RATIONE VOLUNTATIS – INTERPRETATION OF CONSENT IN INVESTMENT ARBITRATION

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Abstract: Some questions of permission of investment disputes are considered in the article. In particular, the author analyses perspective of the arbitrability of investment disputes. At the same time in the article the theory and practice of the specified question is considered. In the conclusion of the article, the author gives his visions on the studied perspective.

Key words: arbitration, investment, investment dispute resolution, ICSID.

RATIONE VOLUNTATIS - ИНТЕРПРЕТАЦИЯ СОГЛАСИЯ В ИНВЕСТИЦИОННОМ АРБИТРАЖЕ

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Аннотация: В статье рассмотрены некоторые вопросы разрешения инвестиционных споров. В частности, автор раскрывает проблематику арбитрабельности инвестиционного спора. При этом в статье рассматривается теория и практика указанного вопроса. В заключении автор дает свои выводу по исследованной проблематике.

Ключевые слова: арбитраж, инвестиции, разрешение инвестиционных споров, МЦУИС.

RATIONE VOLUNTATIS – ИНВЕСТИЦИОН АРБИТРАЖДА ТАРАФЛАР ЎЗАРО РОЗИЛИГИГА ЭРИШИШ

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Аннотация: Мақолада инвестиция низоларини ҳал этишнинг айрим масалалари кўриб чиқилган. Жумладан муаллиф инвестиция низоларининг халкаро арбитражга тааллуқлилиги масаласини, мазкур масаланинг назарий ва амалий жиҳатларини таҳлил қилган. Хулосада муаллиф кўриб чиқилган муаммолар бўйича узининг таклифларини илгари сурган.

Калит сўзлар: Арбитраж. Инвестиция. Инвестиция низоларини хал этиш.

Increasing but yet still insufficient recognition is being accorded to the analysis of *ratione voluntatis* – or of consent to

arbitrate – which is the fundamental requirement for a dispute to be arbitrable as such. In the context of ICSID, which eclipses other arbitral tribunals in the field of investor-state arbitrations, it does not confer its compulsory jurisdiction over disputes with its Member States by a mere ratification of the ICSID Convention. This article aims to look at the pre-requisite of *ratione voluntatis* within the framework of article 25 of the ICSID Convention.

Defining ratione voluntatis

Consensual nature of ICSID's jurisdiction is a backbone of its Convention and of arbitration in general. State participation in Washington Convention carries neither an obligation nor even an expectation as regards that state's consent to arbitrate under the auspices of the Centre. Notably, it is merely to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the ICSID Convention'. In other words, the Convention leaves freedom to its Contracting States as to ultimate decision whether or not to give consent to ICSID jurisdiction. The Report of the Executive Directors summarizes the foregoing in the following way:

> '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 ICSID machinery. As such, ratification does not constitute an

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> 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.'[1]

Requirement of form

Article 25 of the ICSID Convention provides that ICSID extends its jurisdiction over dispute, which the parties to this dispute '*consent in writing to submit to the Centre*', and such consent must be obtained from both or all parties. This is referred to as the only formal requirement for consent under the ICSID Convention.[2]

Remarkably, consent in writing 'must be explicit and not merely construed'.[3] In *Cable TV v St. Kitts and Nevis*, the Government of Nevis, the executive entity of the Nevis Island Administration and a constituent element of the Federation of St. Christopher and Nevis (hereinafter, the Federation),

[1] C. Schreuer, The ICSID Convention: A Commentary, Cambridge, United Kingdom, para 243
[2] C. Schreuer, The ICSID Convention: A Commentary, Cambridge, United Kingdom, para 376
[3] UNCTAD Handbook, available at http://unctad.org/en/docs/edmmisc232add2_en.pdf, p. 5

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entered into the agreement dated 18 September 1986 (hereinafter, the Agreement) with Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. (hereinafter, Cable), granting the latter the exclusive right to provide cable television services on the island of Nevis. Clause 16 of the Agreement read:

> 'any disputes relating to this agreement, its performance or nonperformance shall be referred to arbitration under the rules of procedure for arbitration proceedings (hereinafter the 'Rules') in effect as of February 1, 1981 adopted under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States'[4]

The Agreement also permitted Cable to increase charges for its services, but despite Cable's numerous submissions addressed to the Federation to increase the rates, the latter had consistency refused the same. This led to inability of Cable to recoup its initial investment. On 25 October 1995, Cable submitted its request for ICSID arbitration.

The Federation had therefore been regarded by Claimants in its Request as the other party to arbitration as well as the Contracting State for the purposes of article 25 of the ICSID Convention. Cable Television of Nevis Limited and Cable Television of Nevis Holdings Ltd. – or Cable, the Claimants, – were formed under Companies Act of the Federation and were 99% owned by nationals of the United States of America. As per Agreement, the Federation and Cable agreed to treat the latter as 'National of a Contracting State'

[4] *Cable TV v St. Kitts and Nevis,* ICSID Reports, vol. 5, p. 107

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under article 25 (2b) of the ICSID Convention.[5] The Claimants also argued that institution of the court proceeding by the Attorney General of the Federation to obtain injunction to restrain the Claimants from raising its rates for cable television services on Nevis *prior to the completion of ICSID arbitration* serves as a confirmation of Federation's consent to ICSID Arbitration. In response to Claimants' motion, the Respondent argued that the Tribunal was not competent to substitute the Federation for Nevis Island Administration. The Federation submitted that Nevis Island Administration was party to the Agreement with Cable and was therefore the proper party to arbitration.

The Request for arbitration was ultimately dismissed for lack of jurisdiction. It held that the proper party to the Agreement was Nevis Island Administration, Federation's constituent subdivision and not the Federation itself, and mere institution of proceedings by the Attorney General for injunction could not be construed as Federation's consent to arbitrate under ICSID.

3.1.1.2. Consent of designated constituent subdivision of agency

As per paragraph (3) of article 25, '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.'

Nevis Island Administration (hereinafter, NIA) in *Cable TV v St. Kitts and Nevis* was considered to be the constituent subdivision of the Federation for the purposes of article 25 (3). Pursuant to the Constitution of the Federation, the NIA had the

[5] *Cable TV v St. Kitts and Nevis,* ICSID Reports, vol. 5, pp. 106-107

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power to enter into the Agreement on its own and independently of the Federation. The Tribunal held in this context:

> 'The Consent to ICSID arbitration contained in Clause 16 of the Agreement can only take effect in the present case on the matter of jurisdiction of ICSID if the Contracting State, i.e. the Federation, is a party to the dispute, or, if it is not a party and the relevant party to the dispute *is a constituent subdivision or agency* of the Contracting State, then that relevant party must have been designated as such to ICSID by the Federation. In addition, the *consent by a constituent subdivision or agency of a contracting state requires the approval of that state* unless that state notifies ICSID that no such approval is required. No documentation has been furnished to the Tribunal evidencing that NIA or the Government of Nevis has been so designated to ICSID by the Federation.'[6]

Indeed, there are numerous instances wherein public companies or other similar entities which exercise public functions, but are legally distinct from the State, enter into investment agreements. In some States, these may also be not the central government, but a province or a municipality,

[6] *Cable TV v St. Kitts and Nevis,* ICSID Reports, vol. 5, p. 119

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which enters into agreements with investors. After lengthy discussions and debates as to what constitutes 'constituent subdivision', the drafters of the ICSID Convention intended to create maximum flexibility and include 'any territorial entity below the level of the State itself. The term 'agency' was agreed to be read 'not in structural terms but functionally' and what matters most is whether it performs public functions on behalf of the Contracting State or one of its constituent subdivisions.[7] It is also noteworthy that the very fact of designation by the Contracting State would entail a very strong presumption that the entity in question is indeed a 'constituent subdivision or agency'.

3.1.2. Consent through separate instruments

In this regard, in *Amco v Indonesia* the investor had applied for establishing a locally incorporated entity to carry out investment activities to the Indonesian Foreign Investment Board. The application, inter alia, contained a clause, which effectively enabled dispute resolution through ICSID. When a dispute arose, investor referred to ICSID, which upheld the application. The government of Indonesia accepted the existence of the consent in principle at the same time denying the applicability of that consent to the dispute and to the subject matter, the Tribunal held:

> '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

[7] Schreuer, supra note, p. 151

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> interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them.'

Any investment arbitration dispute is grounded on the provisions of an investment treaty, an investment contract with a dispute resolution clause which refers to ICSID or the provisions of the foreign investment legislation of the host State.

3.1.3. Consent through state legislation

The possibility of consenting to ICSID arbitration through host state legislation is now becoming an accepted practice. Indeed, a State may commit to refer a dispute to ICSID in its foreign investment code or the law for the promotion of foreign investment.[8] Pate argues that while some foreign investment laws do express unequivocal consent to ICSID arbitration, some are not clear and are not inclusive of all types of disputes. According to his analysis, it is commonplace for a host state to offer investors a number of options as to dispute resolution – either ICSID arbitration, or arbitration under the aegis of the International Chamber of Commerce, or through separate agreement with state, etc. Pate classifies these foreign investment laws into three categories. The first category includes foreign investment laws, which contain express or unequivocal consent to settle disputes under ICSID or ICC. These are considered unilateral offers, which require only acceptance by investors. The second category comprises foreign investment laws, which refer to the *possibility* of

[8] See Schreuer, *supra*, p. 199

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referring to ICSID or ICC, which allows foreign investors to choose among the options. It is also commonplace that these laws include dispute resolution methods such as conciliation/mediation mechanisms or national courts of the host state. The third category includes those foreign investment laws, which require an express agreement with a foreign investor as to international arbitration.

Country	Category	Unilateral offer	Condition
Albania	1	Yes	Only refers to expropriation
Kazakhstan	2	No	
Kyrgyzstan	1	Yes	3 months 'cooling off period'
Armenia	3	No	
Egypt	2	No	
Namibia	2	Yes	Investor must specify in the certificate
Ivory Coast	2	Yes	Investor must ask for it in license
Mauritania	2	Yes	Investor must ask for it in license
Nigeria	2	Yes	Only when conciliation is exhausted
Uganda	2	No	
Zaire	2	Yes	Must consent in the request for admission
Tanzania	3	No	
Ivory Coast	1	Yes	Investor must ask for it in license
Tunisia	3	No	
Botswana	1	Yes	Consent within 1 year
Ghana	2	Yes	Only when conciliation is exhausted
Central African Republic	2	Yes	Investor must ask for it in license
Ethiopia	2	No	
Mexico	3	No	But highly liberal under NAFTA
El Salvador	2	Yes	
Peru	2	No	
Venezuela	2	Yes	

Chart 1. Classification of National Investment Legislation. *Source:* T. Pate, 'The past, present and future of the arbitral clause in foreign investment legislation'[9]

Category 1 – Unilateral offer is given; Category 2 – list of dispute resolution options is given to the investor; Category 3 – only by agreement

For example, article 8 of the 1993 Albanian Law on Foreign Investment reads:

> 'If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal in the Republic of Albania in accordance with its laws. In addition , 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, then 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 the settlement of Investment Disputes established by the Convention on the Settlement of

[9] T. Pate, The Past, Present and Future of the Arbitral Clause in Foreign Investment Legislation: In Pursuit of "The Balance", available at http://www.desolapate.com/publicaciones/The%20Past%20Present%20and%20Future%20of%20the%20Arbitral%20Caluse%20in%20Foreign%20Investment%20Legislation,%20In%20Pursuit%20of%20The%20Balance.pdf

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> Investment Dispute between States and Nationals of Other States, done at Washington, March 18, 1965.'

Tunisian foreign investment legislation has a dynamic history of repeals and changes. The now rescinded version of the Tunisian Law Relative to the Code of Investments stipulated:

> 'Any dispute arising between the foreign investor and the Government either from the investor side or from a measure taken by the Government against the investor, shall be settled in accordance with the procedure of arbitration and conciliation.
> These procedures are those foreseen: either in the framework of the bilateral agreements relative to the protection of the investments between Tunisia and the country of nationality of the investor, or the framework of the International Convention for the settlement of disputes between the State and Nationals of Other States, a convention ratified by law no. 66-33 of May 3, 1966.'

It is noteworthy that in *Gaith Pharaon v. Republic of Tunisia* the Claimant referred to the foregoing provision as a basis for ICSID jurisdiction. The case was eventually settled, and Tunisia's objections to ICSID jurisdiction based on the aforementioned article were never addressed. The Tunisian government however undertook measures to change the then

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existing legislation, and as a result the Industrial Promotion Agency was established and new foreign investment laws were adopted. The current Law Promulgating the Investment Incentives Code provides for dispute resolution in local courts of Tunisia:

> 'Tunisian courts are competent to investigate any disputes between foreign investors and the Tunisian State unless otherwise agreed upon in an arbitration clause or a clause permitting one of the parties to appeal to an arbitration procedure.'

Hence, the aforementioned provision permits arbitration provided there is an explicit agreement thereto.

In contrast, the 1970 Settlement of Investment Disputes Act of Botswana was alluded to by one commentator as containing an implicit and 'potential unilateral consent in writing to submit disputes to ICSID.' The Section 11 of the law reads:

> 'Any national of any other State which is party to the [ICSID] Convention may submit to the Centre, for settlement by conciliation or arbitration in pursuance of the Convention, any legal dispute with 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

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> to the like submission to the Centre by Botswana of any such legal dispute'.

Furthermore, falling under the rubric of category 3 countries, article 24 of the 1994 Law of the Republic of Armenia on Foreign Investments reads:

> 'Any disputes on foreign investments, which may arise between the foreign investor and the State shall be considered by the courts of the Republic of Armenia based on the legislation of the Republic of Armenia. Other disputes where the Republic of Armenia is not involved as a side, shall be considered, based on the legislation of the Republic of Armenia, by the courts of the Republic of Armenia or other bodies resolving economic disputes, unless it is otherwise specified by international contracts or preliminary agreement of the sides (on the basis of foundation documents, economic agreements, etc.)'

In other words, the foregoing provision makes the dispute resolution regime quite restrictive. Undoubtedly, the dispute resolution clause does not contain a unilateral offer to arbitrate, but emphasize the overarching role of the Armenia courts in settlement of disputes between the state and foreign investors unless otherwise provided in the express agreement between the parties.

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This is also confirmed by the jurisprudence of the Tribunal in *Tradex v. Albania*[10], *SPP v. Egypt,*[11] *Manufacturers Hanover Trust Co. v. Egypt and General Authority for Investment and Free Zones*. The most prominent case on this issue was *SPP v. Egypt,* where a central issue on jurisdiction was the discussion of the legislative provision of Egypt's Law Concerning the Investment of Arab and Foreign Funds and the Free Zone that stated:

> "Investment disputes in respect of the implementation of the provision 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."[12] (emphasis added)

The Tribunal construed the foregoing provision as a unilateral promise that was afterwards successfully invoked by the investor. It held:

> 'On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law 43 establishes a

[10] *Tradex v. Albania, Decision on Jurisdiction, 24 December 1996*, 14 *ICSID Review – Foreign Investment Law Journal* (1999) 161, 187
[11] *SPP v. Egypt,* Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, 114/5
[12] *SPP v. Egypt,* Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 112, 114/5. 16 ILM (1977) 1476, 1479

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> 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 agreement upon method of dispute settlement and no applicable bilateral treaty'[13]

This reasoning is stated to be rooted in common law concepts of offer and acceptance and is firmly entrenched on common law notions of arbitration.[14] However, another point in this vein is that not all references in host state legislation amount to consent to compulsory arbitral jurisdiction. The parallel is again drawn to the common law approach that differentiates between a definite offer and merely an invitation to treat. In this regard, Egypt argued that the use of expressions "within the framework of the Convention" and "where it applies" implies a need for separate consent to ICSID jurisdiction. In fact, Egypt did not regard its legislation as constituting an offer. It manifested that simple reference to the Convention was insufficient, and even amended the legislation immediately after the case.[15]

In *SPP v. Egypt* ICSID tribunal rejected the arguments of Egypt and took the view that the requirement *ratione voluntatis* has been met grounding its decision on general principles of statutory and treaty interpretation,[16] historical

[13] *SPP v Egypt,* Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 161
[14] See also M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press, Third Edition, p. 210
[15] Ibid
[16] *SPP v. Egypt,* Decision on Jurisdiction I, 3 ICSID Reports 142/3

considerations,[17] a decree implementing the original legislation[18] and principles of international law applicable to unilateral declarations".[19]

Conclusion

The position of ICSID on the method of interpretation of consent is not entirely uniform, [20] and the foregoing analysis attempted to elaborate one of the fundamental criteria of arbitrability of disputes under ICSID Convention, which is ratione voluntatis. The notion of *ratione voluntatis* needs to be developed further, however, the main conclusion stemming from the current analysis is that unconventional and sophisticated claims need to be elaborated *within the context of surrounding circumstances*, hence, extending the reasoning beyond its *prima facie* interpretation.

[17] Ibid at 158
[18] Ibid at 150/1
[19] Ibid at 142/3
[20] Schreuer, *supra*, p. 248

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1. C. Schreuer, The ICSID Convention: A Commentary, Cambridge, United Kingdom, para 243

2. UNCTAD Handbook, available at http://unctad.org/en/docs/edmmisc232add2_en.pdf, p. 5

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5. Tradex v. Albania, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review – Foreign Investment Law Journal (1999) 161, 187

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