the 'investor will also have to consent to ICSID jurisdiction and in that sense accept the offer of arbitration contained in a treaty'.[60] This, however, would not change the nature of international legal obligations

[55] Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27(2) *Arbitration International*, 129–148, at 138; Michael D. Nolan and Frédéric Sourgens, 'Limits of Consent – Arbitration without Privity and Beyond', in Miguel Angel Fernández Ballesteros and David Arias (eds.), *Liber Amicorum Bernardo Cremades* (The Hague: Kluwer Law International, 2010). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180302, last accessed 15 September 2022, pp. 1–11.

[56] Andreeva, fn. 55, p. 140.

[57] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (Judgment) [1998] ICJ Rep. 275, para. 30: '[T]he regime for depositing and transmitting declarations of acceptance of compulsory jurisdiction is distinct from the regime envisaged for treaties by the Vienna Convention. Thus, the provisions of that Convention may only be applied to declarations by analogy.'

[58] United Nations International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations', *Yearbook of the International Law Commission* (2006) Vol. II, Part Two, UN Doc. A/61/10 (2006), pp. 160–166, p. 164, para. 7 (emphasis added).

[59] Nolan and Sourgens, fn. 55, pp. 31–32.

[60] Ibid.

stipulated in a BIT between two sovereign States, or under national law. State consent in investor–state arbitration, therefore 'must divorce itself from contemplating it from the investor's point of view. This point of view, important though it is in every practical regard, is not dogmatically relevant to the understanding of state consent, as such'.[61] In simple words, this approach would see acceptance of the State's offer as not relevant to establishing the consent as such, and only to the question of whether it has been triggered or invoked.[62] The investor's acceptance would allow the tribunal to resolve a specific dispute.

A specific practical consequence of this approach, however, has been identified. If State consent to arbitration is an independent legal obligation, and not dependent on any reciprocal act of acceptance by investors, a State is then not permitted to denounce such consent immediately by merely withdrawing from ICSID Convention.[63] Article 72 of the ICSID Convention provides that a denunciation notice by a State does not 'affect the rights or obligations of [a State or an investor] arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received'. As a result, a State would be required to denounce the instrument of consent, that is national legislations or treaties separately which usually provides for a survival period of several years protecting the rights of foreign investors.[64]

As can be seen, there are different theoretical perspectives and ways of enquiry to understand consent. While each of these approaches touches upon the understanding of the notion of consent, it can have significantly different outcomes in arbitration when applied. For instance, if arbitral tribunals approach consent as unilateral acts that should be read restrictively, the jurisdiction of the arbitral tribunal could be constrained. Arbitration without privity, on the other hand, provides a different understanding of arbitration agreement between the host State and an investor, which can be said to be based on a functional necessity, allowing the arbitral tribunal to adjudicate the dispute by removing the asymmetry between the State and investor on the basis of 'perfected consent'.

[61] Ibid.
[62] Ibid.
[63] Michael D. Nolan and Frédéric Sourgens, 'The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study' (2007) 5 *Transnational Dispute Management*. Available at: www.transnational-dispute-management.com/article.asp?key=1899, last accessed 15 September 2022.
[64] Ibid.

10.4 DO MFN CLAUSES GIVE A NEW FLAVOUR TO A STATE'S CONSENT TO ARBITRATION?

MFN clauses in investment treaties typically prohibit nationality-based discrimination against investments and investors from host States. Such clauses ensure a level playing field between different investors of different countries by creating 'equality of competitive conditions'.[65] To this extent, MFN clauses extend the treatment of foreign investors that is more favourable under a BIT to the treatment of foreign investors that is less favourable under other BITs. Over the years, there has been a debate regarding the nature of treatment that should be extended to foreign investors. Since most of the MFN clauses are general in wording, varied and competing interpretations of such provisions are inevitable. Are investors entitled to enjoy only substantive benefits that might be imported from a third treaty by virtue of an MFN clause? Or, can MFN clauses be relied on by investors to also import favourable terms of dispute settlement resolution stipulated in another BIT between the host State and a third State? Taking a step back, one could even question if there exists a difference between substantive protection rights offered to investors and an option to settle disputes through arbitration.

The interpretation of MFN clauses has widespread implications for State consent, as it has been interpreted to allow the importation of investor-favourable dispute settlement terms from a third BIT (or the comparator BIT) to the BIT applicable in the dispute (or the base BIT). The right to bring an action against a State is not automatic; it is based on State consent. Thus, it is necessary to understand the ways MFN clauses are interpreted by arbitral tribunals to establish State consent. Moreover, the arbitral practice around the interpretation of MFN has been split between fundamentally contradicting approaches. Some consider that the arbitral practice has moved from a jurisprudential split to a jurisprudential schism with one camp belonging to *Maffezini* v. *Spain* (Section 10.4.1) and another belonging to *Plama* v. *Bulgaria* (Section 10.4.2).[66] Additionally, there is a noticeable trend

[65] United Nations Conference on Trade and Development (hereafter UNCTAD), 'Most Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II' (New York and Geneva, 2010), UNCTAD/DIAE/IA/2010/1, p. 13.

[66] Stephan W. Schill, 'Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement', in Kinnear *et al.*, fn. 29, pp. 251–265; Julie Maupin, 'MFN-Based Jurisdiction in Investor–State Arbitration: Is there any Hope for a Consistent Approach?' (2011) 14(1) *Journal of International Economic Law* 157–190.

of 'consent shopping' in the interpretation of MFN clauses which allows investors to import investor–State arbitration into a treaty that does not have a valid investor–State arbitral provision (Section 10.4.3).

10.4.1 Maffezini *v.* Spain: *The Curtain-Raiser?*

The arbitral tribunal in *Maffezini* v. *Spain* caused a tectonic shift in the interpretation and application of MFN clauses, producing a strong debate on the scope of MFN clauses and the extent to which foreign investors could rely on favourable investor–State dispute settlement provisions from various distinct BITs. This has complicated not only the assessment of the true scope of consent but has also questioned the role of third-party adjudicators in international legal order on a more fundamental level. The approach of tribunals that have considered the applicability of MFN clauses to dispute resolution provisions can be divided into two issues: the use of MFN clauses to overcome procedural thresholds that are pre-conditions to arbitration, and the expansion of the jurisdiction of arbitral tribunals not in conformity with the consent expressed.

In *Maffezini* v. *Spain*, the arbitral tribunal allowed the claimant to dispense with a provision in the base BIT, that is, the Argentine-Spain BIT of 1991 requiring the investor to litigate any claims against Spain in Spanish courts during a certain period, before attempting to access investor–State arbitration. In essence, the arbitral tribunal permitted to import more favourable dispute settlement provisions of another BIT entered into by Spain with Chile that did not contain an eighteen-month waiting period requirement and, therefore, were less restrictive.[67] The MFN clause in the Argentine-Spain BIT stated: 'In *all matters* subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country.'[68]

While the clause itself was silent on its applicability to other BIT provisions, and if the dispute settlement provisions are covered by the MFN clause, the tribunal reached its conclusion by relying on the words 'all matters' in the MFN clause. Furthermore, the broad language was unique to the Argentine-Spain BIT and was not common in Spanish treaty practice, thereby according greater significance to the inclusion of such language.[69] The tribunal

[67] *Emilio Agustín Maffezini* v. *The Kingdom of Spain*, ICSID, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) Case No. ARB/97/7, 40 ILM 1129, para. 64.
[68] Ibid., para. 38 (emphasis added).
[69] Ibid., paras. 54–58.

regarded the dispute settlement arrangements in BITs to be 'inextricably related' to the protection of foreign investors.[70]

The tribunal, however, identified certain public policy considerations that would serve as limitations on the use of MFN clauses to import dispute settlement provisions.[71] These public policy considerations included, *inter alia*, a requirement to exhaust local remedies (considered by the tribunal to be a fundamental rule of public international law), and fork-in-the-road provisions that require investors to choose between domestic courts or international arbitration.[72] Additionally, the *Maffezini* v. *Spain* tribunal observed that 'if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration'.[73] For some, the *Maffezini* v. *Spain* decision was the first decision to permit an investor to expand a tribunal's jurisdictional mandate by importing, through the MFN clause, more favourable dispute resolution provisions.[74]

After *Maffezini* v. *Spain*, tribunals have frequently resorted to MFN clauses to import dispute settlement terms favourable to investors from a third BIT. In *Siemens* v. *Argentina*, for instance, the tribunal had to consider the scope of the MFN clause in Germany–Argentina BIT. The dispute resolution provision, in this case, required disputes to be submitted to local courts for eighteen months before resorting to international arbitration. The tribunal held that the words 'treatment' and 'activities related to the investments' in the MFN clause were sufficiently wide to include settlement of disputes. As a result, it permitted the investor to invoke the wider dispute resolution clause in the Argentina–Chile BIT.[75] Similarly, in *Impregilo* v. *Argentina*, the Italy–Argentina BIT had required that investors should first pursue such local remedies for at least eighteen months. The majority found that the investor could rely on the MFN clause to avail benefit from a more favourable six-month consultation and waiting period found in the US–Argentina BIT.[76] Article 3(1) of the Argentina–Italy BIT provides that: 'Each Contracting Party

[70] Ibid.
[71] Ibid., para. 63.
[72] Ibid., para. 64.
[73] Ibid.
[74] Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97–113.
[75] *Siemens* A.G. v. *The Argentine Republic*, ICSID, Decision on Jurisdiction (3 August 2004) Case No. ARB/02/8, 44 ILM 138, para. 103.
[76] *Impregilo S.P.A.* v. *Argentine Republic (I)*, ICSID, Award (21 June 2011) Case No. ARB/07/17, para. 108.

shall, within its own territory, accord to investments made by investors . . . and to *all other matters* regulated by this Agreement, a *treatment* that is no less favorable than that accorded to its own investors or investors from third-party countries.'

According to the majority, the words 'treatment' and 'all other matters regulated by this Agreement' were wide enough to apply to procedural matters such as dispute settlement. The majority further held that 'the argument that the *ejusdem generis* principle would limit its application to matters similar to "investments" and "income and activities related to such investments" is not convincing, since the wording does not allow "all other matters" to be read as "all similar matters" or "all other matters of the same kind"'.[77] For the dissenting arbitrator, however, MFN clauses could not displace such pre-conditions to arbitration. The dissenting arbitrator further notes that 'a conditional right to ICSID cannot magically be transformed into an unconditional right by the grace of the MFN clause. The access to the right as provided in the basic treaty cannot be modified through an MFN clause'.[78] The explanation behind this position is that apart from conditions *ratione personae*, *ratione materiae* and *ratione temporis*, there is another condition to be fulfilled. It is a condition *ratione voluntatis* according to which:

> the State must have given its consent to such a procedure which allows a foreign investor to sue the State directly on the international level. This consent is expressed broadly or restrictively, with conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims: in other words, the consent is given under certain conditions. Just as the conditions of nationality for example must be fulfilled before an investor can have access to all the rights granted by the BIT, the conditions shaping the State's consent to arbitration must be fulfilled before a right to arbitration can arise.[79]

Moreover, the dissenting opinion also noted that conceptually 'the substantive treatment and the jurisdictional treatment are to be treated differently under the *ejusdem generis* principle, precisely because the qualifying conditions in order to benefit from each of this type of treatment are not the same'.[80] A distinction should be made between 'rights' stipulated in the BIT and the

[77] Ibid., para. 99.
[78] *Impregilo S.P.A.* v. *Argentine Republic (I)*, fn. 76, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011), para. 99.
[79] Ibid., para. 52.
[80] Ibid., para. 37.

'fundamental conditions for access to the rights'.[81] As a result, an MFN clause could only 'concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights, in other words, the insuperable conditions of access to the rights granted in the BIT'.[82]

10.4.2 Plama *v.* Bulgaria *and Subsequent Cases: An Attempt to Restrict the* Maffezini *v.* Spain *Wave?*

Since *Maffezini* v. *Spain*, a number of tribunals have opposed the use of MFN clauses to incorporate more favourable clauses, such as expanding the scope of a dispute beyond a specific subject-matter[83] or expanding the jurisdiction of the tribunal to include both treaty and contract claims.[84]

In *Plama* v. *Bulgaria*, the applicable BIT between Bulgaria and Cyprus did not provide for investor–State arbitration. The MFN clause of the BIT, however, required to 'apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states'.[85]

Relying on the MFN clause, the claimant argued that 'the dispute resolution provisions of other Bulgarian BITs such as the Bulgaria–Finland BIT, which provides for the possibility of ICSID arbitration, are imported into the Bulgarian-Cyprus BIT".[86] In essence, the reliance of the claimant on the MFN clause was not to remove any procedural hurdle before establishing the jurisdiction of the arbitral tribunal. Rather, it was to construct consent for investor–State arbitration which otherwise did not exist in the applicable BIT. The arbitral tribunal noted that 'the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed'.[87] The tribunal further held that the 'dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in

[81] Ibid.
[82] Ibid., para. 47.
[83] *Vladimir Berschader and Moïse Berschader* v. *The Russian Federation*, Award (21 April 2006) SCC Case No. 080/2004; *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID, Award (8 December 2008) Case No. ARB/04/14; see *Austrian Airlines* v. *The Slovak Republic*, UNCITRAL, Final Award (9 October 2009).
[84] *Salini Costruttori S.P.A. and Italstrade S.P.A.* v. *Hashemite Kingdom of Jordan*, ICSID, Decision on Jurisdiction (29 November 2004) Case No. ARB/02/13, 44 ILM 569, para. 119.
[85] *Plama* v. *Bulgaria*, fn. 14, para. 187.
[86] Ibid., para. 79.
[87] Ibid., para. 204.

an entirely different context'.[88] The tribunal concluded that '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 [States] intended to incorporate them'.[89]

Plama v. *Bulgaria*, however, is distinct from *Maffezini* v. *Spain* in one crucial aspect. In *Plama* v. *Bulgaria*, Bulgaria had never consented to the jurisdiction of the ICSID with respect to disputes between Bulgaria and investors from Cyprus. In *Maffezini* v. *Spain*, on the other hand, the question addressed by the tribunal was whether an investor had to comply with the domestic litigation requirement before the initiation of investment arbitration.

At this juncture, it is also important to illustrate how similarly worded MFN clauses, such as the ones at stake in *Maffezini* v. *Spain*, have been given competing interpretations. In *Daimler* v. *Argentina*, for instance, the question before the tribunal was whether the investor could rely on the MFN clause of the Argentina–Germany BIT to bypass the eighteen-month domestic court litigation requirement.

The tribunal in *Daimler* v. *Argentina* first observed that the eighteen-month domestic court requirement is a mandatory pre-requisite to commencing international arbitration. Subsequently, the tribunal interpreted the phrase 'treatment in [host State's] territory' in the MFN clause as a 'clearly expressed territorial limitation upon the scope of its MFN clauses' and held that '[States] did not intend for the Treaty's extra-territorial dispute resolution provisions to fall within the scope of those clauses'.[90] In other words, an international arbitration 'almost without exception takes place outside the territory of the Host State and [thus] per definition proceeds independently of any State control'.[91] As a result, *inter alia*, the majority held that the MFN clause in the BIT does not capture dispute settlement provisions.

In relation to the issue of circumvention of procedural pre-conditions to arbitration, consent is once again at stake. The query here is whether such conditions form part of the scope of consent to arbitral jurisdiction, or whether they are a matter of admissibility. There are two schools of thought on this approach. According to some, conditions to consent are a matter of admissibility and do not shape the limits of State consent to arbitration. For others,

[88] Ibid., para. 207.
[89] Ibid., para. 223.
[90] *Daimler Financial Services* AG v. *Argentine Republic*, ICSID, Award (22 August 2012) Case No. ARB/05/1, 51 ILM 1226, para. 231.
[91] Ibid., para. 228.

such 'conditions shaping the State's consent are considered jurisdictional prerequisites to the existence of a right to international arbitration' and as a result, 'an MFN clause will never be able to change the parameters of such consent to a mechanism of international arbitration'.[92]

10.4.3 *'Consent Shopping': Substituting Consent to Specific Arbitral Forums?*

Another issue that does not strictly fall in either the *Maffezini* v. *Spain* or the *Plama* v. *Bulgaria* factual and legal matrix, but concerns the role of the MFN clauses, is the importation of a different dispute settlement mechanism for arbitration from one BIT to another. At the heart of this issue is a fundamental enquiry: does an MFN clause of a base BIT permit an investor to invoke the third BIT to initiate arbitration before a dispute settlement mechanism that is either not contemplated or not applicable in the base treaty in the first place? In other words, does an MFN clause permit an investor to import from another treaty an arbitration forum that may be 'more favourable'? This is different from the mere importation of less stringent procedural conditions to arbitration as was at stake in *Maffezini* v. *Spain* or *Daimler* v. *Argentina*.

In *Garanti Koza* v. *Turkmenistan*, the arbitral tribunal for the first time allowed the investor to invoke the MFN clause and import the State's consent to a specific arbitral forum found in another BIT. The applicable base treaty, in this case, was between the United Kingdom (hereafter UK) and Turkmenistan. Article 8 of the BIT provided as follows:

> (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter … in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
> (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 [ICSID]; or (b) the Court of Arbitration of the [ICC]; or (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the [UNCITRAL].

[92] *Impregilo S.P.A.* v. *Argentine Republic (I)*, fn. 76, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011), para. 88; *Almasryia for Operating and Maintaining Touristic Construction Co L.L.C.* v. *State of Kuwait*, ICSID, Award on The Respondent's Application under Rule 41(5) Of The ICSID Arbitration Rules (1 November 2019) Case No. ARB/18/2, para. 39.

> If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall . . . be submitted to arbitration under [UNCITRAL].

As can be seen, the BIT required the investor and the State to agree on the specific arbitral forum – either ICSID, ICC or *ad hoc* international arbitration – to which the dispute would be referred. In the absence of an agreement, the default option would be to refer the dispute to UNCITRAL arbitration. Turkmenistan had not agreed to go to the ICSID arbitration but the investor argued that the MFN clause of the UK–Turkmenistan BIT should be used to permit the investor to import consent to ICSID arbitration provided by Turkmenistan in other BITs such as the Switzerland–Turkmenistan BIT.[93] The majority held that 'Article 8(1) establish[ed] unequivocally Turkmenistan's consent to submit disputes with UK investors to international arbitration. That consent satisfies the fundamental condition that the State must have consented to participate in arbitration before it may be required to do so.'[94] For the majority, Article 8(1) however, did not inform 'whether Turkmenistan has agreed to participate in ICSID Arbitration with a UK investor, because [it contained] no information about what kind of international arbitration Turkmenistan has consented to engage in'.[95] Article 8 (2) dealt with 'the arbitration systems that may be used if the conditions of Article 8(1) are met'.[96]

The majority subsequently turned to the analysis of the MFN clause of the BIT, which specifically provided for its applicability to the dispute settlement provisions of the BIT. It noted that 'Turkmenistan consented to international arbitration in Article 8(1)', and the BIT 'opened the door to a search by a UK investor for more favourable terms in treaties entered into by Turkmenistan with other states by choosing to make the MFN clause of the BIT applicable to the investor-state arbitration provisions'.[97] The majority found that since Turkmenistan had:

> provided investors of third States, specifically Switzerland, with an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration, there is no reason why Turkmenistan's consent to ICSID Arbitration in its BIT with Switzerland may not be relied upon by a U.K. investor, if the

[93] *Garanti Koza LLP* v. *Turkmenistan*, ICSID, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) Case No. ARB/11/20, para. 15.
[94] Ibid., para. 29.
[95] Ibid.
[96] Ibid., para. 25.
[97] Ibid., para. 78.

> provision for ICSID Arbitration or an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration provides treatment more favorable to the investor than the treatment provided by the base treaty.[98]

The majority in clear terms observed that 'the effect of the MFN clause is not to satisfy the requirements of Article 8(2), but to replace those requirements with a more favourable provision from another treaty, in this case Article 8(2) of the Switzerland-Turkmenistan BIT, which does not require a separate agreement between the Claimant and Turkmenistan in order to commence an ICSID Arbitration'.[99]

The dissenting arbitrator, however, explained that the majority focused solely on Article 8(1) and not on Article 8(2). In fact:

> Articles 8(1) and 8(2) are two sides of the same coin. The coin – Article 8 – encompasses the provisions governing consent to international arbitration under the U.K.-Turkmenistan BIT. One side of the coin – Article 8(1) – shows the general precondition(s) under which a foreign investor can initiate international arbitration against the host state; the other side – Article 8(2) – fixes the strict conditions under which the foreign investor can pursue one specific venue of international arbitration (e.g., ICSID arbitration) rather than another (e.g., UNCITRAL arbitration).[100]

On the interpretation of the MFN clause, the dissenting arbitrator explained that it 'cannot bypass the requirement of consent to ICSID arbitration'.[101] If MFN clauses are permitted to allow for:

> consent to ICSID through incorporation by reference in the frame of a treaty that does not allow this, [it] would have the effect of 'replac[ing] a procedure specifically negotiated by parties with an entirely different mechanism'[102] or 'system of arbitration'. It would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication.[103]

There are a few interrelated questions in such a case: *first*, whether consent can be imported from one treaty to another treaty? *Second*, what are the contours of State consent to arbitrate in the first place? *Third*, can the question

[98] Ibid., para. 79.
[99] Ibid., para. 77.
[100] *Garanti Koza* v. *Turkmenistan*, fn. 93, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013), para. 19.
[101] Ibid., para. 62.
[102] As noted in *Plama* v. *Bulgaria*, fn. 14, para. 209.
[103] *Garanti Koza* v. *Turkmenistan*, fn. 93, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013), para. 19.

of consent to arbitration be delinked from consent to a specific forum, for instance, the ICSID or the UNCITRAL?

For some, if consent is not established under the base treaty itself, it would be hardly reasonable to import consent from a treaty between a host State and a third State. This would mean if conditions to ICSID arbitration or UNCITRAL arbitration under the base treaty are not fulfilled, an MFN clause could not be invoked to have recourse to ICSID arbitration or UNCITRAL arbitration. This is so because such an approach would have the effect of substituting the negotiated conditions for an arbitral forum stipulated in the treaty and disregarding the consent States expressed in the treaty text.

For others, the question is if an MFN clause can be read together with a dispute resolution provision of another BIT between the host State and a third State to establish consent to arbitration. The focus is not on whether conditions of consent to a specific dispute settlement mechanism in this base treaty are fulfilled. Under this approach, it is considered that MFN clauses are not being used to import consent to arbitration but merely the favourable conditions to facilitate access to arbitration before a specific dispute settlement mechanism. Interestingly, the tribunal in *Maffezini* v. *Spain* had cautioned against the operation of the MFN clause in such a manner: '[I]f the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration.'[104]

At this juncture, an important distinction should be borne in mind. Consent to arbitration and consent to a specific dispute settlement are intrinsically linked. Consent to arbitration provides that a State has agreed to settle the dispute through arbitration, and defines the scope and limits of the jurisdiction of the arbitral tribunal. On the other hand, consent to a specific dispute settlement is consent to the jurisdiction of a specific dispute settlement mechanism such as arbitration under the ICSID Convention, or under UNCITRAL or any other arbitration rules. The question at stake is whether an MFN clause can have the effect of substituting consent to a specific dispute settlement mechanism with another dispute settlement mechanism.

Lastly, the importation of consent to a specific arbitral forum through an MFN clause raises the issue of the interplay of the *ejusdem generis* rule. In *Garanti Koza* v. *Turkmenistan*, the BIT in dispute stipulated 'non-consent' to ICSID arbitration in the absence of a mutual agreement between the parties. The subject matter of the dispute resolution clauses in such situations

[104] Ibid.

would be a conditional resort to arbitration before a specific dispute settlement mechanism. In light of this, should an MFN clause be used to invoke a dispute resolution clause that provides for automatic resort to ICSID arbitration or UNCITRAL arbitration? In this context, it is interesting to refer to the explanation of the *ejusdem generis* principle offered by the ILC, and especially in relation to the notion of substantial identity:

> [t]he effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.[105]

10.5 CONCLUSION

When courts and tribunals are faced with the issue of consent, which inevitably is also a question of jurisdiction, the task of judges and arbitrators can be primarily divided into two mutually inclusive parts. The first relates to determining the existence of consent and the second relates to ascertaining its scope. These conditions are a 'necessary prerequisite to the exercise of the international judicial function'.[106] When there is ambiguity or uncertainty about the existence and scope of State consent to arbitrate, there is a need to reflect on how a court or tribunal may exercise jurisdiction. Certainly, consent cannot be presumed in favour of jurisdiction. At the same time, a finding of lack of jurisdiction should not be considered as a defect in a treaty scheme that runs against its object and purpose of providing investment protection.[107]

The arbitral practice reveals that consenting to investment arbitration is a matter beyond a grant of authority to a court or tribunal to adjudicate the dispute between parties. What does a State mean when it gives consent to arbitration, or international adjudication generally? It is one thing to say that consent lays down the scope and limits of the jurisdiction of international

[105] United Nations, 'Draft Articles on Most-Favoured-Nation Clauses', Adopted by the International Law Commission at Its Thirtieth Session (20 July 1978), *Yearbook of the International Law Commission* (1978) Vol. II, Part Two, UN Doc. A/33/10, pp. 16–72, p. 30, paras. 10–11.

[106] *Garanti Koza LLP* v. *Turkmenistan*, fn. 93, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013), para. 5.

[107] *ICS Inspection and Control Services Limited* v. *The Argentine Republic (I)*, PCA, Award on Jurisdiction (10 February 2012) Case No. 2010-09, para. 281.

courts and tribunals. But it is a different task altogether to determine the contours of consent. The importation of consent to arbitration under a specific dispute settlement mechanism through an MFN clause, for instance, shows that the importance of the role of State consent is seemingly being reduced in investment arbitration. It could be said that such 'consent shopping' is taking us farther away from the notion of 'privity' between disputing parties as investors covered under the base BIT are being permitted to import conditions favourable to establishing State consent from a comparator BIT to which they are strangers. In this context, is there a risk of 'a marginalisation of consent in international arbitration'?[108] The various ways and approaches of expression of consent and different interpretative techniques and understandings significantly shape the meaning and contours of consent. It also offers an explanation for the current state of the case law – which is often inconsistent – in investment arbitration. The notion of consent appears to be an inherently indeterminate concept in investment arbitration. While States could engage in clear and more precise drafting of dispute settlement provisions in a treaty or national legislation, the meaning of consent *per se* and its limits would anyhow, it seems, remain susceptible to being given different meanings and interpretations.

[108] Brigitte Stern, 'Un coup d'arrêt à la marginalisation du consentement dans l'arbitrage international (A propos de l'arrêt de la Cour d'appel de Paris du 1er juin 1999)' (2000) 3 *Revue de l'arbitrage* 403–427, at 403: 'marginalisation du consentement dans l'arbitrage international' (my translation); Brigitte Stern, 'ICSID Arbitration and the State's Increasingly Remote Consent: A Propos the Maffezini Case', in Steve Charnovitz, Debra P. Steger and Peter Van den Bossche (eds.), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge: Cambridge University Press, 2005), pp. 246–260, pp. 259–260.