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DISPUTE SETTLEMENT

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

2.3 Consent to Arbitration



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NOTE

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OVERVIEW

This Module gives an overview of the most important legal questions that arise in connexion with consent to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention).

Arbitration is always based on a consent agreement between the parties. But the fact that ICSID arbitration is, by necessity, between a host State and a foreign investor leads to some peculiarities in the giving of consent. The most conspicuous peculiarity is that consent agreements need not be based on a document that is signed by both parties. Rather, the host State may make a general offer to foreign investors or to certain categories of foreign investors to submit to arbitration. This offer may be contained in legislation or in a treaty to which the host State is party. To perfect a consent agreement, the investor has to accept this offer in writing. This acceptance can be quite informal and may even be expressed through the act of instituting proceedings.

Consent to ICSID arbitration, once it is perfected, carries a number of important consequences. These include the irrevocability of consent, the exclusion of other remedies and the prohibition of diplomatic protection. Therefore, the time of consent must be considered carefully.

Consent agreements may be subject to limitations and conditions. Their interpretation can at times raise considerable difficulties.

In some countries, it is not the federal government but a smaller entity or a public company that deals with foreign investors. Therefore, the Convention opens the possibility for a constituent subdivision or agency of the host State to become a party to ICSID arbitration. But host States retain strict control over consent by such entities: the constituent subdivision or agency must have been designated to the Centre and its consent must have been approved by the State to which it belongs.

OBJECTIVES

Upon completion of this Module the reader should be able to:

- Understand the significance of consent to jurisdiction for ICSID's jurisdiction.
- Identify the different forms in which consent to jurisdiction may be given.
- Appreciate the nature of an offer of consent contained in legislation or a treaty.
- Describe the ways in which such an offer may be accepted.
- Understand the principle of the non-revocability of consent.
- Determine the time at which consent was given.
- Define the limitations and conditions that may be attached to consent.
- Discuss the methods whereby consent is interpreted.

INTRODUCTION

Arbitration agreements

Arbitration is always based on an agreement between the parties. In the case of ICSID, there must be an agreement to arbitrate between the host State and the foreign investor. Art. 25, first sentence, of the ICSID Convention provides to this effect:

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.

The parties giving consent must be a State party to the ICSID Convention (or a designated constituent subdivision or agency) and a national of a State party to the ICSID Convention (see Module 2.6). In addition, there must be a legal dispute arising directly out of an investment (see Module 2.7).

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.

Requirements of form

Under the Convention, consent must be in writing. But there is no particular form in which this must be done. Consent in writing will normally be communicated between the parties but there is no need to notify the Centre at the time of consent. 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 arbitration is made.

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. The Claimant argued that consent by the Respondent could be construed from the institution of proceedings by the Attorney-General of St. Kitts and Nevis against the Claimants 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. 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.¹

¹ *Cable TV v. St. Kitts and Nevis, Award, 13 January 1997, 13 ICSID Review–Foreign Investment Law Journal 328, 354-361 (1998).*

**Three different ways
of giving consent:
Direct agreement**

In practice, consent is given in one of three ways. The most obvious way is a consent clause in a direct agreement between the parties. Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. ICSID has prepared and published a set of Model Clauses to facilitate the drafting of these contracts.²

National legislation

Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings.

Treaties

The third method to give consent to ICSID jurisdiction is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty. The same method is employed by a number of regional multilateral treaties such as the NAFTA and the Energy Charter Treaty. Attempts to create a global Multilateral Agreement on Investment that would include a similar dispute settlement clause have not come to fruition. Offers of consent contained in treaties must also be perfected by an acceptance on the part of the investor.

Summary:

- **ICSID arbitration is always based on an agreement between the parties to the arbitration, i.e. the host State and the foreign investor.**
- **No particular formalities are required for the parties' consent to arbitration, except that it must be in writing and that it must be explicit.**
- **In practice, consent to ICSID arbitration is given in one of three ways:**
 1. **A clause in a direct agreement between the host State**

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