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SOURCES OF 'CONSENT'IN INTERNATIONAL INVESTMENT ARBITRATION- UNDERSTANDING THE DIFFERENCES IN MANNER AND CONTENT

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ABSTRACT

Consent is the cornerstone in arbitration. The manner and content of consent, are of immense importance in terms of the effects they ingenerate. Inadequacies in consent might lead to concerns in terms of admissibility, jurisdiction, scope and enforcement. In case of Investment arbitration, consent can either originate from a contract, or a domestic statute, or an Investment treaty. Content of consent could vary from case to case, in terms of nature, scope, form, or the conditions entailing it. Consent to arbitration can hence vary substantially in manner, and inconsequentially, in content- nature, procedures, conditions etc. The essay explains how consent can differ in terms of content and manner, in investment arbitration cases. The aim is to draw distinction between consent by different modes in terms of various facets of content- the nature of consent, procedure through which it is perfected, and the conditions associated with it. It also ventures briefly into the indeterminate questions as to contours of consent, and analyses varied interpretations based on legal contexts and academic perspectives. Since the implications of the mode of consent, or the content of consent, do not vary substantially with the type of arbitration sought- ICSID, Non- ICSID, or ICSID additional facility, the essay precludes drawing distinction as such.

Keywords: Arbitration, Investment Arbitration, Consent, Jurisdiction, Admissibility, ICSID, Enforcement.

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Consent is the cornerstone in arbitration.[2] The manner and content of consent, are of immense importance in terms of the effects they ingenerate. Inadequacies in consent might lead to concerns in terms of admissibility, jurisdiction, scope and enforcement.[3] In case of Investment arbitration, consent can either originate from a contract, or a domestic statute, or an Investment treaty.[4]Content of consent could vary from case to case, in terms of nature, scope, form, or the conditions entailing it. In fact, determination of the meaning and contours of consent often depends on the interpretative techniques – narrow or broad, adopted by the forum.[5] However, if the question is about the general distinction between 'consent by contract' and 'consent by law/treaty', it lies in the fact that the road to obtain final consent tends to be a relatively a complex multi-step process in treaty or statute based cases, as compared to contract based investment arbitration.

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1. Nature of consent: Arbitration with Privity of vs. Arbitration without Privity

Consent via contracts differ from all other modes in one way predominantly- the existence of a direct agreement. A host state and an investor can agree to resolve both future disputes and existing disputes by virtue of an agreement.[6] Generally speaking, consent expressed through contract is not required to be perfected.[7] Nevertheless, there are cases where consent appears to have formed in a multi-step process through successive instruments or communications. That being said, 'consent by investment contract' works predominantly the same way as the

[2]K Youssef, *Consent in context: Fulfilling the promise of international arbitration, Multiparty, Multi-Contract, and Non-Contract Arbitration*, (Thomson Reuters 2011); AM Steingruber, *Consent in international arbitration*, (OUP 2012).
[3]J Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration', (1997) 14(2) Journal of International Arbitration 6.
[4]E Obadia, 'ICSID, Investment Treaties and Arbitration: Current and Emerging Issues', in *Investment Treaties and Arbitration*, (2002) 19 ASA Special Series 69.
[5]*Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47.
[6]SL Brekoulakis, *Third Parties in International Commercial Arbitration*, (OUP, Oxford 2010) para 1.11.
[7]T Várady, JJ Barceló III, and AT von Mehren, *International Commercial Arbitration – A transnational Perspective*, (3rd edn, Thomson West 2006) 85.

traditional commercial arbitration, and upholds the traditional 'privity of contract' rule.[8]On the other hand, Arbitrations based on consent from a domestic law, or a bilateral (or multilateral) investment treaty, align differently from the traditional contract based arbitrations.[9] They are 'arbitrations without privity'.[10] They do not arise out of a legal relationship between negotiating parties, but rather bind prospective investors, who are third parties. Interestingly, this outstanding feature marks the stark difference in the content of such consent from contractual consent, which strictly upholds the principle of 'privity to contract.'

Another significant difference between contractual and treaty based arbitration follows from the first point. Unlike the former category, the latter ones operate in a more elaborate multi-stage process requiring separate set of actions from either of the parties to establish consent.[11] To explain, in treaty based or legislation based consent, states only extend open standing offers to arbitrate, and await acceptance by the investing parties.[12] It is only after the acceptance by the investors that the consent is perfected and a binding arbitration agreement is created between the parties.[13] Few challenge this view arguing that such consent is more than a mere offer, a complete action not requiring any supplementary action from the counter party. In fact, contractual character of state consent in treaties has been recognised by several arbitral decisions.[14] However, the understanding that the state could readily withdraw its consent before the stage of counter party involvement, I argue, vouches for the unilateral and incomplete nature of consent in legislation or treaty based consent.[15]

2. General tendencies: Unequivoval Consent in contract vs. Conditions to consent in treaties and statues

Arbitration clauses in contracts are predominantly absolute, and rarely entail conditions to consent. However, the situation with BITs is slightly different. Several BITs simply promise

[8] JDM Lew, LA Mistelis, and SM Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) para 6-1.
[9]*Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998.
[10] Jan Paulsson, Arbitration Without Privity, 10 ICSID Rev. 232 (1995).
[11] C. Schreuer, Consent to Arbitration, Transnational-Dispute Management (2007) 5.
[12]JDM Lew, LA Mistelis, and SM Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) para 6-1
[13]See United Nations Conference on Trade and Development (UNCTAD), Dispute Settlement, International Centre for Settlement of Investment Disputes, Module prepared by C Schreuer, (United Nations 2003) 7.
[14]*Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, paras 32.
[15]According to Art 25(1) of the ICSID Convention: "When the parties have given their consent, no party may withdraw its consent unilaterally."

future consent to arbitration. Such agreement is not equivalent to consent to arbitrate.[16] Similarly, certain BITs provide a choice between various dispute resolution remedies (litigation, negotiation, ICC arbitration, etc.), and a choice has to be made by the parties. Both these situations call for a separate arbitration agreements formed thereafter. Certain BITs entail writing requirement as regards the communication of consent by the investor.[17]

Additionally, BITs tend to require several preconditions to be satisfied, in order for consent to be perfected.[18]Most common of such conditions are 'exhaustion of local remedies,[19] 'fork-in-the-road provisions',[20]and 'lapse of time periods' etc.[21] First category concerns the provisions which impose the requirement of exhausting other available remedies (domestic procedures, negotiations etc.) in order to be able to avail the remedy of arbitration.[22]Time related conditions require attempts of resolving disputes in courts for a certain time period, upon the expiry of which arbitration will be open as a choice, if the dispute still persists.[23] This condition is, unlike popular belief, is not an application of the local remedies condition.[24] Contrarily, Fork in the road provisions operate in such manner that availing other remedies results in the loss of having arbitration as a choice to resolve the dispute[25] It is worth mentioning that *the Vivendi case*,[26] and many other decisions upheld narrow application of the provision - that the restriction only applies to those situations where a party has already brought the same dispute to the domestic courts.[27] Nevertheless, certain degree of

[16]Art 10(2) of the Japan-Pakistan BIT of 1998

[17]*Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at 43.

[18]The Argentina-Germany BIT provides in Article 10(2): "any investment dispute shall first be submitted to the host State's competent tribunals.". SeeN Blackaby, 'Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)', in LA Mistelis and JDM Lew (eds), *Pervasive Problems in International Arbitration*, (Kluwer Law International 2005), para 11-12.

[19]Eg Article 1121 of the NAFTA or Article 26(2) of the US Model BIT (2012).

[20]Eg Article 9(2) of the Chinese Model BIT (2003).

[21]Eg Article 8(1) of the UK Model BIT (2005), Alternative version.

[22] "Two countries, Israel and Guatemala, have given notifications to ICSID that they will require local remedies to be exhausted. But Israel subsequently withdrew that notification." See. C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', 4 The Law and Practice of International Courts and Tribunals 1 (2005) at 3–5

[23] C.Schreuer , Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', 4 The Law and Practice of International Courts and Tribunals 1 (2005) at 3–5

[24]*Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, para 28; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), para 104; *Gas Natural SDG, SA v Argentina*, Decision on Jurisdiction, 17 June 2005, para 30.

[25] Article VII, Argentina US BIT.

[26]*SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340 at paras 38, 42, 55

[27] Occi*dental v Ecuador*, Award, 1 July 2004 at paras 38–63; *LG&E v Argentina*, Decision on Jurisdiction, 30 April 2004, 11 ICSID Reports 414 at paras 75, 76; *Champion Trading v Egypt*, Decision on Jurisdiction, 21 October 2003, 10 ICSID Reports 400 at para 3.4.3.; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006, paras 155–7.

ambiguity still persists.[28] It is worth noting that, in a similar fashion, statues may require conditions to consent in terms of certain procedural obligations like express acceptance by the counter party, compliance with the time-limits etc. In some cases, consent could only be finalised (perfected), once an investor secures the authorisation for his investment.[29]

The aim of mentioning the above observations is to emphasize the slightly more complex nature of consent drawn from treaties, as against the relatively simpler contract based consent.While all the above observations are common to both consent by treaty and consent by law as against consent by contract, there are certain differences specific to each of them, which are set out in the subsequent sections.

3. The application of MFN clause in BITs- A distinct feature

A significant feature which distinguishes BITs from other modes is the importation of consent by virtue of Most Favoured Nation clauses.[30] MFN is a substantive rule which grants to the entitled party, rights accrued from another treaty with the third party.[31] The interpretation of MFN clauses in investment treaties has significant implications for State consent, since it could be invoked to establish consent to arbitration, when a BIT is not adequate to do so.[32] Some hold the view that consent cannot be imported from one treaty to another, and therefore, an MFN clause cannot be invoked to have recourse if the conditions of the base treaty are not met.[33] I appreciate this approach since it emphasizes the importance of respecting party negotiated conditions under the treaty. Nevertheless, investment arbitrations are 'arbitrations without privity' for a reason, and MFN clauses do not unnecessarily adduce consent where it is absent, but rather facilitate equitable and investor friendly dispute settlement systems.[34] That being said, MFN clauses are to be interpreted with due caution, being mindful of the treaty provisions and the context of the cases.[35]

4. Certainity in contract vs. Generality in law- An understated observation

[28] *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178 at para 71;
[29] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3
[30] *National Grid PCL v Argentina*, Decision on Jurisdiction, 20 June 2006, paras 80–93; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina and AWG Group Ltd v Argentina*, Decision on Jurisdiction, 3 August 2006, paras 52–68.
[31] C. Schreuer, Loretta Milintoppi, August Reinisch and Athony Sinclair, The ICSID Convention: A Commentary 2d ed. (Cambridge University Press: 2009), 1280.
[32] *Maffezini v Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396, paras 54–64; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), paras 32–110;
[33] See *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005) at para 224.
[34] Maffezini, para 63.
[35] *Siemens AG v Argentine Republic*, ICSID Case ARB/02/8, Decision on Jurisdiction, 3 August 2004.

The following observation about the difference between consent by contract and consent by statute, I believe, is worth mentioning. Unlike, contracts, statutory provisions establishing state consent tend to not be ambiguous and general in application, typically to all foreign investors or to certain broad categories. In the infamous *Pyramids case,*[36] wherein consent was based on Article 8 of Egyptian Law No. 43 of 1974, the tribunal held that "a separate agreement of consent to arbitration is not required",[37] and upheld arbitral proceedings solely based on national law. The case law is considered a tipping point to investment arbitrations based on national law. An observation in this regard is that the increasing prominence of BITs in the realm of investment relationships is tending to undermine the relevance of arbitrations solely based on national law. However, recognition of the latter category to be as functional as the former is an important indication of a pro-investor framework.

Conclusion

Consent to arbitration can hence vary substantially in manner, and inconsequentially, in content- nature, procedures, conditions etc. In such context, indeterminate questions as to contours of consent, are inevitable.[38] As noted from the above observations, most of the questions do not have hard and fast answers, and await interpretations based on current legal position and the context of the case. Different types of interpretation generate different answers and understandings. One potential solution to this problem is to use more precise language when drafting dispute settlement provisions in a treaty or national legislation to ensure clarity and certainty.

[36]*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3
[37] Ibid.
[38]United Nations Conference on Trade and Development (UNCTAD), Dispute Settlement, International Centre for Settlement of Investment Disputes, Module prepared by C Schreuer, (United Nations 2003) 7.