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Consent in Investment Arbitration: A Few Remarks

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When it comes to consent to the jurisdiction of international courts and tribunals, its understanding and interpretation raise a fundamental question – do we really know what it means? In this blog post, it will be demonstrated that there are a number of uncertainties around the notion of consent in investment arbitration. The theoretical underpinnings of consent will be first briefly introduced. The blogpost will then highlight that the different means of expression of consent of a State to arbitration leads to different interpretative issues in ascertaining the contours of consent. To illustrate the varied techniques deployed in interpreting consent, possibly leading to the expansion of arbitral jurisdiction, the blogpost will then analyse the issue of State consent in the context of most-favoured nation (MFN) clauses as a case study.

Before turning to the issue of expression and interpretation of consent, it is necessary to point out that many arbitral tribunals have considered that the agreement to arbitrate between the parties should be "clear and unambiguous". A few tribunals have embarked on the debate concerning the expansive or restrictive interpretation of consent. However, as rightly observed by Judge Higgins, "there is no rule that requires a restrictive interpretation of compromissory clauses." For international courts and tribunals, there should be "no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses".

Theoretical underpinnings around the notion of consent

Consent to arbitration between a host State and an investor in a bilateral investment treaty (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 is considered by some as a unilateral act by a 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". According to this theory, consent of a State in a national legislation or a treaty is merely an offer to arbitration. When an investor accepts the State's open offer, a valid and binding agreement is created between the parties.

Expression of consent and its interpretation

In investment arbitration, particularly under the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (ICSID) regime, States enjoy flexibility regarding the 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* i.e., 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.

Before the 1990s, investment arbitrations arising under contracts between States and investors dominated the workload of the **International Centre for Settlement of Investment Disputes** (Centre or ICSID). Although less predominant, investment arbitration under contracts is still present. 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. State contracts differ from national legislations on foreign investment and investment treaties in one particular aspect i.e., there is a direct agreement to arbitrate between the State and investor as contracting parties.

National legislation may be another basis of a State's consent to arbitration. However, in practice, reference to investment arbitration under national law may not always be clear or mandatory. Article 8 of Egyptian Law No. 43 of 1974 is a case in point. It provided various fora, including the ICSID convention, to settle investment disputes. This provision was the basis of consent in the *SPP v Egypt*, famously referred to as the *Pyramids* case. The tribunal in this case observed that "in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the [ICSID'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." The Tribunal inter alia also held that the text of Article 8 "does not import into a treaty additional requirements which the treaty does not contain." Ultimately, the tribunal held that a separate agreement of consent to arbitration is not required under the Egyptian Law, which was a contentious issue between the parties. This case has been said to be the "tipping point" in the history of the ICSID as it opened the door to investment arbitration based on national legislations, and on investment treaties which are explored below. 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.

Since the late 1950s, the international legal order has witnessed the adoption of many BITs. As a result, the most frequent contemporary means to express consent, in practice, has been through BITs, or multilateral treaties such as the **Energy Charter Treaty** (ECT). Unlike national legislations where 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].

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". On the other hand, there are clauses such as "all disputes concerning investments" or

"any legal dispute concerning investments", which have given rise to various interpretations.

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 of State consent. It demonstrates 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 did 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.

Do MFN clauses give a new flavour to a state's consent to arbitration?

MFN clauses in investment treaties typically 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, for example the fair and equitable treatment (FET) protection which 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?

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). 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'?

There are two 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? Can the question of consent to arbitration be uncoupled from consent to a specific forum, for instance, the ICSID or the *ad hoc* arbitration under the **United Nations Commission on International Trade Law** (UNCITRAL) rules?

For some, if the 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.

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 identified certain public policy considerations that would serve as limitations on the use of MFN clauses to import dispute settlement provisions. In particular, the 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.*

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 – do MFN clauses have the effect of substituting consent to a specific dispute settlement mechanism with another dispute settlement mechanism?

Conclusion

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 courts and tribunals. But it is a different task altogether to determine the contours of consent.

Importing consent to arbitration under a specific dispute settlement mechanism through an MFN clause, for instance, one could argue 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, one could ask if there is a risk of reducing the role of State consent in international arbitration.

The various ways and approaches to the expression of consent and different interpretative techniques and understandings significantly shape the meaning and contours of consent. The notion of consent appears to be an inherently indeterminate concept in investment arbitration. To address this problem, more precise drafting of dispute settlement provisions in a treaty or national legislation may be a means to ensure clarity. The investment arbitration practice indicates, however, that the meaning of consent *per se* and its limits will remain susceptible to being given different meanings and interpretations.

The blogpost is based on author’s forthcoming chapter titled “Variations around the notion of consent in investment arbitration” in Samantha Besson (ed.), Consenting to International Law

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