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ARBITRATION WITHOUT AGREEMENT UNDER THE ICSID RULES: A COMPARATIVE STUDY WITH EGYPTIAN AND QATARI LEGAL SYSTEMS

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ABSTRACT

Background: *A state's offer to resort to arbitration is one of the most significant topics that raises numerous issues, as such an offer serves as the legal basis for the arbitration agreement, which is later completed upon the investor's acceptance. The state's expression of consent to arbitration is no longer limited to cases where it concludes a contract with the investor containing an arbitration clause. Rather, the state's consent is now inferred through legislative offers and international agreements to which the state is a party.*

Methods: *In some cases, arbitration is based on specific international legal obligations, such as bilateral investment treaties, which may bind states to arbitration in disputes with foreign investors. As a result, states have become parties to arbitration claims initiated by investors with whom they have no contractual relationship. This has led to a fundamental shift in the landscape of international arbitration, as investment disputes have moved from the realm of diplomatic protection to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). ICSID has, in turn, expanded its jurisdiction to encompass investment disputes even in the absence of an agreement between the disputing parties to resort to arbitration.*

Results and conclusions: *The study has demonstrated that a state's consent to ICSID arbitration may, in certain cases, be inferred from domestic legislation or bilateral investment treaties, thereby establishing a valid legal basis for ICSID jurisdiction even where no directly concluded arbitration agreement exists between the state and the investor.*

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1 INTRODUCTION

Arbitration, as a whole, seeks to achieve justice based on principles distinct from those underlying the traditional concept of justice before state courts. It is a legal system founded on two fundamental pillars: the will of the parties and the state's recognition of that will.[1]

The basis of arbitration as a dispute resolution mechanism lies in legal provisions that permit parties to opt for it over the ordinary judicial process. It is based on the parties' consent and their acceptance of arbitration as a means to resolve disputes arising from their legal relationship. Accordingly, the parties have the right to agree on the procedures the arbitral tribunal will follow. They must also define the subject matter of the dispute in a manner that determines the tribunal's jurisdiction and delineates the boundaries within which the arbitrators must operate.

Despite the fundamental importance of the existence of an arbitration agreement, which serves as the basis of an arbitrator's competence to resolve disputes, some legal systems permit arbitration without a prior agreement in specific cases—particularly in matters of an international or investment nature. In such instances, arbitration may be conducted even in the absence of an agreement between the parties, provided that the dispute pertains to an investment between a state and a foreign investor, pursuant to rules such as those of the International Centre for Settlement of Investment Disputes (ICSID), hereinafter referred to as ICSID.

This development is better understood in light of recent developments in international investment relations. The increasing involvement of states in commercial transactions, along with the expansion of activities carried out by individuals and private companies in foreign countries, has led to disputes between these entities and host states. This, in turn, has necessitated the establishment of mechanisms offering judicial guarantees to investors or foreign parties contracting with states—mechanisms distinct from national courts, which investors often view with suspicion.

The availability of consent in investment arbitration under the ICSID Convention has been the subject of extensive debate since the 1990s. Numerous questions have been raised regarding the forms through which consent is expressed and whether such expressions are sufficient to establish the Centre's arbitral jurisdiction. Although a substantial body of literature has addressed this issue, many aspects still require further analysis, particularly in light of arbitral practice. This is especially true concerning the sufficiency of Most-

1 Ahmed Abou El-Wafa, *Optional and Compulsory Arbitration* (5th edn, Monshaat Al-Maaref 1987) para 3, 19-20; Osama Ahmed Shawky El-Meligy, *The Formation of the Arbitral Tribunal in Optional Arbitration: A Comparative Analytical Study of Its Legal Nature and the Nature of Its Function* (Dar Al-Nahda Al-Arabia 2004) para 2, 4 et seq; **Mahmoud Mostafa Younis,** *The Reference on Egyptian and Comparative Arbitration Law* (Dar Al-Nahda Al-Arabia 2016) 16-7.

Favoured-Nation (MFN) clauses as a basis for establishing the Centre's jurisdiction—an area in which no consistent arbitral approach has yet been settled.

As a result, a state's expression of consent to arbitration is no longer limited to instances where it enters into a contract with a foreign investor that explicitly includes an arbitration clause. Instead, state consent to arbitration may, in certain circumstances, be inferred from relevant domestic laws and international treaties to which the state is a party. Consequently, states have become parties to arbitration proceedings initiated by investors with whom they share no contractual relationship.

1.1. Research Problem

This research examines the mechanisms employed by ICSID arbitral tribunals to assert jurisdiction in the absence of a prior arbitration agreement between the parties. It also explores the appropriateness of these mechanisms in light of the requirements for written consent and the arbitrability of the dispute's subject matter, particularly considering the conflicting decisions issued by ICSID tribunals on this issue.

1.2. Research Objectives

The primary objective of this research is to shed light on how the effectiveness of arbitration can be ensured, regardless of the extent of the parties' consent to this dispute resolution mechanism. It further explores the extent to which this outcome aligns with the contractual foundation of arbitration, which has traditionally been regarded as a form of adjudication that depends entirely on the consent of the involved parties.

1.3. Research Methodology

The study adopts a comparative analytical methodology to analyse the legal provisions governing arbitration agreements and their validity requirements in Egyptian and Qatari legislation, comparing them to the framework established by Article 25 of the Washington Convention.[2] It further explores the evolving jurisdiction of ICSID in handling certain investment disputes where no direct contractual relationship exists between the parties regarding arbitration. The study aims to assess the extent of ICSID's jurisdiction over such disputes, particularly in light of the divergent rulings issued by arbitral tribunals operating under ICSID's framework on this matter.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) (adopted 18 March 1965, entered into force 14 October 1966) <https://icsid.worldbank.org/node/87246> accessed 10 March 2025.

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1.4. Research Plan

To thoroughly examine this topic, the study will be structured into three main sections. The first section will discuss the nature of arbitration agreements and the requirements for their validity. The second section will analyse arbitration agreements within the framework of the ICSID Convention. The third section will explore the new forms of ICSID jurisdiction that operate without a prior agreement between the parties.

Accordingly, the first section will address the conditions required for the conclusion of an arbitration agreement under Egyptian and Qatari law. The second section will examine the manifestation of state consent to arbitration under the Washington Convention by analysing key arbitral cases decided by tribunals established under the ICSID framework, in which state consent was inferred—whether through domestic legislation, bilateral investment treaties, or the application of the Most-Favoured-Nation (MFN) clauses.

2 THE NATURE OF ARBITRATION AGREEMENTS AND THEIR VALIDITY REQUIREMENTS

The arbitration agreement is the cornerstone that determines the validity of the arbitration process as a whole. Thus, the arbitration agreement, whether in the form of an arbitration clause or a submission agreement, must be valid and must satisfy all formal and substantive requirements to produce its legal effects. This necessitates addressing the definition of the arbitration agreement, its various forms, and the conditions required for its validity.

2.1. Definition and Forms of the Arbitration Agreement

Given the legal implications arising from the arbitrators' decisions, which invariably entail the transfer of rights, the exchange of legal positions, or their establishment and stabilisation for their respective holders, it is imperative to address the definition of the arbitration agreement and its various forms.

2.1.1. The Definition of the Arbitration Agreement

National laws and international conventions have placed great emphasis on establishing rules governing arbitration agreements.[3] In fact, most legal systems have gone further by

3 Leonardo Graffi, 'The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Otto Schmidt Verlagskontor 2010) 19-20, doi:10.1515/9783866539297.19.

explicitly defining arbitration agreements.[4] The Qatari Arbitration Law defines an arbitration agreement as:

> "An agreement between the parties, whether legal or natural persons possessing the legal capacity to contract, to resort to arbitration for the resolution of all or some of the disputes that have arisen or may arise between them concerning a specific legal relationship, whether contractual or non-contractual."[5]

Similarly, the Egyptian Arbitration Law defines an arbitration agreement as "an agreement between the parties to resort to arbitration for the resolution of all or some of the disputes that have arisen or may arise between them in relation to a specific legal relationship, whether contractual or non-contractual."[6]

By virtue of the arbitration agreement, arbitrators are entrusted with resolving disputes arising from a legal relationship between the parties. This relationship may be contractual, where the parties are bound by a contract (Article 2(1) of the New York Convention), or non-contractual concerning matters that may be settled through arbitration (also under Article 2(1) of the New York Convention), such as cases of tort liability, where the tortfeasor and the injured party may agree to settle their dispute through arbitration.[7] The arbitration agreement may extend to all disputes arising from the legal relationship or be limited to certain specific matters.

2.1.2. Forms of the Arbitration Agreement

An arbitration agreement is referred to as an "arbitration clause" when it is concluded before any dispute arises between the parties. This clause may be included in the original contract establishing the legal relationship, regardless of the nature and subject matter of that contract; it may also take the form of a subsequent agreement between the parties or even a reference to an institutional arbitration framework.[8] In addition, the parties to an arbitration agreement may agree to subject their legal relationship to the provisions of a

4 See, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958, entered into force 7 June 1959) art 2(1) <https://www.newyorkconvention.org/english> accessed 10 March 2025; *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (UN 2008) art 7(1); Arbitration Act 1996 (UK) s 6 <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 10 March 2025.

5 Law of the State of Qatar No 2 of 2017 'Promulgating the Civil and Commercial Arbitration Law', art 7(1) <https://www.qicdrc.gov.qa/law-no2-2017-issuing-arbitration-law-civil-and-commercial> accessed 10 March 2025.

6 Law of the Arab Republic of Egypt No 27/1994 'Promulgating the Law Concerning Arbitration in Civil and Commercial Matters', art 10(1) <https://www.newyorkconvention.org/contracting-states/contracting-states/egypt> accessed 10 March 2025.

7 Mohamed Selim El-Awa, *Arbitration Law in Egypt and Arab States: Annotated with Scholarly Opinions and Judicial Rulings*, vol 1 (Dar Makkah for Printing and Publishing 2014) 245.

8 Graffi (n 3) 21.

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standard contract, an international convention, or any other document. In such cases, the provisions of that document—including its arbitration-related provisions—shall apply.[9]

A reference to an arbitration clause in a document or a prior contract may be explicit, in which case such a reference is sufficient, as the parties' intention to resort to arbitration is clear.[10] However, if the reference is general and vague, it is insufficient and does not constitute a valid arbitration agreement.[11]

The arbitration clause constitutes a prior agreement to arbitrate any future disputes that may arise between the parties, with its implementation being contingent on the occurrence of such disputes.[12] In contrast, a submission agreement signifies an agreement concluded after a dispute has already arisen, whereby the parties agree to resolve their existing dispute through arbitration. Consequently, an arbitration agreement may be concluded after the dispute has arisen, even if a lawsuit has already been filed before a judicial body regarding the matter. This type of agreement is specific to the particular dispute at hand and is referred to as a submission agreement.[13]

The Egyptian Court of Cassation has ruled that a submission agreement must specify the subject matter of the dispute to determine the jurisdiction of the arbitrators and enable judicial oversight of their compliance with the limits of their jurisdiction.[14]

This stands in contrast to the arbitration clause, where it is often difficult to determine, at the time of contracting, the exact nature and scope of any potential future dispute.

9 Law of the Arab Republic of Egypt No 27/1994 (n 6) art 6.

10 Fathi Wali, *Arbitration in National and International Commercial Disputes: Theory and Practice* (Monshaat Al-Maaref 2014) para 55, 111; Ahmed Sawy, *The Concise Guide to Arbitration* (3rd edn, Dar Al-Nahda Al-Arabia 2010) para 8, 18-9.

11 Sawy (n 10) para 9, 19; Mostafa El-Gamal and Okasha Abdel Aal, *Arbitration in Private International and Domestic Relations (Egyptian Commercial Arbitration Law No 27 of 1994, in Light of Comparative Law and International Trade Law, with Reference to Arab Arbitration Laws)*, vol 1 (Al-Halabi Legal Publications 1998) para 234, 349.
The Egyptian Court of Cassation has consistently ruled that a merely general reference in a bill of lading to the charterparty does not incorporate the arbitration clause contained therein into the bill of lading. See, Appeal No 376 of Judicial Year 41 (Egyptian Court of Cassation (Civil), 30 April 1975) [1982] 1 Collection of Cassation Judgments over Fifty Years, para 26, 1674.

12 Case No 83 of Judicial Year 118 (Cairo Court of Appeal, Commercial Circuit (62), 5 June 2002).

13 Law of the Arab Republic of Egypt No 27/1994 (n 6) art 10 (2). For clarification on the distinction between an arbitration clause and an arbitration agreement. See, Abou El-Wafa (n 1) para 7, 22; El-Awa (n 7) 246; Wali (n 10) para 56, 113; Case No 49 of Judicial Year 122 (Cairo Court of Appeal, Commercial Circuit (91), 26 April 2006).

14 Appeal No 275 of Judicial Year 36 (Egyptian Court of Cassation, 16 February 1971); Appeal No 489 of Judicial Year 37 (Egyptian Court of Cassation, 24 March 1973).
'Once the arbitration agreement has been concluded, it may not be modified except by mutual agreement of the parties.' See, Appeal No 586 of Judicial Year 25 (Egyptian Court of Cassation, 30 January 1961) [1982] 1 Collection of Cassation Judgments over Fifty Years 730.

Therefore, parties who opt for an arbitration clause often prefer to refer their disputes to an arbitration institution and its rules. This ensures that the absence of an agreement on specific procedural aspects does not impede the effectiveness of the arbitration agreement.[15]

It is noteworthy that the parties' express or implied agreement to apply the procedural rules of a specific law or a designated arbitration centre constitutes an integral part of the arbitration agreement itself. Thus, if the parties expressly adopt the rules of an arbitration center to conduct arbitration under its auspices and regulations, the selected arbitration institution shall undertake all procedures related to the arbitration process, from the request for arbitration to the issuance of the final arbitral award (Article 3 of the Qatari Arbitration Law; Articles 5 and 6 of the Egyptian Arbitration Law).[16]

The 1958 New York Convention on Arbitration affirms the right of the parties to agree on the law governing the arbitration procedures, even if it differs from the law of the seat of arbitration. Moreover, the parties may leave the determination of all procedural rules and conditions to the institutional arbitration framework they have chosen to refer to.[17]

Furthermore, under the principle of separability of the arbitration agreement, the fate of the arbitration clause is not necessarily tied to the fate of the main contract. If the main contract is declared void, rescinded, or terminated for any reason, the arbitration clause remains in effect between the parties. It continues to govern the resolution of disputes, including those concerning the validity, rescission, or termination of the contract, through arbitration.

The same principle applies when arbitration is agreed upon through a submission agreement: if the main contract is annulled or terminated, the submission agreement remains valid and binding on the parties. It precludes the parties from resorting to state courts for disputes related to the contract's annulment, rescission, or any other associated matters.[18]

15 Samir Saleh, *The Arbitral Award: An Analytical Study in Light of Egyptian and Comparative Law* (Dar Al-Nahda Al-Arabia 2020) 290.

16 Appeals Nos 20 and 64 of Judicial Year 128, and Nos 128, 16, 20, and 47 of Judicial Year 129 (Cairo Court of Appeal, Commercial Circuit (7), 7 April 2013) [2013] Arab Arbitration Journal 20/189.

17 Graffi (n 3) 21. See also. Law of the State of Qatar No 2 of 2017 (n 5) art 19; Law of the Arab Republic of Egypt No 27/1994 (n 6) art 25.

18 The Sudanese Supreme Court ruled that: 'The arbitration clause is considered an independent agreement separate from the terms of the contract. The annulment, rescission, or expiration of the contract has no effect on the arbitration clause contained therein.' See, Appeal No 1903 of 2006 (Sudanese Supreme Court, Civil Circuit, 27 February 2007) [2010] Global Arbitration Journal 5/280. See also, El-Awa (n 7) 785; Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 68.

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2.2. Requirements for The Validity of the Arbitration Agreement

For an arbitration agreement—whether in the form of a clause or a submission agreement—to be valid, it must satisfy the essential elements of any contract: consent, subject matter, and cause. Additionally, the parties' intention to submit the dispute to arbitration for resolution by a final and binding decision must be clear and definitive.[19]

At this stage, it is important to address some conditions that specifically ensure the validity of an arbitration agreement: first, the requirement of written consent, and second, the arbitrability of the subject matter of the dispute.

2.2.1. Written Consent to The Arbitration Agreement

It is well established that an arbitration agreement, whether in the form of an arbitration clause or a submission agreement, constitutes a genuine contract and must meet all the general conditions and essential elements of contracts. Among these, consent stands as a fundamental pillar without which an arbitration agreement cannot exist. At its core, consent requires the concurrence of two matching wills of the parties who wish to settle their disputes through arbitration rather than resorting to state courts, which by default have general jurisdiction over all disputes, regardless of their nature or the identity of the parties involved.[20]

Consent to an arbitration clause is typically achieved during negotiations over the terms of the main contract, where the arbitration clause is regarded as an independent agreement embedded within the broader contract. Importantly, the parties' mutual consent must be documented in writing and duly signed.

The Qatari Court of Appeal has ruled that if the power of a person designated by the parties is limited to proposing amicable solutions or reconciling differing viewpoints, such an arrangement does not constitute an arbitration agreement within the legal meaning of the term.[21] Therefore, for an arbitration agreement to produce its legal effects, two matching wills must be present: a valid offer and acceptance to resort to arbitration.[22] The offer and acceptance must not be tainted by any defect in consent, such as mistake, fraud, coercion,

19 For further details on the requirements for the validity of the arbitration agreement. See, Dalia Abdel-Moati, 'Consent as the Basis of an Arbitration Agreement' (PhD thesis, Cairo University 2007) para 103, 45 et seq; Mahmoud Mokhtar Al-Berairi, *International Commercial Arbitration: Revised Edition with Arbitration-Related Rulings and Regulations of International Arbitral Institutions* (4th edn, Dar Al-Nahda Al-Arabia 2010) para 22, 45 et seq; El-Meligy (n 1) para 24, 26 et seq; Wali (n 10) para 59, 119 et seq.

20 See, Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Transnational Publishers, Kluwer Law International 2001) 155.

21 Case No 348 of 2002 (Qatar Court of Appeal, 29 October 2002). See, El-Awa (n 7) 254.

22 See on the issue of party consent: Graffi (n 3) 36; Loukas A Mistelis, Concise International Arbitration (Kluwer Law International 2010) 6.

exploitation, or gross disparity. Furthermore, the parties' consent to arbitration must be expressed in writing; otherwise, the agreement is deemed void.[23]

An arbitration agreement is considered to be in writing if it is contained in a document signed by the parties, or if it is recorded in letters, whether in paper or electronic form, or in any other format that allows for proof of receipt in writing (Article 7(3) of the Qatari Arbitration Law; Article 12 of the Egyptian Arbitration Law; Article 2(2) of the New York Convention). Additionally, an arbitration agreement satisfies the writing requirement if one party asserts its existence in a statement of claim or a statement of defence, and the other party does not deny it in their defence (Article 7(4) of the Qatari Arbitration Law).

Various legal systems allow both natural and legal persons, regardless of their nationality or domicile, to be parties to an arbitration agreement, whether the arbitration is domestic or international, and irrespective of the nature of the legal relationship underlying the dispute (Article 2(1) of the Qatari Arbitration Law; Article 1(1) of the Egyptian Arbitration Law). This approach aligns with the 1958 New York Convention, which states in Article 1(1) that the Convention applies to "differences between persons, whether physical or legal."

It is to be noted that for a person to be a party to an arbitration agreement, it is not sufficient that they merely have the legal capacity to dispose of the rights subject to the dispute or that their consent to arbitration is free from defects such as mistake, fraud, coercion, exploitation, or gross disparity. The person must also have legal authority to enter into an arbitration agreement for a specific dispute. If an arbitration agreement is concluded on behalf of a principal, the representative must have the legal authority to do so. If this authority is absent, the arbitration agreement concluded by such a person shall be deemed invalid.

2.2.2. Arbitrability of the Subject Matter of Dispute

While state courts have general jurisdiction over all disputes regardless of their nature, arbitral tribunals may only adjudicate the disputes that the law allows them to hear and that the parties agree to submit to arbitration. However, national legislators cannot directly control the range of issues that parties may agree to arbitrate, except by explicitly prohibiting arbitration in specific matters.

23 Law of the State of Qatar No 2 of 2017 (n 5) art 7(3); Law of the Arab Republic of Egypt No 27/1994 (n 6) art 12.
It should be noted that the validity of the arbitration agreement may be subject to challenge before different judicial systems, whether before state courts or the arbitral tribunal, as applicable. Such challenges may arise at various stages of the proceedings, either during the arbitration itself or at the stage of seeking recognition or enforcement of the arbitral award. See, Graffi (n 3) 34.

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Article 5(2) of the New York Convention reinforces this principle, stating that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.[24]

Thus, for an arbitration agreement to be valid, it is not sufficient for its subject matter to be determined, clear, and free of defects. In addition, the agreement must relate to a matter capable of being resolved through arbitration. Both Qatari and Egyptian legislators have explicitly stated that: "Arbitration is not permitted in matters that cannot be subject to compromise." (Article 7(2) of the Qatari Arbitration Law; Article 11 of the Egyptian Arbitration Law).

Consequently, national courts retain jurisdiction over all matters that cannot be subject to compromise. Both the Qatari and Egyptian Civil Codes address such matters, stating that: "Compromise is not permitted in matters relating to personal status or public policy. However, it is permissible to compromise financial interests arising out of personal status or from the commission of a criminal offence." (Article 575 of the Qatari Civil Code; Article 551 of the Egyptian Civil Code).

Some national legal systems, such as Swiss Private International Law and Anglo-American legal systems, permit the state to resort to arbitration without restrictions. However, some other jurisdictions impose certain restrictions on state arbitration, including Qatar and Egypt. Under Qatari law, arbitration agreements concerning administrative contracts require the approval of the Prime Minister or their delegate (Article 2(2) of the Qatari Arbitration Law). Similarly, under Egyptian law, such agreements require the approval of the competent minister or their equivalent in the case of public legal entities, but such approval cannot be delegated (Article 1(2) of the Egyptian Arbitration Law).

These provisions act as a restriction on the state's and public entities' ability to resort to arbitration in administrative contracts, without distinction between domestic administrative contracts and state contracts concluded with foreign private entities. Failure to comply with this requirement results in the nullity of the arbitration agreement. However, it is arguable that such nullity may be remedied by subsequent ratification if arbitration was agreed upon without obtaining the required approval.

24 Some scholars hold that the concept of public policy should be interpreted narrowly, in accordance with Article 5(2)(b) of the New York Convention. See, Loukas A Mistelis, 'Arbitrability – International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 2.

The issue, however, is more complex in practice. A state may include an arbitration clause in the contract concluded with private entities and later, when a dispute arises, invoke the nullity of the agreement to evade arbitration. It may claim that its domestic law's requirements for arbitration in administrative contracts were not met when the contract was executed, raising the question of whether the state has the legal right to invoke such nullity.

In this regard, the prevailing view in Egyptian legal jurisprudence[25] holds that this restriction does not apply to international commercial arbitrations. This argument is based on the fact that although the New York Convention does not explicitly address this issue, it does not impose any restrictions on a party's capacity to enter into an arbitration agreement, whether that party is a natural or legal person.

As a result, the restrictions imposed by national laws apply only to domestic arbitration, not to international arbitration. Additionally, judicial practice has established an international norm derived from customary commercial practices, which holds that international arbitration is not subject to such restrictions.

This principle was affirmed in an ICC arbitration award in Case No. 5103 of 1988, where the tribunal ruled that public sector companies cannot invoke a restriction in their national law after having entered into an arbitration agreement.[26] Similarly, in the *Malicorp* case against the Arab Republic of Egypt and others, issued on 27 February 2006, the tribunal held that a concession contract of an international nature, being an international contract, does not fall within the scope of the Egyptian domestic legal system, and therefore may be subject to rules beyond it.[27]

3 THE ARBITRATION AGREEMENT WITHIN THE FRAMEWORK OF THE ICSID CONVENTION

While the general principle is that a state agrees to arbitration with a specific investor concerning a defined legal relationship through an arbitration agreement, whether in the form of an arbitration clause or a submission agreement, the Washington Convention, reinforced by ICSID jurisprudence, has introduced alternative forms of expressing a state's

25 See, El-Gamal and Abdel Aal (n 10) para 214, 319; Ahmed Abdel-Karim Salama, *International and Domestic Commercial Arbitration Law* (Dar Al-Nahda Al-Arabia 2004) para 109, 370 et seq; Wali (n 10) para 68, 139 et seq; Ahmed Awad Hindi, *Enforcement of Arbitral Awards (The Order for the Enforcement of National and Foreign Arbitral Awards in Light of the Code of Civil Procedure, the Arbitration Law, and the New York Convention)* (Dar Al-Jami'a Al-Jadida 2009) 17 et seq; Samia Rashid, *Arbitration in Private International Relations*, vol 1 (Dar Al-Nahda Al-Arabia 1984) para 181, 328 et seq.

26 See, ICC Case No 5103 of 1988 [1991] 2(2) ICC Bull 20; Wali (n 10) para 68, 140.

27 Case No 382/2004 *Malicorp Ltd v the Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyption Airports Company* (CRCICA, 27 February 2006) <https://www.italaw.com/cases/4400> accessed 10 March 2025.

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consent to arbitration, whether through domestic legislation, bilateral investment treaties, or multilateral investment treaties.

This necessitates addressing the requirement of party consent to ICSID arbitration and the newly developed forms of ICSID jurisdiction in the absence of a prior agreement.

3.1. The Importance of Resorting to ICSID Arbitration in Investment Disputes

Arbitration under the auspices of ICSID is one of the most suitable arbitration forms for resolving disputes arising from international trade contracts between host states and foreign investors, whether individuals or private companies. The national judiciary of the host state may not be the optimal forum for resolving such disputes, as foreign investors often perceive national courts with suspicion, fearing bias in favour of the host state, which is a party to the dispute.[28]

As a result of the absence of a specialised judicial system for resolving investment disputes between states and foreign investors, the International Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States, signed in Washington on March 18, 1965, established an international framework for resolving such disputes under the auspices of the 'International Centre for Settlement of Investment Disputes (ICSID)', which is virtually the only entity specialised in settling disputes arising between contracting states and foreign investors, whether individuals or private companies.[29]

ICSID administers arbitration proceedings in accordance with the provisions of the Washington Convention, under which the Centre was established. Arbitration proceedings are conducted under ICSID's supervision, with specialised arbitrators appointed for this purpose, following the provisions of the Convention.[30]

As of 31 December 2024, there were 1022 arbitration and conciliation cases registered under the ICSID Convention and Additional Facility Rules. A majority of ICSID cases (58%) are based on Bilateral Investment Treaties (BITs), reflecting the widespread use

28 See in detail: Henry P de Vries, 'The Enforcement of Economic Development Agreements with Foreign States' (1984) 62 University of Detroit Law Review 6-7; Ricardo Luzzatto, *International Commercial Arbitration and the Municipal Law of States* (Collected Courses of The Hague Academy of International Law - Recueil des cours, vol 157, Brill Nijhoff 1977) 87, doi:10.1163/18758096_pplrdc_A9789028610309_01; Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (Kluwer Law and Taxation Publishers 1984) 14.

29 Galal Wafaa Mohamedin, *Arbitration Between Foreign Investors and Host States Before the International Centre for Settlement of Investment Disputes* (Dar Al-Jami'a Al-Jadida 2001) 13.

30 The Washington Convention has the advantage of allowing private investors to directly resort to ICSID against the host state in the event of an investment-related dispute, without the need to obtain the consent of the investor's home state and without the investor fearing their state's intervention in the dispute to replace them in the dispute. See, Abdel-Moati (n 19) para 771, 315.

of these agreements as a foundation for consent in arbitration. investment laws of host-states account for 7%.[31]

For the ICSID to have jurisdiction over a dispute, three elements must be present: first, the dispute must be legal in nature and arise directly from an investment, such that there is a direct relationship between the dispute and the investment, and the dispute must possess characteristics relating it to the investment and distinguishing it from other disputes that arise from traditional commercial relationships; second, the dispute must be between a contracting state and a national of another contracting state; and third, the parties must have consented to arbitration before the Centre.

It is clear from the above elements that "investment" constitutes a fundamental requirement for the Centre's jurisdiction, as stipulated in Article 25. However, the Convention does not explicitly define the term, despite multiple attempts during the preparatory negotiations to establish specific criteria, such as a minimum value or duration of commitment, which were ultimately set aside in favour of a more flexible, party-driven approach. This approach is reinforced by Article 25(4), which allows contracting states to declare classes of disputes they do not consider eligible for submission to the Centre. As a result, the task of defining "investment" has largely been left to arbitral jurisprudence and judicial practice.[32]

In this context, the Salini test, formulated by the arbitral tribunal in *Salini v. Morocco*, has attained broad recognition and application in arbitral practice. It is based on four objective criteria: a substantial financial or non-financial contribution, a certain duration, the assumption of risk, and a contribution to the economic development of the host state. Although these criteria are not expressly adopted in the Convention, they have gained widespread acceptance in arbitral practice and have significantly contributed to shaping a definition of "investment".[33]

In this regard, it is important to distinguish between investment arbitration and commercial arbitration. The fundamental difference between the two lies in the nature of the disputing parties and the source of the obligation to arbitrate. Commercial arbitration typically involves private entities and is based on a contractual agreement that includes an arbitration clause, frequently within the context of international commercial contracts.

Investment arbitration, conversely, arises between a foreign investor and a host state based on a Bilateral Investment Treaty (BIT) or a national investment law which contains

31 'The ICSID Caseload – Statistics: (iss 2025-1)' (*ICSID International Centre for Settlement of Investment Disputes*, 14 February 2025) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 9 March 2025.

32 Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 90. For more details on the concept of "investment" see: Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review - Foreign Investment Law Journal 236, doi:10.1093/icsidreview/10.2.232.

33 Dolzer, Kriebaum and Schreuer (n 32) 91.

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a standing offer of arbitration. In the latter scenario, the investor has the right to accept this offer, thereby establishing the arbitral relationship in the absence of a direct contractual relationship with the state. These forms were described by Jan Paulsson as "arbitration without privity."[34]

Regarding legal protection, commercial arbitration is concerned with the enforcement of contractual obligations and compensation for their breach. In contrast, investment arbitration safeguards a broader spectrum of investor rights, including the principle of fair and equitable treatment, protection against expropriation without compensation, and the right to transfer profits.[35]

3.2. Consent to ICSID Arbitration Through an Arbitration Agreement

Consent is the fundamental basis for ICSID's jurisdiction and the source of the arbitrator's authority to resolve disputes between the state and the foreign investor, as there must, as a rule, be an arbitration agreement between the parties. Accordingly, it is important to address the importance of resorting to ICSID arbitration, and then to address the consent to ICSID arbitration through an arbitration agreement.

A state expresses its consent to arbitration either by concluding a submission agreement with the investor or the relevant party after a dispute has arisen, or by incorporating an arbitration clause in the contract concluded with them. This scenario ensures that the state is fully aware of the potential parties in an arbitration proceeding, as well as the specific legal relationship from which the dispute has arisen or may arise. Consequently, there is no issue regarding the state's consent to arbitration in such cases, as its willingness to arbitrate is explicitly reflected in the arbitration agreement concluded with the investor.

The Washington Convention does not impose any specific formal requirements for consent to arbitration, except that such consent must be in writing. Accordingly, an arbitration agreement may be concluded in a separate written document, distinct from the contract between the state and the foreign investor. The written consent requirement is also satisfied if the arbitration agreement is formed through exchanging letters, faxes, or any other written means. Additionally, the parties may, through their agreement, define the scope of arbitration by specifying certain disputes that may be submitted to ICSID arbitration while excluding others from its jurisdiction.[36]

Article 25(1) of the Washington Convention states that: "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

34 See, Paulsson (n 32).
35 See for the protections usually provided for in bilateral investment treaties: Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 8.78, 470.
36 ibid, para 806, 336.

that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[37]

It is clear from the wording cited above that ICSID's jurisdiction is determined in both a substantive and personal scope.[38] In both cases, written consent from both parties, i.e., the host state and the foreign investor, is required for a dispute to be submitted to an ICSID tribunal. The basis of ICSID's jurisdiction over a dispute is the parties' mutual consent to arbitration before the Centre. This mutual consent exists when the arbitration agreement is in the form of an arbitration clause or a submission agreement. Consequently, resorting to ICSID arbitration remains a voluntary choice by the parties.[39]

It is worth noting that the Washington Convention refers to the form of consent to arbitration using the phrase "which the parties to the dispute consent in writing to submit to the Centre", without specifying additional details. This implies that once both parties provide their written consent to arbitration, neither may withdraw it unilaterally without the other party's approval (Article 25(1) of the Convention). Even if one of the disputing parties withdraws from the Convention itself, such withdrawal does not affect the validity of their consent to ICSID arbitration. Likewise, the withdrawal of the host state from the Convention or the withdrawal of the investor's home state does not impact the validity of consent to arbitration under the auspices of ICSID. [40]

Accordingly, the final consent, which is recognised for the Centre's jurisdiction over the dispute, is issued by both parties together, and not by one party alone. Furthermore, the consent or acceptance of arbitration by the Centre precludes the parties from submitting their disputes before any other jurisdictional body, such as another dispute resolution centre, a local judiciary, or an administrative committee.[41] This is confirmed by Article 26 of the Washington Convention.[42]

37 Washington Convention (n 2) art 25(1).

38 For further details, see: Rajaa Jinah, 'ICSID Arbitration Between the Provisions of the Washington Convention and Arbitral Jurisprudence' (2023) 3 Mediation and Arbitration Journal 9.

39 Hassan Al-Nimr, *Foreign Investments Between Incentives and Protection in Arab and International Agreements* (Al-Wafaa Legal Library 2025) 362.
The parties' consent to arbitration under the auspices of ICSID and in accordance with its rules may be given either before or after the dispute arises. However, such consent must be established prior to submitting the request for arbitration before the Centre. See, PF Sutherland, 'The World Bank Convention on the Settlement of Investment Disputes' (1979) 28(3) The International and Comparative Law Quarterly 382.

40 Mohamedin (n 29) 36. See also: Aron Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Columbia Journal of Transnational Law 352.

41 Fatima Mahmoudi Al-Zahra, 'The Scope of Jurisdiction of the International Centre for Settlement of Investment Disputes' (Master's thesis, Mu'tah University 2011) 98; Mohamedin (n 29) 36.

42 Washington Convention (n 2) art 26. Article provides that: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.'

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4 NEW FORMS OF ICSID JURISDICTION WITHOUT A PRIOR AGREEMENT

The possibility of resorting to international arbitration without privity enables the actual claimant to bring a case directly against the responsible state, rather than relying on diplomatic protection, where the claimant's home state confronts the host state on their behalf. This direct engagement promotes clarity and realism.[43]

The Washington Convention has introduced alternative forms through which a state's offer to arbitrate may be inferred. This necessitates examining the forms of state consent listed by the Convention to oblige the state to submit disputes to arbitration without a direct agreement between it and the investor.

4.1. Consent to ICSID Arbitration Through Domestic Legislative Provisions

One of the most common ways a state expresses its consent to ICSID jurisdiction is by enacting domestic legislation that explicitly provides for submission to ICSID arbitration. Under this mechanism, the state's consent becomes legally binding once the investor accepts it. A key feature of this form of consent is that the state extends its offer to all foreign investors without knowing in advance—that is, at the time the legislation, containing the state's acceptance to resolve disputes through arbitration, is enacted—who the potential counterparty will be.[44]

Another key feature of this type of consent is that the state's offer is separate from the investor's acceptance. The state expresses its consent within its domestic legislation, while the investor may accept it at a later stage. This acceptance may even occur after a dispute has arisen.[45]

An investor may express acceptance of a state's arbitration offer through various means, provided that the acceptance is in writing, as required under Article 25 of the Washington Convention. The investor may indicate consent to ICSID jurisdiction by including it in a contract concluded with the state, by issuing a written declaration, or by sending a formal letter to the state, whether before or after the dispute arises. Therefore, for mutual consent

43 Paulsson (n 32) 255-6.

44 Jinah (n 38) 15-6.

45 Some developing countries adopt this approach in the hope of encouraging foreign investors and attracting foreign capital. Domestic law may require that the investor's expression of consent to arbitration before ICSID be made in the form of an application for a business license submitted to the relevant authorities in the host state. In such cases, the investor must express their consent in the manner prescribed by law. See, Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 38.

to be perfected and produce its legal effects, the state's offer in its domestic legislation must be met with the investor's acceptance.[46]

The host state's consent to arbitration may also be expressed through domestic legislation that directly refers disputes to ICSID arbitration as one of the available mechanisms for settling investment disputes with foreign investors. In such cases, the foreign investor may express their consent in writing. This form of state consent does not preclude the state from resorting to other dispute resolution mechanisms provided for in its domestic legislation.[47]

ICSID case law has consistently affirmed that a foreign investor may accept a state's unilateral offer by submitting a request for arbitration directly to the Centre. Such a request is deemed a written acceptance in accordance with Article 25 of the Washington Convention. This principle has been upheld in several arbitral awards, most notably in the case of *Tradex Hellas S.A. v. Albania*.[48]

In *SPP v Egypt*,[49] the SPP company filed a request for ICSID arbitration against the Arab Republic of Egypt, seeking compensation for the unilateral termination of their contract. The claim was based on Article 8 of Egyptian Investment Law No. 43 of 1974.[50]

46 An example of this is the case of Al-Ahram, in which the two claimant companies sent a letter to the Minister of Tourism of the Arab Republic of Egypt approximately one year before initiating arbitration proceedings before ICSID, expressing their acceptance of the Centre's jurisdiction to settle the dispute between the parties. This acceptance was based on the mechanism provided under Article 8 of Law No. 42 of 1974 on Arab and Foreign Investment. See, ibid.

47 Mohamedin (n 29) 42.
National legislators may grant the parties the freedom to choose the arbitral forum, whether domestic or international. An example of this is Article 11 of Qatari Law No. 13 of 2000 on the Regulation of Foreign Capital Investment in Economic Activity, which provides that: 'It shall be permissible to agree to resolve any dispute arising between a foreign investor and any other party through a domestic or international arbitral tribunal.' See, Law of the State of Qatar No 13 of 2000 'On the Regulation of the Investment of Non-Qatari Capital in the Economic Activity', art 11 <https://www.lexismiddleeast.com/law/Qatar/Law_13_2000> accessed 10 March 2025.

48 Case No ARB/94/2 *Tradex Hellas SA v Republic of Albania* (ICSID, 24 December 1996) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/94/2> accessed 10 March 2025; Reed, Paulsson and Blackaby (n 45) 38.

49 Case No ARB/84/3 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID, 20 May 1992) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/84/3> accessed 10 March 2025.

50 Article 8 of Egyptian Investment Law No 43 of 1974 stated: "Investment disputes related to the implementation of this law shall be settled in the manner agreed upon with the investor, or under the agreements in force between the Arab Republic of Egypt and the investor's home state, or under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, to which the Arab Republic of Egypt acceded by virtue of Law No. 90 of 1971, where applicable. The parties may also agree to settle disputes through arbitration." See, Arab Republic of Egypt, *Law No 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zones, as Amended by Law No 32 of 1977* (General Authority for Investment and Free Zones 1977) art 8.

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Egypt challenged ICSID's jurisdiction, arguing that no written agreement had been concluded between the parties for arbitration, as required under Article 25(1) of the Washington Convention. Additionally, Egypt contended that Law No. 43 of 1974 did not apply to the dispute because it required the investor to obtain a license from the state to operate, which had been revoked from the foreign company. Furthermore, Egypt argued that Article 8 of the Investment Law merely provided a list of possible dispute resolution mechanisms, without obligating the government to submit disputes to ICSID arbitration, as it could choose from other options listed in the said article.[51]

However, the arbitral tribunal rejected Egypt's objections and upheld its jurisdiction over the dispute by a majority award on 14 April 1988. The tribunal reasoned that Article 8 of Law No. 43 of 1974 established a sequential relationship between the dispute resolution mechanisms it provided: an agreement between the parties on the method of dispute resolution, settlement of disputes under a bilateral investment treaty (BIT) between Egypt and the investor's home state, or resolution through ICSID arbitration under the Washington Convention.

Since no agreement existed between Egypt and the foreign investor on a dispute resolution method and in the absence of a BIT between Egypt and the investor's home state, the tribunal found that the wording of the law constituted Egypt's explicit and written consent to ICSID's jurisdiction, as required by Article 25(1) of the Washington Convention.

The tribunal ultimately concluded that Article 8 of Egyptian Investment Law No. 43 of 1974 did not require a separate arbitration agreement to confirm the state's consent. Instead, a reference to ICSID arbitration as a possible dispute resolution mechanism was sufficient to establish ICSID's jurisdiction over the dispute.[52]

Accordingly, the investor may rely on legislative consent to the Centre's jurisdiction as a legal basis for its authority to adjudicate the dispute. This was the position taken by the claimant in the case of *Gaith Pharaon v. Republic of Tunisia*, where reliance was on a provision of the Tunisian Investment Code of 1969 as the legal foundation for the Centre's jurisdiction. However, as the dispute between the parties was ultimately resolved through an amicable settlement, the arbitral tribunal did not rule on the objections raised by the State in the course of the proceedings.[53]

51 See, Paulsson (n 32) 235.

52 See, Abdel-Moati (n 19) paras 844 et seq, 358 et seq; Mohamedin (n 29) 42; Case No ARB/84/3 (n 49).

53 See, Order of Discontinuance dated 21 November 1988, cited in ICSID Cases, Doc ICSID/16/Rev. 4 (July 31, 1995) 26; Paulsson (n 32) 235.

4.2. Consent to ICSID Arbitration Through a Bilateral Treaty

Arbitration without a prior agreement is one of the key mechanisms in bilateral investment treaties (BITs), as it allows foreign investors to sue states before ICSID in case of an investment dispute, without the need for a specific prior arbitration agreement.[54]

Article 26 of the Washington Convention states: "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[55] This means that bilateral investment treaties (BITs) may stipulate that disputes between the host state and investors must first be submitted to the national courts of the host country before resorting to international arbitration, i.e., the necessity to exhaust domestic judicial means before resorting to international arbitration. Some other treaties may allow for direct recourse to arbitration.[56]

The requirement of state consent to ICSID jurisdiction is deemed fulfilled under the bilateral treaty, regardless of whether there is a direct contractual relationship between the host state and the foreign investor. This opens the door for bilateral treaties to serve as a legal basis for ICSID jurisdiction over investment disputes, even though such a basis is not explicitly mentioned in the Washington Convention. This principle was upheld by ICSID in establishing its jurisdiction in the *AAPL v. Sri Lanka* case.[57]

The facts of the AAPL case revolved around a dispute in which the claimant, Asian Agricultural Products Ltd. (AAPL), had entered into a joint venture agreement with the Sri Lankan government. However, during military operations, the Sri Lankan armed forces destroyed certain facilities of the project. As a result, AAPL filed a request for arbitration before ICSID on 20 July 1987, seeking compensation for the damage incurred. Although the contract between AAPL and Sri Lanka did not contain an arbitration clause, the claimant based its request on the bilateral investment treaty (BIT) signed between the Government of Sri Lanka and the United Kingdom in 1980.[58]

The ICSID tribunal considered the parties' consent to arbitration as completed by the state's offer expressed in the bilateral investment treaty (BIT) and the investor's acceptance demonstrated by the submission of the request for arbitration. This principle later became well established in ICSID jurisprudence, where the Centre accepted jurisdiction based on the state's consent in investment treaties, even in the absence of a direct contractual

54 Born (n 20) 194-5.

55 Washington Convention (n 2) art 26.

56 Reed, Paulsson and Blackaby (n 45) 57.

57 Christoph Schreuer, 'Commentary on the ICSID Convention: Article 42' (1997) 12(2) ICSID Review - Foreign Investment Law Journal 443, doi:10.1093/icsidreview/12.2.398.

58 Salah El-Din Gamal El-Din, *Perspectives on the Applicable Law under Article 42(1) of the ICSID Convention* (Dar Al-Nahda Al-Arabia 1996) 80; Qebaili Tayeb, 'Arbitration in Investment Contracts Between States and Nationals of Other States in Light of the Washington Convention' (PhD thesis, Mouloud Mammeri University 2012) 146; Abdel-Moati (n 19) para 886, 376 et seq; Jinah (n 38) 19.

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relationship between the state and the investor. A notable example of this approach is the award in the case *of AMT v. Zaire* (now the Democratic Republic of the Congo), issued on 21 February 1997.[59]

4.3. ICSID Jurisdiction Under the Most-Favoured-Nation (MFN) Clause

For ICSID jurisdiction to be established, one party to the dispute must be a contracting state and the other must be a national of another contracting state. If the state is not a contracting party to the Washington Convention, it cannot be a party to ICSID arbitration proceedings. The same applies to investors, as a foreign investor from a non-contracting state cannot be a party to ICSID arbitration.

Although Article 25 of the Washington Convention bases ICSID's jurisdiction on the principle of "written consent", ICSID has, in some cases, expanded its jurisdiction even in the absence of a traditional bilateral arbitration agreement. The Centre has allowed itself to infer state consent to arbitration, even when there was no direct contractual relationship between the state and the investor, by invoking the Most-Favoured-Nation (MFN) clause.

The purpose of the MFN clause is to allow investors from the beneficiary state to receive the best treatment that the host state has provided or may provide to investors from another foreign state. This clause applies not only to substantive provisions concerning the treatment and protection of investments but also to procedural provisions governing investment dispute resolution. ICSID jurisprudence has further recognised this principle in the *Maffezini v. Spain* case, where the tribunal accepted the investor's invocation of the MFN clause to infer the host state's consent to ICSID arbitration.[60]

59 Walid Ben Hamida, 'L'arbitrage transnational unilatéral : réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique' (Thèse de doctorat, Université Panthéon-Assas Paris II 2003) 35-7; Schreuer (n 57) 445-6.
The ICSID tribunal in case *Impregilo v Pakistan* upheld its jurisdiction (Decision on Jurisdiction, 22 April 2005), stating: 'it is clear that the coincidence of these two forms of consent can constitute "consent in writing" within the meaning of Article 25(1) of the ICSID Convention.' See, Case No ARB/03/3 *Impregilo SpA v Islamic Republic of Pakistan* (ICSID, 22 April 2005) para 108 <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/3> accessed 10 March 2025. The two forms of consent refer to the state's consent in the investment treaty and the investor's submission of a request for arbitration.
According to ICSID case law, a state cannot invoke its domestic law to evade its international obligations arising from a treaty or general international law. Additionally, an arbitration clause in a bilateral treaty is, in itself, considered an investment. See, Case No ARB/08/2 *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (ICSID, 7 March 2011) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/08/2> accessed 10 March 2025.

60 This case serves as an authority on the interpretation of Bilateral Investment Treaties (BITs) regarding investors' rights and the available avenues for resorting to international arbitration. See, Case No ARB/97/7 *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID, 25 January 2000) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/97/7> accessed 10 March 2025.

It is noteworthy that the arbitral tribunal imposed a restriction on the application of the Most-Favoured-Nation (MFN) clause concerning dispute resolution provisions. This restriction is that the application of the MFN clause must not undermine the host state's public policy considerations, meaning its application must not override provisions that the contracting states deem fundamental when consenting to the treaty.[61]

Unlike the award in *Maffezini*, the arbitral tribunal in *Plama Consortium Limited v. Bulgaria* ruled that the MFN clause could only apply if there were explicit consent from both parties to the dispute.[62] The Cypriot consortium sought to establish Bulgaria's consent to ICSID arbitration by selecting the most favourable provision available to it through "treaty shopping", invoking the MFN clause contained in the bilateral investment treaty (BIT) between Cyprus and Bulgaria as the legal basis for submitting the dispute to ICSID arbitration.

Although the BIT in question stipulated in Article 4: "If within 3 months after the beginning of the consultations no agreement is reached, the amount of the compensation at the request of the concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international 'Ad Hoc1' Arbitration Court," the investor attempted to invoke Bulgaria's consent to ICSID arbitration based on Article 26 of the Energy Charter Treaty (ECT) between Bulgaria and Finland (1997), which allowed nationals of contracting states to submit their disputes to ICSID arbitration.

The arbitral tribunal rightfully concluded that a state's consent to arbitration could not be inferred from its consent expressed in a different treaty by invoking the MFN clause contained in the treaty that formed the basis of the dispute.

The same principle was upheld by the arbitral tribunal in *Salini v. Kingdom of Jordan*, which ruled in its award, dated 29 November 2004, that it lacked jurisdiction due to the absence of an explicit expression of the contracting states' intent to extend the MFN clause to dispute resolution provisions.[63]

61 ibid, para 62.
The arbitral tribunal constituted in case *Siemens AG v Argentina* (ICSID Case No ARB/02/8, Award, 3 August 2004) applied the same reasoning as the decision in *Maffezini*. The tribunal relied on the Most-Favored-Nation (MFN) clause in the Germany-Argentina BIT to establish its jurisdiction over the dispute. See, Case No ARB/02/8 *Siemens AG v Argentine Republic* (ICSID, 3 August 2004) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/8> accessed 10 March 2025.

62 Case No ARB/03/24 *Plama Consortium Limited v Republic of Bulgaria* (ICSID, 8 February 2005) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/24> accessed 10 March 2025; Abdel-Moati (n 19) para 1020, 433 et seq; Tayeb (n 58) 191 et seq; Jinah (n 38) 21 et seq.

63 Case No ARB/02/13 *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* (ICSID, 29 November 2004) <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/13> accessed 10 March 2025.

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This latter ruling is more persuasive, as it aligns with contract law principles. Consent to ICSID arbitration must be based on the mutual agreement of the parties to the dispute, reflecting their shared intention to confer jurisdiction on ICSID, in accordance with Article 25 of the Washington Convention.

5 CONCLUSIONS

Arbitration without privity is a sensitive system. A single case in which an arbitrator oversteps their authority in a sensitive case could cause a strong negative reaction. However, if used with care and fairness, this form of arbitration has the potential to address the current gap left by the lack of compulsory jurisdiction and, in doing so, enhance the legal security of international economic relations.[64]

Having concluded the examination of the research topic, the study presents the following findings and recommendations:

Research Findings:

1. The default rule is that an arbitration agreement produces its legal effects only when it is in writing and signed by the parties. Additionally, it must relate to matters that are legally capable of being subject to compromise; otherwise, it is null and void under Egyptian and Qatari law.
2. The jurisdiction of ICSID over a dispute between the state and a foreign investor does not require the existence of a direct arbitration agreement between them, where the host state's domestic legislation refers to the possibility of resolving the dispute in accordance with the ICSID Convention.
3. Bilateral investment treaties (BITs) constitute the legal basis for ICSID's jurisdiction over investment disputes between the host state and the foreign investor, provided that the treaty includes a clause stipulating that such disputes are to be resolved in accordance with the Washington Convention. This applies even in the absence of a prior arbitration agreement between the parties.
4. In the authors' opinion, a state's consent to arbitration cannot be inferred from its acceptance of arbitration in a treaty to which the investor's home state is not a party. In such a case, it is not permissible to invoke the Most-Favoured-Nation (MFN) clause as a legal basis for establishing ICSID's jurisdiction over the investment dispute.

Research Recommendations:

1. It is recommended that ICSID refrain from expanding its jurisdiction over investment disputes by relying on the Most-Favoured-Nation (MFN) clause unless the treaty expressly and unequivocally provides that the MFN clause applies to investment dispute settlement.

64 Paulsson (n 32) 257.

2. It is recommended that both Egyptian and Qatari legislators develop a model for bilateral investment treaties (BITs) that includes a detailed provision on investment dispute resolution through arbitration.
3. It is recommended that national legislators should carefully draft the scope of application of the MFN clause, tailoring it to serve national interests on a case-by-case basis.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

АРБІТРАЖ БЕЗ УГОДИ ЗА ПРАВИЛАМИ ICSID: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ З ЄГИПЕТСЬКОЮ ТА КАТАРСЬКОЮ ПРАВОВИМИ СИСТЕМАМИ

Тарек Гомаа Ель-Саєд Рашед*, Ахмед Юссеф Аль-Емаді та Самір Шаабан Салех

АНОТАЦІЯ

Вступ. *Пропозиція держави звернутися до арбітражу є однією з найважливіших тем, яка викликає численні питання, оскільки така пропозиція є правовою основою для арбітражної угоди, яка згодом укладається після її прийняття інвестором. Вираження згоди держави на арбітраж більше не обмежується випадками, коли вона укладає договір з інвестором, що містить арбітражне застереження. Натомість, згода держави тепер випливає з законодавчих пропозицій та міжнародних угод, стороною яких є держава.*

Методи. *У деяких випадках арбітраж ґрунтується на конкретних міжнародно-правових зобов'язаннях, таких як двосторонні інвестиційні договори, які можуть зобов'язувати держави до арбітражу у спорах з іноземними інвесторами. У результаті держави стали сторонами арбітражних позовів, ініційованих інвесторами, з якими вони не мають договірних відносин. Це призвело до фундаментальних змін у сфері міжнародного арбітражу, оскільки інвестиційні спори перейшли з області дипломатичного захисту до*

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юрисдикції Міжнародного центру з врегулювання інвестиційних спорів (надалі – Міжнародний центр). Міжнародний центр, у свою чергу, розширив свою юрисдикцію, охопивши інвестиційні спори навіть за відсутності угоди між сторонами спору про звернення до арбітражу.

Результати та висновки. *Дослідження продемонструвало, що згода держави на арбітраж у певних випадках може випливати з внутрішнього законодавства або двосторонніх інвестиційних договорів, тим самим створюючи дійсну правову основу для юрисдикції Міжнародного центру навіть за відсутності безпосередньо укладеної арбітражної угоди між державою та інвестором.*

Ключові слова: *арбітражна угода, згода, Міжнародний центр, сторони, юрисдикція, Вашингтонська конвенція, BIT.*