

ANGLIA RUSKIN UNIVERSITY

JURISDICTION & ADMISSIBILITY  
IN INTERNATIONAL INVESTMENT ARBITRATION

PEYMAN GHAFARI

A Thesis in partial fulfilment of the  
requirements of Anglia Ruskin University  
for the degree of Doctor of Philosophy

Submitted: August 2012

FACULTY OF ARTS, LAW & SOCIAL SCIENCES  
SCHOOL OF LAW

## ACKNOWLEDGMENTS

First and foremost, I would like to offer my profound thanks to my supervisor Professor Robert Home who accepted the great responsibility to oversee this research and guided it to a successful completion. In addition to guiding this research, the opportunity professor Robert Home provided to broaden my academic experience and challenges are greatly acknowledged.

I would also like to extend my gratitude to Dr. Tom Mortimer the previous head of law school at Anglia Ruskin University who was among the supervisory team for a while and supported this research at earlier stages of proposal development.

This research benefited from various professional, academic and personal experiences for which thanks are due to friends, colleagues and mentors that accompanied, supported and inspired me during past few of years. They have all assisted and contributed to this research in their own special way, but are too numerous to name.

I would like to express my deepest appreciation to my lovely wife Dr Mojgan Ghaemi and my adorable sons Iman & Ehsan, who provided so much support and encouragement throughout this process.

This salutation would not be complete without expressing unqualified acknowledgement of my very first teachers in life, Parviz and Mehri whose careful and thoughtful parenting paved my path to such attainment.

ANGLIA RUSKIN UNIVERSITY  
ABSTRACT

FACULTY OF ARTS, LAW AND SOCIAL SCIENCES

DOCTOR OF PHILOSOPHY (PhD)

JURISDICTION & ADMISSIBILITY  
IN INTERNATIONAL INVESTMENT ARBITRATION

By PEYMAN GHAFARI

August 2012

For an investment treaty tribunal to proceed to adjudge the merits of claims arising out of an investment, it must have *jurisdiction* over the parties and the claims, and the claims submitted to the tribunal must be *admissible*. Inconsistent interpretations of substantive and procedural principles of international investment law that govern the existence and exercise of the arbitral tribunal's supremacy to adjudge an investment dispute have caused incoherence in investment treaty arbitration. The thesis is an in-depth study of article 25 of the 1965 Washington Convention on the Settlement of Investment Disputes (ICSID), which articulates the Material, Personal and Consensual requirements for establishing the existence of the adjudicative power (Jurisdiction) for dispute resolution and to exercise that adjudicative power (Admissibility) under the aegis of ICSID. The main findings of the research are as follows:

- 1) ICSID's double-filtering nature, which has been largely overlooked in ICSID jurisprudence, is fundamental to correct decision-making by arbitral tribunals when deciding on admissibility and jurisdiction issues.
- 2) 'Fraudulent intent' criterion, which borrows its rationale from the concurrent themes in international law jurisprudence, is instrumental to test compliance as required in the upper jurisdictional threshold.
- 3) 'Bona fide investor' test used to measure compliance with the objective requirements of article 25 of the ICSID runs counter to the object and purpose of the Convention.
- 4) 'Dynamic' test, rather than plain 'objective' test, would be the adequate pattern to ensure compliance with article 25 of the ICSID Convention for the contemplated investment due to evolving meaning of such generic term.
- 5) 'Lex Juridictio' or set of rules, principals and mechanisms governing jurisdictional and admissibility issues is required as foundation for legal unification and harmonization.

**Key words:** Jurisdiction, Admissibility, Arbitrability, Consent, Investment, Investor.

## **TABLE OF CONTENTS**

|           |  |            |
|-----------|--|------------|
| <b>1.</b> | <b>CHAPTER ONE: THE INTERNATIONAL INVESTMENT LAW</b>                           | <b>1</b>   |
| 1.1.      | Introduction   | 1          |
| 1.2.      | International Investment and Its Risks   | 2          |
| 1.3.      | Rights and Remedies in International Investment                                | 12         |
| 1.4.      | Development of International Investment Law                                    | 20         |
| 1.5.      | Objectives of This Research  | 27         |
| 1.6.      | Methodology of This Research   | 34         |
| 1.7.      | Summary of Thesis Argument   | 45         |
| <b>2.</b> | <b>CHAPTER TWO: SETTLEMENT OF INVESTMENT DISPUTES</b>                          | <b>48</b>  |
| 2.1.      | Introduction   | 48         |
| 2.2.      | International Treaties on Arbitration  | 49         |
| 2.3.      | International Arbitration Rules and Regimes                                    | 55         |
| 2.4.      | International Commercial Arbitration   | 61         |
| 2.5.      | International Investment (Mixed) Arbitration                                   | 70         |
| 2.6.      | Conclusion   | 79         |
| <b>3.</b> | <b>CHAPTER THREE: PREREQUISITES FOR INVESTMENT ARBITRATION – ADMISSIBILITY</b> | <b>80</b>  |
| 3.1.      | Introduction   | 80         |
| 3.2.      | Taxonomy of the Preliminary Issues in Investment Arbitration                   | 81         |
| 3.3.      | The Exercise of the Adjudicative Power - (Admissibility)                       | 86         |
| 3.4.      | Conclusion   | 105        |
| <b>4.</b> | <b>CHAPTER FOUR: PREREQUISITES FOR INVESTMENT ARBITRATION – JURISDICTION</b>   | <b>107</b> |
| 4.1.      | Introduction   | 107        |
| 4.2.      | The Existence of the Adjudicative Power–(Jurisdiction)                         | 108        |
| 4.3.      | The Concept of Scope of Jurisdiction   | 116        |
| 4.4.      | Conclusion   | 125        |

|           |  |            |
|-----------|--|------------|
| <b>5.</b> | <b>CHAPTER FIVE: PREREQUISITES FOR INVESTMENT ARBITRATION – ARBITRABILITY</b>              | <b>127</b> |
| 5.1.      | Introduction   | 127        |
| 5.2.      | The Agreement to Arbitrate   | 128        |
| 5.3.      | Legal Resolutions to Uphold Arbitrability  | 129        |
| 5.4.      | Approach of Various Legislations and Institutions  | 139        |
| 5.5.      | Conclusion   | 147        |
| <b>6.</b> | <b>CHAPTER SIX: JURISDICTION RATIONE PERSONAE –NATIONALITY IN INVESTMENT ARBITRATION</b>   | <b>149</b> |
| 6.1.      | Introduction   | 149        |
| 6.2.      | Semantics of Sources of International Law  | 150        |
| 6.3.      | Nationality in the Diplomatic Protection Context   | 153        |
| 6.4.      | The Concept of ‘Nationality’ In Arbitration  | 158        |
| 6.5.      | The Concept of ‘Control’ In Arbitration  | 164        |
| 6.6.      | Conclusion   | 168        |
| <b>7.</b> | <b>CHAPTER SEVEN: JURISDICTION RATIONE MATERIAE – INVESTMENT IN INVESTMENT ARBITRATION</b> | <b>169</b> |
| 7.1.      | Introduction   | 169        |
| 7.2.      | The Concept of ‘Investment’ In Arbitration   | 170        |
| 7.3.      | The Categories of Investment (Case Law)  | 182        |
| 7.4.      | Conclusion   | 195        |
| <b>8.</b> | <b>CHAPTER EIGHT: JURISDICTION RATIONE VOLUNTATIS – CONSENT IN INVESTMENT ARBITRATION</b>  | <b>197</b> |
| 8.1.      | Introduction   | 197        |
| 8.2.      | The Concept of ‘Consent’ In Arbitration  | 199        |
| 8.3.      | Modalities of Consent to Arbitration   | 215        |
| 8.4.      | Other Criteria of Consent  | 225        |
| 8.5.      | Conclusion   | 231        |

|           |   |            |
|-----------|---|------------|
| <b>9.</b> | <b>CHAPTER NINE: SUMMARY CONCLUSIONS</b>                    | <b>233</b> |
| 9.1.      | Revisiting Research Objectives                              | 235        |
| 9.2.      | Recommendation for Further Research                         | 251        |
| 9.3.      | Limitations   | 252        |
|           | <b>BIBLIOGRAPHY</b>   | <b>253</b> |
|           | <b>LIST OF ABBREVIATIONS</b>                                | <b>256</b> |
|           | <b>LIST OF TREATIES, CONVENTIONS, RESOLUTIONS AND RULES</b> | <b>257</b> |
|           | <b>LIST OF COURT &amp; TRIBUNAL CASES</b>                   | <b>258</b> |
|           | <b>LIST OF TABLES &amp; FIGURES</b>                         | <b>260</b> |
|           | <b>LIST OF APPENDIXES</b>                                   | <b>261</b> |
|           | <b>APPENDIX 1</b>   | <b>262</b> |
|           | <b>APPENDIX 2</b>   | <b>268</b> |
|           | <b>APPENDIX 3</b>   | <b>275</b> |

## **COPYRIGHT DECLARATION**

Attention is drawn to the fact that copyright of this thesis rests with:

- (i) Anglia Ruskin University for one year and thereafter with
- (ii) Mr. Peyman Ghaffari

This copy of the thesis has been supplied on condition that anyone who consults it is bound by copyright.

# 1. CHAPTER ONE: THE INTERNATIONAL INVESTMENT LAW

## 1.1. INTRODUCTION

Developing Countries,<sup>1</sup> the principal exporters of capital, have driven the creation of the international investment regime. Until recently they accounted for 90 per cent of world outward investment flows; even at the end of the first decade in twenty-first century, they accounted for more than four-fifths of such flows. Accordingly, the principal objectives of developed countries in creating the international investment regime have been, first and foremost, to give strong international investment law protection to investments made by their firms abroad and, second, to facilitate the entry and operations of their firms in other countries.<sup>2</sup>

Today, the proliferating number of investment agreements includes an increasing number that are concluded between emerging markets. Bilateral Investment Treaties, Free Trade Agreements,<sup>3</sup> along with more specialized multilateral agreements such as the Energy Charter,<sup>4</sup> constitute today's international investment law regime. This regime provides distinct protection for the post entry treatment of foreign investors, including fair and equitable treatment, full protection and security, treatment otherwise in accordance with the international minimum standard, and prompt, adequate, and effective compensation in case of expropriation.

Much of the investment climate in a country will consist of economic and political factors such as market access, the availability and cost of production factors, taxation, the existence of infrastructures, the existence of a functioning public administration, the level of corruption and political stability. In addition to economic and political factors, the legal framework for foreign investment is also important in determining its investment climate.

---

<sup>1</sup> 'Developed countries' are all members of the Organisation for Economic Co-operation and Development (OECD), MINUS Chile, Mexico, the Republic of Korea, and Turkey. 'Emerging markets' are all economies that are not members of the OECD, plus Chile, Mexico, the Republic of Korea, and Turkey. 'Developing countries' are all emerging markets that do not belong to the Commonwealth of Independent States and South-East Europe. See UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD 2009) for individual members of these groups (UNCTAD, *WIR* 2009).

<sup>2</sup> J E Alvarez and K P Sauvant, *The Evolving International Investment Regime* (Oxford University Press 2011) p xxxi.

<sup>3</sup> The great majority of recent Free Trade Agreements contain an investment chapter. See, e.g., Australia-United States Free Trade Agreement (AUSFTA), entered into force on January 1, 2004. U.S. FTAs are at <http://www.export.gov/TA/index.asp>.

<sup>4</sup> Energy Charter Treaty (ECT), Part III, Arts 10-17, at <<http://www.encharter.org>> accessed 15 July 2010.



This legal environment is, in turn, determined by a number of factors. These include the stability of the legal conditions under which an investor can operate the quality of the local public administration in applying relevant regulations, the transparency of the system of local regulations and an effective system of dispute settlement.

The settlement of disputes between hosts States and foreign investors is a particularly important aspect of the legal protection of foreign investments. Impartial and effective dispute settlement is an essential element in investor protection.

In this chapter the author will initially introduce Foreign Direct Investment (FDI), followed by elaboration on nature, evolution and context of international investment law and foreign state immunity. The chapter will then address general aspects of the research (including the scope, aims, methodology and limitations). It will end with synopsis of the taxonomy and structure of other chapters included in the thesis.

## **1.2. INTERNATIONAL INVESTMENT AND ITS RISKS**

Expansion of economic activities from one hand and the acceleration of globalization process on the other hand have led the world into a single marketplace where national borders are no more of economic and legal significance. Businesses have transcend national/domestic laws and stepped into transnational legislations. International Investment Agreements (IIAs) of various natures particularly in form of Foreign Direct Investment (FDI) have been the commonplace transaction entered into between states and foreign investors in the pursuit of raising Funds, Goods and Services.

There is a highly competitive global market for foreign investment. The standing of each nation state in that market depends upon a myriad of factors, among which the stability and predictability of the existing regulatory regime for investment is always important and often decisive.<sup>5</sup>

### **A. Foreign Direct Investment (FDI)**

Foreign direct investment (FDI) is investment directly into production in a country by a company located in another country, either by buying a company in the target country or

---

<sup>5</sup> Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) p.1.

by expanding operations of an existing business in that country. Foreign direct investment is done for many reasons including to take advantage of cheaper wages in the country, special investment privileges such as tax exemptions offered by the country as an incentive to gain tariff-free access to the markets of the country or the region. Foreign direct investment is in contrast to portfolio investment which is a passive investment in the securities of another country such as stocks and bonds.<sup>6</sup>

Foreign direct investment (FDI) is a measure of foreign ownership of productive assets, such as factories, mines and land. Increasing foreign investment can be used as one measure of growing economic globalization. FDI is investment in productive assets, not financial assets. It does not include short-term flows of money, such as portfolio investments and foreign exchange dealings.

In most of today's academic literature, the expectations of developing countries regarding the international investment regime are typically analyzed exclusively in terms of the abilities of the developing countries to attract greater foreign direct investment (FDI) inflows. This discussion assumes that the international investment regime attempts to regulate three interrelated primary actors: the MNEs, the developed countries, and the developing economies. The MNEs are portrayed as the main international investor, the developed countries are envisioned as capital exporting and as homes to the MNEs, and the developing economies are viewed as capital importing and thus, as hosts to the investments made by MNEs in their territories.<sup>7</sup>

After World War II, when many colonized countries gained independence, officials in the new governments believed that foreign investment, foreign ownership of production, was neocolonialism, a continuation of colonialism in economic form. Acting on these ideas, many governments of newly independent countries nationalized foreign owned industry. This meant that the factory, mine or other enterprise was taken over and run as a state enterprise. In recent years, recognition of the low productivity of state enterprises has

---

<sup>6</sup> B Matthew '*Essential Economics*' (2004) The Economist 102.

<sup>7</sup> J D Sachs, 'The Context: Foreign Investment and the Changing Global Economic Reality', in JE Alvarez and KP Sauvart with KG Ahmed and GP Vizcaino (ed) *The evolving international investment regime: expectations, realities, options* (Oxford University Press 2011).

contributed to the reversal of the trend toward nationalization. Many state enterprises have been privatized, that is, turned into privately owned corporations.

Global foreign direct investment (FDI) flows exceeded the pre-crisis average in 2011, reaching \$1.5 trillion despite turmoil in the global economy. However, they still remained some 23 percent below their 2007 peak. UNCTAD predicts slower FDI growth in 2012, with flows leveling off at about \$1.6 trillion. Longer-term projections show a moderate but steady rise, with global FDI reaching \$1.8 trillion in 2013 and \$1.9 trillion in 2014, barring any macroeconomic shocks (Table 1).<sup>8</sup>

**Table 1. Summary of econometric results of medium-term baseline scenarios of FDI flows, by region (Billions of dollars)**

| Host region                     | Averages     |              |              |              |              | Projections          |                      |                      |
|---------------------------------|--------------|--------------|--------------|--------------|--------------|----------------------|----------------------|----------------------|
|                                 | 2005–2007    | 2009–2011    | 2009         | 2010         | 2011         | 2012                 | 2013                 | 2014                 |
| <b>Global FDI flows</b>         | <b>1,473</b> | <b>1,344</b> | <b>1,198</b> | <b>1,309</b> | <b>1,524</b> | <b>1,495 – 1,695</b> | <b>1,630 – 1,925</b> | <b>1,700 – 2,110</b> |
| <b>Developed countries</b>      | <b>972</b>   | <b>658</b>   | <b>606</b>   | <b>619</b>   | <b>748</b>   | <b>735 – 826</b>     | <b>810 – 941</b>     | <b>840 – 1 021</b>   |
| European Union                  | 646          | 365          | 357          | 318          | 421          | 410 – 450            | 430 – 510            | 440 – 550            |
| North America                   | 253          | 218          | 165          | 221          | 268          | 255 – 285            | 280 – 310            | 290 – 340            |
| <b>Developing countries</b>     | <b>443</b>   | <b>607</b>   | <b>519</b>   | <b>617</b>   | <b>684</b>   | <b>670 – 760</b>     | <b>720 – 855</b>     | <b>755 – 930</b>     |
| Africa                          | 40           | 46           | 53           | 43           | 43           | 55 – 65              | 70 – 85              | 75 – 100             |
| Latin America and the Caribbean | 116          | 185          | 149          | 187          | 217          | 195 – 225            | 215 – 265            | 200 – 250            |
| Asia                            | 286          | 374          | 315          | 384          | 423          | 420–471              | 440–521              | 461 – 570            |
| <b>Transition economies</b>     | <b>59</b>    | <b>79</b>    | <b>72</b>    | <b>74</b>    | <b>92</b>    | <b>90 – 110</b>      | <b>100 – 130</b>     | <b>110 – 150</b>     |

Source: UNCTAD, *World Investment Report 2012*.

FDI inflows increased across all major economic groupings in 2011. Flows to developed countries increased by 21 percent, to \$748 billion. In developing countries FDI increased by 11 per cent, reaching a record \$684 billion. FDI in the transition economies has increased by 25 percent to \$92 billion. Developing and transition economies respectively accounted for 45 percent and 6 per cent of global FDI. UNCTAD's projections show these countries maintaining their high levels of investment over the next three years.<sup>9</sup> Africa and the least developed countries (LDCs) saw a third year of declining FDI inflows. But

<sup>8</sup> United Nations Conference on Trade and Development, 'World Investment Report 2012' at <<http://www.unctad-worldinvestmentforum.org/page/wir-2012>> accessed 6 August 2012.

<sup>9</sup> Ibid.

prospects in Africa are brightening. The 2011 decline in flows to the continent was due largely to divestments from North Africa. In contrast, inflows to sub-Saharan Africa recovered to \$37 billion, close to their historic peak.

Against a backdrop of continued economic uncertainty, turmoil in financial markets and slow growth, countries worldwide continued to liberalize and promote foreign investment as a means to support economic growth and development. At the same time, regulatory activities with regard to FDI continued. Investment policy measures undertaken in 2011 were generally favorable to foreign investors (table 2).<sup>10</sup>

**Table 2. National regulatory changes, 2000–2011**  
(Number of measures)

| Item  | 2001      | 2002      | 2003       | 2004       | 2005       | 2006       | 2007      | 2008      | 2009      | 2010       | 2011      |
|---|-----------|-----------|------------|------------|------------|------------|-----------|-----------|-----------|------------|-----------|
| Number of countries that introduced changes | 51        | 43        | 59         | 80         | 77         | 74         | 49        | 41        | 45        | 57         | 44        |
| Number of regulatory changes                | <b>97</b> | <b>94</b> | <b>126</b> | <b>166</b> | <b>145</b> | <b>132</b> | <b>80</b> | <b>69</b> | <b>89</b> | <b>112</b> | <b>67</b> |
| More favourable to investment               | 85        | 79        | 114        | 144        | 119        | 107        | 59        | 51        | 61        | 75         | 52        |
| Less favourable to investment               | 2         | 12        | 12         | 20         | 25         | 25         | 19        | 16        | 24        | 36         | 15        |
| Neutral/indeterminate                       | 10        | 3         | 0          | 2          | 1          | 0          | 2         | 2         | 4         | 1          | 0         |

*Source: UNCTAD, World Investment Report 2012.*

There is now consensus among governments of industrialized and non-industrialized countries that foreign direct investment is desirable, even essential, for economic growth and poverty reduction. Many questions remain about how foreign investment should be regulated. Critics of foreign investment have suggested that it led to dependent, or restricted, development. Supporters have suggested that foreign investment can bring capital and technology, develop skills and linkages and increased employment and incomes.

In 2011–2012, several countries took a more critical approach towards outward FDI. In light of high domestic unemployment, concerns are rising that outward FDI may contribute to job exports and a weakening of the domestic industrial base. Other policy objectives include foreign exchange stability and an improved balance of payments. Policy

<sup>10</sup> Ibid.

measures undertaken included outward FDI restrictions and incentives to repatriate foreign investment.<sup>11</sup>

## **B. International Investment Agreements (IIAs)**

In furtherance of their economic development policies, most countries have entered into one or more investment agreements that in various ways liberalize, promote, protect or regulate international investment flows. Such agreements typically apply to investment in the territory of one country by investors of another country.

Developing countries seek foreign direct investment (FDI) in order to promote their economic development. This is their paramount objective. To that end, they have sought to establish — through national legislation and international instruments — a legal framework aimed at reducing obstacles to FDI, while providing foreign investors with high standards of treatment and legal protection for their investments and increasingly putting in place mechanisms to assure the proper functioning of markets. Developing countries participate in international investment agreements (IIAs) — whether at bilateral, regional, interregional or multilateral levels — because they believe that, on balance, these instruments help them to attract FDI and to benefit from it.<sup>12</sup>

During the 1990s, the number of international agreements dealing with foreign investment increased dramatically at the bilateral, regional and interregional levels. As the new millennium begins, negotiating activity in this area continues to be intense. Many of these instruments and negotiations involve countries at different levels of development. Indeed, the full participation of developing countries in IIAs is important, given that these countries are increasingly becoming destinations and even, slowly, important sources of FDI. While developing countries acknowledge the value of FDI for their economic growth and development, they are equally keen that IIAs in which they participate strike a balance between the interests of foreign investors and the national development objectives of host countries.<sup>13</sup>

---

<sup>11</sup> Ibid.

<sup>12</sup> United Nations, UNCTAD, *‘International Investment Agreements: Key Issues’*, Vol.1, New York & Geneva (2004).

<sup>13</sup> Ibid.

Bilateral Investment Treaties (BITs), Preferential Trade and Investment Agreements (PTIAs), International Taxation Agreements and Double Taxation Treaties (DTTs) are considered as most common types on IIAs. They usually cover investments by enterprises or individuals of one country in the territory of its treaty partner. Since the early 1990s, a considerable degree of conformity has emerged in terms of the main contents of BITs, although with significant differences concerning their substantive details. On the other hand, the surge in BITs has been accompanied by a degree of normative evolution. This development presents new challenges for policymakers.<sup>14</sup>

While all BITs limit the regulatory flexibility within which contracting parties can pursue their economic development policies, more recent BITs include a wider variety of disciplines affecting more areas of host country activity in a more complex and detailed manner. At the same time, these treaties put more emphasis on public policy concerns, in particular through, inter alia, the inclusion of safeguards and exceptions relating to public health, environmental protection and national security. Furthermore, the interaction of BITs with other agreements at different levels, including the bilateral, regional, plurilateral and multilateral levels becomes more complicated. As global economic integration deepens, managing the impacts of integration on the domestic economy becomes more demanding and the challenges involved in concluding BITs are correspondingly greater.<sup>15</sup>

The first BIT was concluded in 1959 between the Federal Republic of Germany and Pakistan.<sup>16</sup> Between 1959 and 1969, the total number of BITs concluded came up to only 75 treaties. Another 92 BITs were concluded between 1970 and 1979. Further 219 BITs were concluded between 1980 and 1989. In other words from 1959 until 1989, the total number of BITs summed-up to 386. In the 1990s situation changed rather drastically. Between 1990 and 2006, the number of BITs rose significantly to a total of more than 2,500. Today there are over 2,600 bilateral, regional and sectoral investment treaties and over 300 known investment treaty arbitration cases. Global foreign direct investment

---

<sup>14</sup> United Nations, UNCTAD, *'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking'*, New York & Geneva (2007).

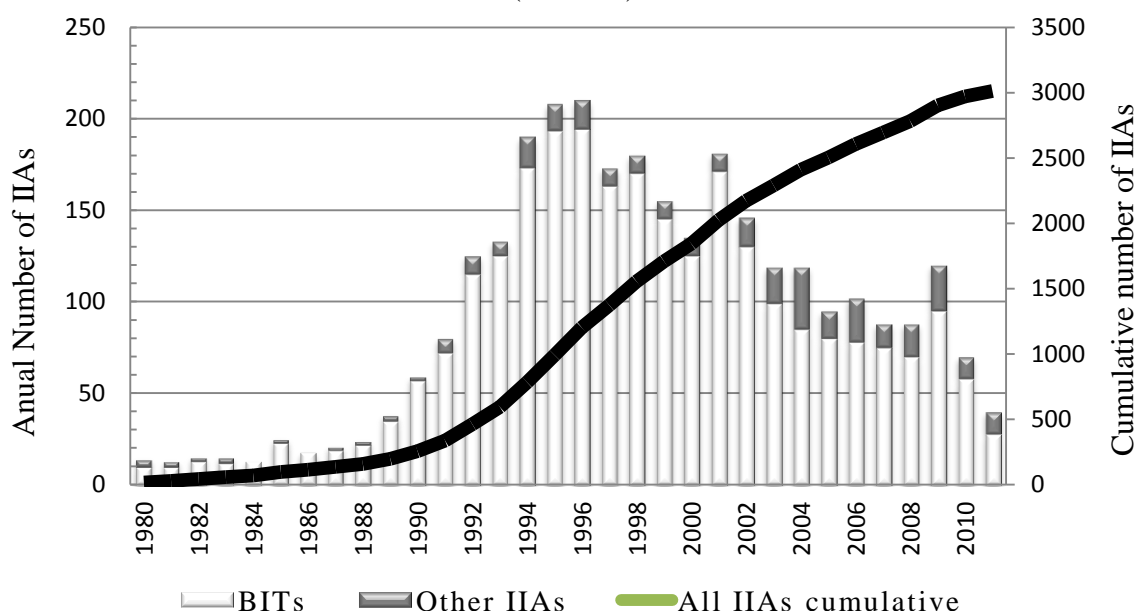
<sup>15</sup> Ibid.

<sup>16</sup> Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed on November 25, 1959, entered into force on April 28, 1962.

(FDI) rose moderately to \$1.24 trillion in 2010. They are expected to rise to \$1.7 trillion in 2012 and reach \$1.9 trillion in 2013.<sup>17</sup>

By the end of 2011, the overall IIA universe consisted of 3,164 agreements, which include 2,833 bilateral investment treaties (BITs) and 331 “other IIAs”, including, principally, free trade agreements (FTAs) with investment provisions, economic partnership agreements and regional agreements. With a total of 47 IIAs signed in 2011 (33 BITs and 14 other IIAs), compared with 69 in 2010, traditional investment treaty making continued to lose momentum (figure 5). This may have several causes, including (i) a gradual shift towards regional treaty making, and (ii) the fact that IIAs are becoming increasingly controversial and politically sensitive.

Figure 1. Trend of BITs and IIAs, 1980 - 2011  
(Number)



Source: UNCTAD: World Investment Report 2012

In quantitative terms, bilateral agreements still dominate; however, in terms of economic significance, regionalism becomes more important. The increasing economic weight and impact of regional treaty making is evidenced by investment negotiations under way for the Trans-Pacific Partnership (TPP) Agreement; the conclusion of the 2012 trilateral

<sup>17</sup> United Nations, UNCTAD, World Investment Report (2011).

investment agreement between China, Japan and the Republic of Korea; the Mexico–Central America FTA, which includes an investment chapter; the fact that at the EU level the European Commission now negotiates investment agreements on behalf of all EU member States; and developments in ASEAN.<sup>18</sup> Instead of simplification and growing consistency, regionalization may lead to a multiplication of treaty layers, making the IIA network even more complex and prone to overlaps and inconsistencies.

With thousands of treaties, many on-going negotiations and multiple dispute-settlement mechanisms, today's IIA regime has come close to a point where it is too big and complex to handle for governments and investors alike. Yet it offers protection to only two-thirds of global FDI stock and covers only one-fifth of possible bilateral investment relationships. To provide full coverage a further 14,100 bilateral treaties would be required. This raises questions not only about the efforts needed to complete the global IIA network, but also about the impact of the IIA regime and its effectiveness for promoting and protecting investment, and about how to ensure that IIAs deliver on their development potential.<sup>19</sup>

### **C. Foreign Investment Risks**

Like any other trade and business relation there are naturally risks inherent through a foreign investment where the public interest of a state overlaps with that of the private interest of a foreign investor leading to complexities and disputes. Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) were ratified to boost investor protection in the host state.

BITs and MITs operate to reduce the level of sovereign risk inherent in every foreign direct investment project by establishing a regime of international minimum standards for the exercise of public power by the host contracting state in relation to investment made in its territory by the national of another contracting state.<sup>20</sup>

---

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) p.1.



Berlin claims that one of major considerations inherent in any investment decision-making is the political risk represented by the host country.<sup>21</sup> Political risk is construed as ‘the possibility that political developments in the host state undermine the economics on which an investment decision was based.’<sup>22</sup> Wälde and N’Di define it as the occurrence of events in the political sphere which disrupt the routine activities of a business venture with a detrimental financial impact on the commercial viability of the enterprise.<sup>23</sup> It encompasses an ample number of issues, such as, *inter alia*, expropriation, unclear, contradictory and unstable legislation, breach of license rights and that of contract - all constitute different peculiarities of the political risk now faced by investors all over the world.<sup>24</sup>

Among the aforementioned risks, expropriation is referred to as the most dramatic form of the political risk.<sup>25</sup> George contends that an expropriatory act entails ‘the taking, deprivation, confiscation, or interference, by a state, of property, owned (or partially owned) by foreign investors.’<sup>26</sup> The Harvard Draft Convention, in turn, interprets expropriatory act as ‘any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property after the inception of such interference.’<sup>27</sup> North American Free Trade Agreement (NAFTA) between the United States of America, Canada and Mexico defines that expropriation must be justified by a public purpose and applied on a non-discriminatory basis, and compensation must be ‘equivalent to the fair market value’ of the investment at the date of expropriation, must be ‘paid without delay

---

<sup>21</sup> A Berlin, ‘Managing Political Risks’ <[http://www.Transnational-Dispute-Management.Com/Samples/Freearticles/Tv1-1-Article\\_54.Htm](http://www.Transnational-Dispute-Management.Com/Samples/Freearticles/Tv1-1-Article_54.Htm)> accessed 02.01.2010.

<sup>22</sup> T Wälde, ‘Investment Arbitration under the Energy Charter Treaty’ < <http://www.Transnational-Dispute-Management.Com/Samples/Freearticles/Tv1-2-Article224b.Htm>> accessed 12 December 2009.

<sup>23</sup> T Wälde and G N’Di, ‘Stabilizing International Investment Commitments: International Law versus Contract Interpretation’ (1996) 31 Tex Int’l LJ 215.

<sup>24</sup> T Wälde, ‘The Russian Oil and Gas Industry and Foreign Investment’ (1994) OPEC-Bulletin 7, p. 16.

<sup>25</sup> ‘The Investment Decision-Making’ available at <[http://ivythesis.typepad.com/term\\_paper\\_topics/2009/02/the-investment-decision-making.html](http://ivythesis.typepad.com/term_paper_topics/2009/02/the-investment-decision-making.html)>, accessed 10 January 2010.

<sup>26</sup> L George, ‘Expropriation’ (2002) International Energy Law and Taxation Review 3, p.46.

<sup>27</sup> 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 AJIL 553-554, art 10 (3).

and be fully realizable,' and must bear interest at a commercially reasonable rate until the date of actual payment.<sup>28</sup>

Notably, transition economies, wherein a significant share of large-scale investment projects is located, tend to use very vague language in provisions of so-called Foreign Investment Laws pertaining to conditions under which the government can rightfully expropriate property and calculate indemnification for expropriated property. As a logical consequence, it is commonplace that this gives rise to conflicting interpretations by the host governments and foreign investors with such differences further crystallizing into an investment dispute, which is indeed the case of many instances wherein investors claim that the host government illegally and discriminately expropriated their property.

The risk for the investor inherent in major investment projects has led to the evolution of a market for investment insurance schemes. As to the type of risks covered, these are similar to those addressed in bilateral investment treaties. Beyond the protection of assets, most programs offer protection against non-compliance with contracts. Also the risks of currency inconvertibility and of restrictions on currency transfer are covered. Of course, all schemes provide for protection against direct and indirect expropriation, and some insurers also cover cases of business interruption. Risks of war and civil disturbance are generally covered. Nonpayment of an obligation under an arbitral award may constitute an expropriation as understood in international law and as covered by an insurance contract, even if the host country considers that is not able to pay the amount due under the arbitral award.<sup>29</sup>

In a number of disputes tribunals set up under insurance contracts have addressed legal issues of expropriation, of currency inconvertibility, of breaches of contract, of the consequences of political violence, and of attribution. Some decisions of these tribunals set up under insurance contracts have been relied upon in disputes between investors and

---

<sup>28</sup> Article 1110, NAFTA Agreement, North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., International Legal Materials 32, 289.

<sup>29</sup> See e.g. *MidAmerican Energy Holding Company v OPIC*, citing the Restatement (Third) of Foreign Relations Law § 712 cmt.h (1999) and the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, <<http://www.investmentclaims.com/decisions/MidAmericanEnergy-OPIC-Indonesia-Nov1999.htm>>; an excerpt of the case is reprinted in D Bishop, J Crawford, and M Reisman, *Foreign Investment Disputes* (2005) 563.

States.<sup>30</sup> The authority of arbitral awards rendered under insurance contracts to disputes between States and foreign investors will depend, not least, on whether the provisions in insurance contracts and the standards of protection in treaties and customary law are the same.

### 1.3. RIGHTS AND REMEDIES IN INTERNATIONAL INVESTMENT

Under the rules of customary international law, no state is under an obligation to admit foreign investment in its territory and to its economy. In particular each state has the supremacy to evaluate the economic viabilities and financial credentials of a treaty-based foreign investment against the consequences of being committed to the standards of protection tendered in the treaty. The right to accept and to regulate foreign investment, and the power to conclude treaties with other states flow from the concept of state sovereignty.

At the same time, the release of economic activity from territorial linkages challenges both the ability of States to regulate their economy<sup>31</sup> and their capacity to provide the legal institutions that are necessary for the functioning of the global economy.<sup>32</sup> Such institutions include, for example the legal concepts of contract and property rights, as well as regulatory frameworks, compliance procedures, and dispute settlement mechanisms that enable economic actors to unfold their activity and to structure economic exchange.

While host State and investors initially have largely converging interests in attracting and making investments, the situation changes once an investment has been made. As the investor's option to simply withdraw his investment without sever financial loss will be limited, the host State has an incentive to change unilaterally the investment contract,

---

<sup>30</sup> The award in *Revere Copper v OPIC*, Award, 24 August 1978, 56 ILR (1980) 258, is often cited in the context of defining an indirect expropriation.

<sup>31</sup> Von Bogdandy, 'Globalization and Europe' (2004) 15 Eur. J. Int'l L. 885.

<sup>32</sup> Institutions are understood in North, *Structure and Change in Economic History*, pp.201et seq. (1981), as 'a set of rules, compliance procedures, and moral and ethical behavioral norms designed to constraint the behavior of individuals in the interests of maximizing the wealth or utility of principals', 'or more plastically: 'Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.'(North, *Institutions, Institutional Change, and Economic Performance*, p.3 [1990]). Institutions are characterized by constraints with a certain performance and durability which are imposed on actors of any kind. Legal rules that impose restrictions on the behavior of individuals as well as legal requirements that concern the exercise of public power, therefore, qualify as institutions in this sense.

amend the law governing the investment, or even expropriate the investor without compensation.<sup>33</sup>

This so called risk stemming from opportunistic behavior of the host State not only increases the cost of investment for investors and consumers, it may even prevent the flow of foreign investment completely.<sup>34</sup> As a consequence, promoting and protecting foreign investment behooves the establishment of institutions that reduce political risk and outweigh incentives of the host State to act opportunistically in order for private actors to unfold foreign investment activities.

Conceptually one may ask today whether the operation of the international law of foreign investment amounts to a body of international rules of administrative law governing the relationship of the foreign investor and the host state.<sup>35</sup> It is thus of paramount importance that rights and remedies of investors and host States are sufficiently protected and precisely balanced within the realm of the domestic and international laws of foreign investment. As suggested by UNCTAD in its 2012 annual report, investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.

Today, treaties typically grant national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security, prohibit direct and indirect expropriations without compensation, and contain the consent of host State to investor-state arbitration.<sup>36</sup>

### **A. Foreign State's Immunity:**

Until the twentieth century, mutual respect for the independence, legal equality, and dignity of all nations was thought to entitle each nation to a broad immunity from the

---

<sup>33</sup> This change in incentives after one party has started performing or placed an asset under the control of the other party is also described as a hold-up or dynamic inconsistency problem. See Williamson, *'The Economic Institutions of Capitalism'* (1985), p.52; Guzman, *'Why LDCs Sign Treaties that Hurt Them'* (1998) 38 Va. J. Int'l L. 639. Unlike contractual situations where mutual obligations are carried out in a directly reciprocal and simultaneous manner, foreign investment is, therefore, comparable to contracts involving the performance of continuing obligations.

<sup>34</sup> See R Cooter and C Ulen, *Law and Economics* (4<sup>th</sup> edition 2004) p.195

<sup>35</sup> R Dolzer, *'The Impact of International Investment Treaties on Administrative Law'* (2005) 37 *New York University Journal of International Law and Politics* 953.

<sup>36</sup> For general accounts of investment treaties and related instruments of investment protection see, for example, Dolzer and Stevens, *'Bilateral Investment Treaties'* (1995).

judicial process of other states'. This immunity was extended to heads of state, in both their personal and official capacities, and to foreign property. In the 1812 case of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch.) 116, 3 L. Ed. 287, a ship privately owned by a U.S. citizen was seized in French waters by Napoleon's government and converted into a French warship. When the ship entered the port of Philadelphia, the original owner sought to regain title, but the Supreme Court respected the confiscation of the ship because it occurred in accordance with French law in French waters.

With the emergence of socialist and Communist countries after World War I, the traditional rules of sovereignty placed the private companies of free enterprise nations at a competitive disadvantage compared to state-owned companies from socialist and Communist countries, which would plead immunity from lawsuits. European and U.S. businesses that engaged in transactions with such companies began to insist that all contracts waive the sovereign immunity of the state companies. This situation led courts to reconsider the broad immunity and adopt instead a doctrine of restrictive immunity that excluded commercial activity and property. Western European countries began waiving immunity for state commercial enterprises through bilateral or multilateral treaties.

When an enterprise contracts with a foreign State<sup>37</sup> or a foreign State corporation and dispute occur, the question arises whether, if proceedings are commenced, the foreign State or State Corporation can plead sovereign immunity and thereby evade its commercial obligations. Here two theories are advanced. Under the Doctrine of 'absolute immunity', the foreign State or State Corporation can always plead immunity and must actually consent to any court proceedings (by way of submission to the court's jurisdiction or waiver). Under the doctrine of 'restrictive immunity', a distinction is drawn between acts in the exercise of sovereign authority (*acta jure imperii*) and ordinary commercial transaction (*acta jure gestionis*). Immunity is accorded to the former but refused to the latter.<sup>38</sup>

---

<sup>37</sup> The EC is not a "State" within the meaning of State Immunity Act 1978 and cannot claim immunity under it: *International Tin Council cases* [1988] 3 All E.R. 257, 316-320.

<sup>38</sup> C Murray, D Holloway and D Timson-Hunt, *The Law and Practice of International Trade* (11th edition, Sweet & Maxwell 2010) p.488.

Unlike the other party to a business transaction with a state, the general trend is that host governments are notoriously reluctant to submit a dispute to a proceeding in another country. This is congruous with its sovereign immunity - the untenable principle under the law of nations – which dictates that a state is predominantly immune from the legal proceedings in another jurisdiction. In other words, when the principle is employed, a sovereign state cannot be compelled to a lawsuit in a relevant court or an arbitral proceeding in another state's jurisdiction as well as within the state's own borders.

However, greater state participation in international business transactions has shifted a paradigm, which conventionally upheld the doctrine of *absolute immunity* of a sovereign. Absolute sovereign immunity has been gradually limited, and pendulum began to swing in favor of the possibility to lodge a claim against a state in another state's forum, the latter being the fruit of introducing the restrictive immunity principle. Hence, the concept of restrictive immunity purports to grant state immunity from a legal action where it stems from pure governmental acts of a foreign state, however, a state is not entitled to such immunity where the dispute is purely commercial in nature.<sup>39</sup>

With the aim of piercing the cloud surrounding the concept a number of national and supranational legislative acts have been adopted, such as, *inter alia*, the UK State Immunity Act of 1978, the US Foreign Sovereign Immunities Act 1976, the European Convention on State Immunity of 1972.

Factors responsible for the changing nature and the necessity of introducing the restrictive immunity principle are the expansion of economic activities and acceleration of globalization processes, whereby the world for all intents and purposes becomes a single marketplace. Such a scenario gradually renders national borders of no economic and legal significance. Businesses transcend the national boundaries administered by domestic laws and step into a global marketplace regulated by transnational legislation.<sup>40</sup>

A commonplace transaction entered into by states through various entities acting as their representatives or agents on the transnational arena is an investment contract. The state enters into such investment transactions with investors to raise funds, or actual goods or

---

<sup>39</sup> M Sornarajah, *The Pursuit of Nationalized Property* (Martinus Nijhoff, Dordrecht-Boston-Lancaster 1986) p. 253.

<sup>40</sup> P Ghaffari, 'Jurisdictional Requirements under Article 25 of the ICSID Convention' (2011) 12 4 TJWIT p.603.

services.<sup>41</sup> However, conflicts exist in any relationship. The complexity peculiar to investor-state relationship arise due to overlap between public interests of a state and private interests of foreign investors.

For instance, the approach of the European courts in this regard has been that when a state enters the market place it must be treated in the same way as private businesses are dealt with.<sup>42</sup> It was also opined in *Trendtex Trading Corp v Central Bank of Nigeria* that sovereign immunity is not applicable to commercial dealings.<sup>43</sup> Hence, this feeds the argument that courts began to categorize and distinguish between disputes emanating from the governmental conduct and those having purely commercial nature.

Broadly speaking, a state cannot claim immunity from a proceeding in another state if it has committed to submit to the jurisdiction of that forum either:

- By international agreement – e.g. bilateral or multilateral agreements, or
- By an expressed term contained in writing – e.g. contract and its dispute resolution clause, or
- By an explicit consent given after the dispute has arisen between the parties – e.g. arbitration agreement concluded after parties' differences had matured into a dispute.<sup>44</sup>

As earlier discussed in this chapter, in an attempt to obscure the traditional viewpoint that endorses sovereign immunity as one of the fundamental principles of customary international law, various treaties – be it multilateral (MITs) or bilateral (BITs) – and investment agreements were ratified to boost investor protection in the host states. Investment treaties usually create two distinct dispute resolution mechanisms: one for disputes between a qualifying investor and the host state in relation to its investment ('investor/state disputes') and another for disputes between the contracting state parties to the treaty ('state/state disputes'). Investment treaties generally provide that the state/state

---

<sup>41</sup> I Adebisi, 'Is the doctrine of sovereign immunity a threat to investment arbitration?' (CEPLMP, 4 June 2009).

<sup>42</sup> M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, London 2000) see generally pp. 291 - 292

<sup>43</sup> (1977) Q.B 529

<sup>44</sup> See European Convention on State Immunity and Additional Protocol.

mechanism covers disputes ‘concerning the interpretation or application’ of the treaty, whereas disputes relating to a specific investment of a particular investor (which may of course give rise to interpretative questions) are encompassed by the investor/state dispute resolution procedure.

## **B. Foreign Investor’s Remedy**

Legally reliable relieves and enforceable remedies are of crucial importance to a foreign investor who commits to engage substantial financial resources within domestic jurisdiction of a host State. Such relieves would normally be resolved through access to an impartial dispute resolution mechanism and an authentic enforcement authority. Traditionally, when States and State owned corporations were the economic players in foreign investment, compliance and enforcement of international law was vested exclusively in the hands of States themselves. The State that was harmed by a violated breach would resort to counter-measures, such as reprisal, retaliation, and ultimately the use of force.

Modern Investment treaties, by contrast, instead of laying enforcement exclusively in the hands of States, provided for the right of foreign investors to have recourse to investor – State arbitration and directly claim for the violation of the respective investment treaty. Whereas traditionally, foreign private investors could not directly oblige host States to comply with their obligations under customary international law, today they may directly advance a claim against a host State in front of an independent arbitration tribunal in a third party jurisdiction based on dispute resolution mechanism of relevant BIT.

The aggressive proliferation of investment treaties has led to explosion of investment arbitration. Franck argues that since at least 1794, arbitration has been referred to as a mechanism for enforcing foreign investors’ rights and providing a neutral forum to resolve international disputes. In practical terms, the distinctive feature of the majority of the BITs is the ability to refer a dispute to a neutral arbitral tribunal, oftentimes this being the International Centre for the Settlement of Investment Disputes (ICSID), which is commonly referred to as a tribunal created by voluntary will of sovereign governments.<sup>45</sup>

---

<sup>45</sup> M Sornarajah, *‘The International Law on Foreign Investment’* (2nd edition, CUP, Cambridge 2004), p. 430.



Arbitration under ICSID facility is also one of the main mechanisms of the settlement of investment disputes under four recent multilateral trade and investment treaties – North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur.

One of the remarkable protection mechanisms that ICSID affords to its awards is their insulation from the review in the courts of the seat of arbitration. This was prominently demonstrated by *Occidental v Ecuador* case, whereby the claimant has opted for UNCITRAL arbitration over ICSID. Pursuant to English Arbitration Act 1996, Occidental had to face challenges to the UNCITRAL award rendered in its favor in English court proceedings that went from High Court up to Court of Appeal. Whilst Occidental was ultimately successful in these proceedings, the foregoing sequence of events wouldn't have had occurred had it been awarded by ICSID tribunal.

The first awards of ICSID were rendered in 1988 and 1990. It is also interesting to note that the frequency with which ICSID arbitration is filed for has been changed dramatically over the past six years, with over half of all ICSID cases for its thirty seven year history registered within the period 2004-2010.<sup>46</sup> This progressive statistics suggests that multinational enterprises – who are largely considered to be main investors worldwide - are increasingly desirous to use investment arbitration as opposed to any other forms of dispute settlement to resolve their disputes with the host states. Harten and Loughlin contend that investment arbitration has become an influential instrument for foreign investors 'to resist state regulation and seek compensation for the costs that flow from the exercise of public authority'.<sup>47</sup>

The fundamental rationale behind referring a dispute to arbitration is the expectation of its neutrality. According to the logic of a foreign investor, host countries' judges may have real bias in adjudicating investment disputes.<sup>48</sup> Wälde claims that investment arbitration is one of the most powerful instruments available to foreign investors to counteract political

---

<sup>46</sup> See also G Harten and M Loughlin, '*Investment Treaty Arbitration as a Species of Global Administrative Law*' (2006) EJIL 17 (1), p. 124.

<sup>47</sup> Ibid, page 124.

<sup>48</sup> K Clermont and T Eisenberg, '*Xenophilia in American Courts*' (1996) Harvard Law Review 109, pp. 1133-1134, see also W Park, '*Neutrality, Predictability and Economic Co-operation*' (1995) J.Int'l Arb. 12, p.99

risk at least to the extent such risk is within the control of the host state.<sup>49</sup> Although there have been various exigencies as international arbitration has matured into an independent discipline with impartial and expert decision makers, it is currently the predominant method for resolving complex disputes with a foreign element.<sup>50</sup>

It should be noted, however, that for an investment treaty tribunal to proceed to adjudge the merits of claims arising out of an investment, it must have *jurisdiction* over the parties and the claims, and the claims submitted to the tribunal must be *admissible*. In the same context, eminent ICSID facility of dispute resolution stipulates that a mere existence of a dispute related to an investment does not render arbitration of such a dispute possible.

Article 25 (1) of ICSID Convention reads:

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally’ [emphasis added].

Hence, under ICSID Convention, for the jurisdiction of ICSID to be upheld, it must be proved that there had been investment (*ratione materiae*) of a foreign investor (*ratione personae*) and there is a written consent of both parties to the dispute (*ratione voluntatis*) to arbitrate under the auspices of ICSID facility

In general, in order for an investor to benefit from the substantive and procedural rights of an investment treaty, the treaty in question has to be applicable *ratione materiae*, *ratione personae* and *ratione voluntatis*. This requires that a covered investment has been made by a covered investor and that covered parties have consented to an agreed dispute resolution mechanism, namely arbitration. The definition of investment, the definition of investor and the terms for consent component, therefore, determine the scope of application of the obligations States incur under their investment treaties.

---

<sup>49</sup> T Wälde, ‘Investment arbitration under the Energy Charter Treaty’, at <<http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article224b.htm>> accessed on 13 January 2010.

<sup>50</sup> See generally J Lelewer, ‘International Commercial Arbitration as a Model for Resolving Treaty Disputes’ (1989) New York University Journal of International Law and Policy 21, p. 379. See also S Franck, ‘The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity’ (2000) New York Law School Journal of International and Comparative Law 20, pp.1-2.

While there is no uniform definition of 'investment' that is endorsed by every single investment treaty – and notwithstanding the fact that some treaties contain exceptions for portfolio investments, for investments below a certain value, or for investments in certain economic sectors – the large majority of investment treaties define investment broadly.<sup>51</sup> For this purpose, most treaties rely on a non-exhaustive list of rights and interests that are covered.

Similarly, the clear definition of investor's 'nationality' is relevant for two purposes. The substantive standards guaranteed in a treaty will only apply to the respective nationals.<sup>52</sup> In addition, the jurisdiction of an international tribunal is determined, *inter alia*, by the claimant's nationality. In particular if the host state's 'consent' to jurisdiction is given through a treaty, it will only apply to nationals of a state that is a party to the treaty.

The author contends, based on related professional experience, that the ambiguities prevailing around diverse awards of *ad hoc* arbitral tribunals is much instigated in the absence of comprehensive and conclusive definition of these determining notions or in other words vagueness of the substantive provisions of investment treaties to uphold jurisdiction and tackle the waivers of arbitrability. In his current research, the author has attempted to highlight these notions, discuss their implications, analyze relevant cases admitted or rejected on those merits within international and national laws and finally propose the thesis of legal unification and harmonization of investment arbitration precisely focused at jurisprudence of ICSID.

#### **1.4. DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW**

*'And the more important international economic interests grow, the more International Law will grow.'*

Lassa Oppenheim, *International Law* (Volume I, 1905) § 51

Economic benefits are undoubtedly among major motives for constitution of legal rules and orders. Consequently, law does not impose only normative guidance for individual behavior, but is itself product of society, its needs, and preferences, and has the objective of sustaining social exchange. This holds true not only in the domestic realm but also at

---

<sup>51</sup> See UNCTAD, '*International Investment Agreements: Key Issues*' (2004) Volume 1, pp. 77-81, 118-26.

<sup>52</sup> On the issue of rights conferred upon private investors through treaties, see O Spiermann, "Individual rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties" (2004) 20 *Arbitration International* 179, 183 et seq.

the international level. The shift from national to international level holds equally true for international investment relations, where the demand for international investment law has amplified parallel to an increase in foreign investment flows. In fact, foreign investment often takes place in a situation that requires international cooperation and ordering structure, not so much because of the element of trans-border flows of investment, but due to the involvement of the host State as a sovereign actor.<sup>53</sup>

## **A. Evolution of Investment Law**

The roots of modern treaty rules on foreign investment can be traced back to 1778 when the United States and France concluded their first commercial treaty, followed in the nineteenth century by treaties among the United States and its European allies and, subsequently the new Latin American States.<sup>54</sup> These early treaties mainly addressed trade issues, but also contained rules requiring compensation in case of expropriation. After 1919, the United States negotiated a series of agreements ‘on Friendship, Commerce and Navigation (FCN), followed by another series of 21 treaties between 1945 and 1966.<sup>55</sup>

Rules on investment were never prominent or distinct in these FCN treaties. In 1977, the US State Department launched an initiative for the United States to join the European practice of the past two decades to conclude agreements that are meant to address issues of foreign investment only, mainly to protect investments of nationals abroad. Following a short period of political hesitation in view of the issue of exporting jobs by way of promoting foreign investment, and a shift of responsibility from the State Department to the US Trade Representative during that period, the United States, between 1982 and 2002, concluded 46 bilateral treaties, mainly with developing states.<sup>56</sup>

---

<sup>53</sup> S W Schill, *The Multilateralization of International Investment law* (Cambridge University press 2009) 1,3.

<sup>54</sup> See R Wilson, *United States Commercial Treaties and International Law* (1960) 2.

<sup>55</sup> See K J Vandevelde, *The Bilateral Investment Program of the United States* (1988) 21 *Cornell Int'l LJ* 201, 207-208

<sup>56</sup> As to BIT practice of the United States, see K J Vandevelde, *United States Investment Treaties: Policy and Practice* (1992); K J Vandevelde, ‘A Brief History of International Investment Agreements’ (2005) *University of California Journal of Investment Law and Policy* 157; S M Schwebel, ‘The United States 2004 model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law’ in G Aksen, K H Böckstiegel, M J Mustill, P M Patocchi, and A M Whitesell (eds), *Liber Amicorum in Honour of Robert Briner: Global Reflections on International Law, Commerce and Dispute Resolution* (2005) 815; J Paulsson, Denial of Justice in International Law (2005) 228,247; K Gugdeon, ‘United States Bilateral Investment Treaties’(1986) 4 *International Tax and Business Law* 105; M Clodfelter, ‘US State Department Participation in International Dispute Resolution’(2001) 42 *South Texas Law Review* 1273; N Rubins, ‘The Arbitral Innovations of Recent US Free Trade Agreements: Two Steps Forward, One Step Back’ (2003) 8 *International Business Law Journal* 865; G Gagné and J F Morin, ‘The Evolving American Policy on

With a view to repairing in part the damage it had brought about to the bulk of its pre-war foreign investments when starting World War II in violation of international law, Germany decided (during late 1950s) to launch a bilateral program for a series of treaties to protect the foreign investment of its companies in the future.

Soon after Germany had successfully negotiated its first treaties, other European states followed suit: Switzerland concluded its first such treaty in 1961,<sup>57</sup> France in 1972.<sup>58</sup> In 1961 already, two years after the era of bilateral treaties had begun; the World Bank took the lead among the international economic organizations to address the emerging international legal framework of foreign investment, pointing to its mandate and to the link between economic development, international cooperation, and the role of private international investment.

The object and purpose of existing treaty based international investment law do not vary fundamentally from those of the early days. It was, and is, aimed at promotion, protection and indemnity of foreign investment. Arbitral decisions often refer to object and purpose of investment treaties. The will of the parties is embodied primarily, but not necessarily completely in the totality of the treaty's provisions. The Vienna Convention on the Law of Treaties (VCLT) refers to the object and purpose in Article 18, laying down the obligation of a state that has signed but not yet ratified a treaty and, more importantly, in Article 31, which sets forth the rules of interpretation. These rules include the object and purpose of the treaty.

Foreign investment law consists of layers of general international law, of general standards of international economic law, and of distinct rules peculiar to its domain. The study of the field must take into account and turn to all of these three levels of the law. Moreover, it

---

Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT (2006) 9 *Journal of International Economic Law* 357; W Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1.

<sup>57</sup> Treaty between Switzerland and Tunisia of 2 December 1961; see N Huu-tru, 'Le Réseau Suisse d'accords bilatéraux d'encouragement et de protection des investissements' (1988) 92 *Revue Générale de Droit International Public* 577.

<sup>58</sup> Treaty between France and Tunisia of 30 June 1972; see P Juillard, 'Le Réseau français des conventions bilatérales d'investissement: à la recherche d'un droit perdu?' (1987) 13 *Droit et Pratique de Commerce International* 9.

has long been observed that rules on foreign investment by necessity also incorporate aspects of the laws of the host state.<sup>59</sup>

The interplay between relevant domestic rules of the host state and applicable rules of international law may become central to the required analysis of a case; for instance, the domestic definition of an investment, domestic rules addressing the jurisdiction of international tribunals, or the domestic rules on nationality may determine the nature and the outcome of a specific issue.<sup>60</sup>

International investment law is one of the fastest-growing and most vibrant fields of international law and dispute settlement today. It is both shaped by, and is shaping, the economic and social processes associated with globalization. In fact, it grows at a rate that makes authoring and publishing on international investment law an endeavor that evokes Achilles' footrace against the tortoise: an infinite struggle of catching up to a place and point in time that will be past present.<sup>61</sup>

## **B. Globalization and Investment Law**

International law is developing, growing, and being refined at an unprecedented pace as the need for international legal rules abounds in reaction to the social and economic phenomenon of globalization.<sup>62</sup> Indeed globalization, as one of the formative processes which affects today's cultural, political, and economic life virtually anywhere in the world, is gradually transforming international law from a simple tool to coordinate inter-State relations to an instrument that provides a legal structure for truly global legal orders.

One of the characteristics of globalization is the growth of trans-border economic activities: goods, services, and capital. These activities have progressively cast off territorial ties and circulate increasingly freely across borders.<sup>63</sup> This option not only enhances the options and choices of individual economic actors, both consumers and

---

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> S W Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press, New York 2009) p.xiii.

<sup>62</sup> On the notion and concept of globalization from a sociological perspective see Beck, *What is Globalization?* (2000).

<sup>63</sup> For an historical account of economic globalization see Rourke and Williamson, *Globalization and History* (1999).

producers, but leads to expanding economic interdependences and to the increasing, yet still incomplete, integration of national economies into a global economic system.<sup>64</sup>

Parallel to the cross border growth of foreign investment, the principles governing foreign investment have over time developed their own distinct features within the broader realm of international economic law. Today, it remains a matter of semantics whether it is appropriate to speak of the existence of a separate category of ‘principles of foreign investment law’, given their strong links to international economic law in general.<sup>65</sup> Certainly, the main function of such foreign investment law to provide international institutions necessary for sustainable global economic activities and economic growth is closely connected to the interests of those foreign investors and States that push for increasingly globalized markets and the legal framework that accompanies them.

As a consequence of globalization and expansion of economic activities, the demand for law as an ordering structure progressively shifts from the national to international levels. This shift can be witnessed with regard to international trade and monetary law, where the World Trade Organization (WTO) and the International Monetary Fund (IMF) and their respective legal regimes establish legal and institutional infrastructures that enable and enhance trans-border economic exchange.<sup>66</sup>

The international legal framework consists of international treaties providing for the settlement of disputes between foreign investors and host States, instruments providing for investment guarantees, and more than 2,500 bilateral, regional and sectoral investment treaties that contain substantive standards for the protection of foreign investors against undue government interference. At the same time, investment treaties enshrine principles of international investment law, rather than hard and fast rules.

---

<sup>64</sup> Even though economic globalization is not a linear, nor necessarily an irreversible development, but rather an evolutionary process towards economic integration which has, up to this moment, not abided in a unitary and borderless economic space, we can nevertheless understand such trans-border activities as forming part of the economic system of the *Weltgesellschaft* (‘global society’). On the understanding of the economy as a functional sub-system of society see Luhmann, *Die Wirtschaft der Gesellschaft*, (1988) 43-90. On the concept of the ‘global society’ see Luhmann, *Die Gesellschaft der Gesellschaft*, (1997) 145-171; Luhmann, *Die Weltgesellschaft* (1971) 57 *Archiv für Rechtsund Sozialphilosophie* 1.

<sup>65</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) p2-3.

<sup>66</sup> See J H Jackson, ‘Global Economics and International Economic Law’ (1998) 1 *J. Int’l Econ. L.* 1.

Almost unavoidably, international investment law therefore became coined more by the dispute settlement activities of arbitral tribunals which entertain claims between foreign investors and host states brought under investment treaties rather than by diplomatic exchange, inter-governmental negotiations, and inter-state treaty-making. Similarly, international investment law transpires and develops more in view of arbitral precedent and case law than on the basis of traditional textual approaches to treaty interpretation. Nonetheless, applying investment treaties in practice as well as studying and understanding the field not only requires knowledge about the jurisprudential development but also demands awareness of the historic, economic, and customary international law context of foreign investment activities.

Ultimately, the possibilities for corporate investors to setup multi-level, multi-jurisdictional structure are phenomenon of the globalization of financial markets and cross-border economic activities. Such opportunities illustrate that the criteria that have traditionally served to separate different spheres of sovereignty over persons and companies are increasingly disintegrating as an ordering paradigm for social relations on the international level. Thus the traditional theory of various national economies interacting in a global economy is transforming to the notion of a truly global market economy in which private economic actors with numerous national backgrounds directly interact in a single global market. In line with this transformation of the global economy, the nature of bilateral obligations under BITs is increasingly multilateralizing.

### **C. Bilateralism v Multilateralism**

The development of international investment law after the Second World War on the basis of bilateral treaties contrasts significantly with the multilateral development in other areas of international economic law, in particular international trade and international monetary law. While multilateralism dominated international relations in these fields through the establishment of international organizations, such as the General Agreement on Tariffs and Trade and (GATT) and later the WTO, as well as IMF, several approaches to establish a multilateral investment regime based on a multilateral treaty failed.



In the past, there have been several initiatives for the establishment of a more multilateral approach to international investment rulemaking. These attempts include the Havana Charter of 1948, the United Nations Draft Code of Conduct on Transnational Corporations in the 1980s, and the Multilateral Agreement on Investment (MAI) of the Organization for Economic Cooperation and Development (OECD) in the 1990s. None of these initiatives reached successful conclusion, due to disagreements among countries and, in case of the MAI, also in light of strong opposition by civil society groups. Further attempts of advancing the process towards establishment of a multilateral agreement have since been made within the WTO, but also without success.<sup>67</sup>

Concerns have been raised regarding the specific objectives that such a multilateral agreement is meant to accomplish, who would benefit in what way from it, and what impact such a multilateral agreement would have on countries' broader public policies, including those related to environmental, social and other issues. Particularly developing countries may require "policy space" to develop their regulatory frameworks, such as in the area of economic or financial policies, and one major concern was that a multilateral agreement on investment would diminish such policy space. As a result, current international investment rulemaking remains short of having a unified system based on a multilateral agreement.<sup>68</sup>

In sharp contrast to the failure of multilateral agreements, bilateral and regional treaties containing substantive law on international investment protection came into existence, starting in the late 1950s. The structure of the international economy thus came to be compared with an unbalanced and unstable two-legged stool supported only by international trade and monetary law.<sup>69</sup> Indeed this choice of bilateralism in international investment law seems surprising compared with the general decision for multilateralism in the other main areas of international economic relations.<sup>70</sup>

---

<sup>67</sup> UNCTAD, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward*, New York and Geneva, 2008, pp. 42-43.

<sup>68</sup> Ibid.

<sup>69</sup> See J Kline, '*International Regulations of Transnational Business*' (February 1993) 2 *Transnational Corp.* 153.

<sup>70</sup> It bears, however, noting that other areas of international economic law also know counter movements in the form of bilateralism and regionalism. See, for example, the contributions in Demaret, Bellis and Garcia Jimenez (eds.), *Regionalism and Multilateralism after the Uruguay Round* (1997); Okediji, '*Back to Bilateralism?*' (2003-2004) 1 *U. Ottawa L. & Tech. J.* 125.

In reality, while bilateralism puts the State and its sovereignty center stage, assumes a primacy of national interests, and allows for preferential and discriminatory treatment among States depending on their relative power,<sup>71</sup> multilateralism views States as embedded in an international community,<sup>72</sup> stresses the primacy of international law over national interests,<sup>73</sup> and presupposes that international relations are ordered on the basis of non-discriminatory principles that apply to all States.

The mere number of more than 2,600 bilateral investment treaties (BITs) suggests a chaotic and unsystematic aggregate of substantive rules governing international investment relations. Rather than constituting a consistent and coherent system of law, one would expect an extreme divergence and fragmentation in this area of international cooperation. The fragmentation into bilateral treaties should in fact compromise any attempts at understanding international investment law as providing uniform institutions for the functioning of a global economy. Instead, differentiated standards, such as preferential and discriminatory treatment, should be the result of bilateral treaty-making.<sup>74</sup>

In sum, recent developments in bilateral and regional investment treaty making have made the system increasingly complex and diverse. Moreover, even to the extent that the principal components of IIAs are similar across most of the agreements, substantial divergences can be found in the details of these provisions. All of this makes managing the interaction among IIAs increasingly challenging for countries, particularly those in the developing world, and also complicates the negotiation of new agreements.<sup>75</sup>

## **1.5. OBJECTIVES OF THIS RESEARCH**

While the core claim of this research deals with significance of arbitral jurisprudence for the interpretation and development of international investment law, author has endeavoured to reach beyond a static perspective of investment jurisprudence in an

---

<sup>71</sup> See B Simma, *'From Bilateralism to Community Interest in International Law'* (1994) 250 *Recueil des Cours* 217 230.

<sup>72</sup> *Ibid* page 233.

<sup>73</sup> J Alvarez, 'Multilateralism and Its Discontents' (2000) 11 *Eur. J. Int'l* 393 (referring to multilateralism as a 'shared secular religion' that 'requires preferring ... 'the international over the national, integration over sovereignty' – quoting from Koskeniemi, 'International Law in a Post-Realist Era' [1995] 16 *Australian Ybk. Int'l L.* 1.

<sup>74</sup> S W Schill, *Multilateralization of International Investment Law* (Cambridge University Press 2009) 11.

<sup>75</sup> See above, p. 32.

attempt to make a contribution towards developing a theory of international investment law that conjoins the subtleties of arbitral jurisprudence and investment treaty making. It contends on resolving one of the principal impediments to developing a theory of international investment law, namely the fragmented, disintegrated and disordered state of the law that is entrenched in several, largely bilateral treaties and implemented by arbitral tribunals which, established on a case-by-case basis, that generate increasing jurisprudential inconsistencies.

This research is expected to provide, hopefully, a conceptual taxonomy for apprehending the nature and functioning of international investment law as a genuine system of law and dispute resolution and offer remedies to several practical and theoretical complications, *inter alia*, questions of treaty interpretation, of the use of the notions of investor and investment regarding the establishment of jurisdiction of arbitral tribunals and admissibility of claims.

Author's personal experience of ambiguities surrounding arbitral awards rendered by ad hoc tribunals caused by implementation of contradictory interpretation of jurisdictional and admissibility requirements under the auspices of international arbitration institutions has been the main motivation behind initiating this research. It is thus expected that this research may pave the path forward in laying down foundations of the basis for legal unification and harmonization in investment arbitration based on constitution of set of rules and regulations deliberately instituted for the purpose of tackling jurisdictional and admissibility issues.

International investment law has become increasingly prominent in the international legal order. This rise to prominence and the current surge of investor-state disputes have, however, not always been matched by academic reflection on the content of procedure of international investment law which is coined by the dispute settlement activities of arbitral tribunals under investment treaties. International investment law transpires and develops more on arbitral precedent and case law than textual approaches to treaty interpretation. Like every legal system that relies on the judicial solutions of individual conflicts the treaty based investment arbitration needs to deal with conflicting and contradictory decisions.

Inconsistencies and incoherence in decision making of investment tribunals has ensued great concern and debate about investment treaty arbitration. A number of factors rooted in substantive international investment law are responsible for the potential for inconsistent decisions. Fragmentation of sources of international investment law, differing assessments of law and fact, inconsistent interpretation of terminologies and multiplicity of proceedings can be among numerous potential factors. For an investment treaty tribunal to proceed to adjudicate the merits of claims arising out of an investment, it must have jurisdiction over the parties and the claims, and the claims submitted to the tribunal must be admissible.

The thesis is supposedly the first in-depth study of article 25 of the 1965 Washington Convention on the Settlement of Investment Disputes (ICSID), which articulates the Material (*ratione materiae*), Personal (*ratione personae*) and Consensual (*ratione voluntatis*) requirements for establishing the existence of the adjudicative power (Jurisdiction) for dispute resolution and to exercise that adjudicative power (Admissibility) in tackling waivers of arbitrability under the aegis of ICSID. Due to deficiency of available lexicon as to the scope of jurisdictional and admissibility criteria, the thesis sought to delineate their specific contours, scrutinize the process through which the outer limits of these requirements are drawn, address uncertainty and lack of clarity in the arbitral practice of ICSID tribunals in this regard, explore the double-jurisdictional nature of treaty arbitration and conditions surrounding the application of relevant principles.

The main hypotheses, findings and suppositions of the research are as follows:

- 1) ICSID's jurisdictional double-filtering, which has been largely overlooked in ICSID jurisprudence, is fundamental to correct decision-making by ICSID tribunals.
- 2) 'Fraudulent intent' criterion, which borrows its rationale from the concurrent themes in international law jurisprudence, is instrumental to test compliance as required in the upper jurisdictional keyhole.
- 3) The compliance with the objective requirements of article 25 of the ICSID Convention measured through the 'bona fide investor' test runs counter to the object and purpose of the ICSID Convention.

4) 'Dynamic' test for the contemplated investment, rather than plain 'objective' test, is an adequate pattern to ensure compliance with article 25 of the ICSID Convention due to evolving meaning of such generic term.

5) Legal unification and harmonization is proposed through introduction of a set of rules, principals and mechanisms for tackling waivers of arbitrability and upholding jurisdiction (*lex Juridictio*).

This research seeks to scrutinize waivers of arbitrability of disputes – the doctrine of sovereign immunity, absence of essential pre-requisites to establish a jurisdiction of a particular forum as well as claims related to invalidity of the agreement that contains the arbitration clause – which in author's view fall under the purview of a broader concept of *lex juridictio* – law related to establishing a jurisdiction of a particular forum. The author contends that *lex juridictio* is a multifaceted area of law, which embraces a number of fundamental and so far least researched aspects.

During nearly two decades of legal practice in various jurisdictions the author has been directly involved in several trade and investment claims with local and international arbitral panels particularly those of Iran-US Claims Tribunal (3,800 claims, often involving complex factual and legal measures) the author realized that the taxonomy of the principals and rules that govern the existence and exercise of the arbitral tribunal's power to adjudge an investment dispute from one hand and ambiguities surrounding ambivalence and inconsistent interpretation of terminologies are most important yet least researched factors of incoherence and fragmentation in investment treaty arbitration.

More importantly, as senior advisor to multinational corporations and governments in Middle East including British Petroleum and Samsung Corporation the author was closely involved with drafting and execution of several major investment contracts based on bilateral treaties when following ambiguities were identified in jurisprudence of investment law:

- a. Absence of a comprehensive definition of the term 'investment' and uncertainty in its formulation by investment treaty tribunals.

- b. Lack of clarity with respect to the concept of the ‘nationality’ in investment arbitration.
- c. Lack of clarity with respect to interpretation of state’s consent to arbitrate arising from the overlap between so-called state’s unilateral undertakings and concurrent obligation of an investor.

Based on ambiguities of above nature within the jurisprudence of international law the need to strike a fair balance between public and private interest becomes pertinent. The uncertainty regarding the formulation of the term ‘investment’, lack of clarity in the application of the concept of ‘nationality’ and conflicting interpretative practices as to state’s consent to arbitrate have been identified as the key problems surrounding the investment treaty jurisprudence in the law governing the jurisdiction of investment tribunals.

Apart from the obligation to treat foreign investors fairly and equitably contained in most investment treaties, a step further towards neutral dispute resolution procedure is blurred with unclear formulations and inconsistent applications. Thus this research seeks to fill legal vacuum of investment arbitration’s jurisdictional criteria to balance the protection of investor’s rights with state’s public interests. The problem statement and main quest for this research is:

How can the uncertainties surrounding jurisdictional and admissibility issues related to the notions of investment, investor and consent be resolved in investment arbitration?

In trying to tackle the main question, the following sub questions are also emerged:

- Given the most recent challenges facing foreign direct investment, is the Salini test still fit or the purpose of defining the criteria for a dispute to qualify as arising ‘directly from an investment’?
- Is there any alternative method for testing qualification of a project as an investment?
- Should the Salini test be subjective or objective?
- What should be the approach to interpretation of state’s consent to arbitration?

- Whether the jurisprudence of the European Court of Justice can help with respect to rules related to corporate nationality of foreign investors?
- While need to strike a balance between public and private interests is desirable should the interpretative emphasis be on the arbitrator's belief or on an autonomous test?
- Should the regulatory framework form rules to define 'nationality' of investors?

There are no clear-cut answers to these questions within the existing literature on international investment law, the jurisprudence of ICSID and bilateral investment treaties. As a matter of fact the immature interpretations that come out of investment treaty tribunals further add to the uncertainty and lack of clarity in the jurisprudence.

The author's findings further illustrate that the current formulation and application of the jurisprudence under the investment treaty tribunals are devoid of coherence and consistency. From a practical view point, inconsistent and unpredictable outcomes are discrediting to the jurisprudence. The requirement of legal certainty demands that investors need to know the level of their protection to enable them design their investment fully aware of the associated risks. Host countries need to know their limitations in terms of their regulatory powers and their ability to respond to changing circumstances in the public interest. Academic scholars and legal practitioners in public service and private practice need to offer relative but predictable legal opinion in matters regarding jurisdictional criteria in investment arbitration. Thus, the need for clarity in this area is imminent. Several arbitral awards highlighted in proceeding chapters of this research illustrates how arbitral tribunals have swayed between applying different approaches to *ratione materiae*, *ratione personae* and *ratione voluntatis*. It may be emphasized that such divergent approach has led to various jurisprudential complications: e.g. uncertainty in the law; accusation of tribunals applying personal interpretative preferences; threat to legitimacy of the treaty based arbitration system.

Furthermore, the research tries to analyze current and emerging developments in investment laws and policies and law governing jurisdictional criteria of investment arbitration – legal issues directly and indirectly related to upholding the competence of the arbitral tribunal to hear a dispute. In this regard, it also opens the jurisdiction of the

International Centre for the Settlement of Investment Disputes (ICSID) to more scrutiny due to the prominent nature of this institution. There are two broad objectives intended to be achieved by this research, namely:

- **Gap Filling:** To conduct a comprehensive study of *Lex Juridictio* in transnational investment law.
- **Uncertainty Settlement:** To resolve the conflict between different interpretative practices as to Jurisdiction and admissibility with regards to concept of ‘nationality’, requirements for ‘consent’ and definition of ‘investment’ in transnational investment arbitration.
- **Balancing Overlap:** To resolve the conflict between foreign investor’s right to investment arbitration and state’s sovereign immunity.

During earlier academic involvement in international business and legal research, the author has not been able to identify a comprehensive study of *law governing jurisdiction requirements and waivers of admissibility* under investment treaty arbitration.<sup>76</sup> This research was therefore aimed at filling this vacuum by proposition of a comprehensive study of those requirements. The research would inquire deeply into the constituents of these requirements, their sources, basis upon which these requirements are built upon. It seeks to determine how the criteria governing these requirements can be identified, process through which they are generated, and how they are applied. The criteria to be identified in the formulation of these jurisdictional requirements will assist in fulfilling this aim. It is hoped that this research will put together all the fragmented views and fill in the literature gap.

Moreover, both investor’s right to investment arbitration and state’s sovereign immunity are metaphorically viewed as two untamed tigers that need to be arrested in a balanced way. The research would therefore propose equilibrium between fulfilling investor’s interests to a neutral dispute resolution procedure and deference to state’s sovereign immunity. In other words to introduce a fair balancing structure within the investment

---

<sup>76</sup> This fact is also documented in the forward note by Justice Stephan Schwebel to the recent book written by professor Peter Cameron. See P. Cameron, *International Energy Investment Law: The Pursuit of Stability* (OUP, England, 2010).



arbitration that would protect above mentioned investor's rights on one hand, and respect the immunity of a sovereign.

## **1.6. METHODOLOGY Of THIS RESEARCH**

Legal researchers have always struggled to explain the nature of their activities to colleagues in other disciplines. If Becher's (1981, p. 111) work continues to represent an accurate account of how academic lawyers are viewed by their peers they have much work still to do in this respect. He found that they were regarded as 'not really academic ...: an appendage to the academic world ....'.<sup>77</sup>

The built environment is usually considered to be an interdisciplinary field linking the disciplines of management, economics, law, technology and design (Chynoweth, 2006). The field as a whole can benefit from the greatest possible involvement of each of these in its collective research agenda. The author presents a welcome opportunity to express his views on the actual nature of legal research (or 'legal scholarship' as it is more usually described) in the context of the law discipline, specifically, to describe the nature of this research by reference to the epistemological, methodological and cultural features which distinguish it from other forms of built environment research.<sup>78</sup>

### **A. The epistemology of legal research:**

The author consents to the opinion that there is a dearth of theoretical literature on the nature of legal scholarship and a consequent lack of awareness about what legal scholars actually do. Although there is a tradition of theoretical scholarship (or 'jurisprudence') within the law, this tends to address abstract philosophical questions about the nature of law itself. Many lawyers would recognize Bix's (2003) description of jurisprudence as 'theorists talking past each other'.

Nevertheless, in a very different context, Arthurs (1983, pp. 63–71) proposed a useful taxonomy of legal research styles in his report on legal education and research in Canada. It has informed the choice of methodology employed by this research and is represented as a matrix in Figure 2 below. It will be seen that the vertical axis of the matrix represents the

---

<sup>77</sup> A Knight & L Ruddok, *'Advanced Research Methods in the Built Environment'*, (Blackwell Publishing Ltd 2008).

<sup>78</sup> Ibid.

familiar distinction between pure research which is undertaken for a predominantly academic constituency, and applied work which generally serves the professional needs of practitioners and policy makers.

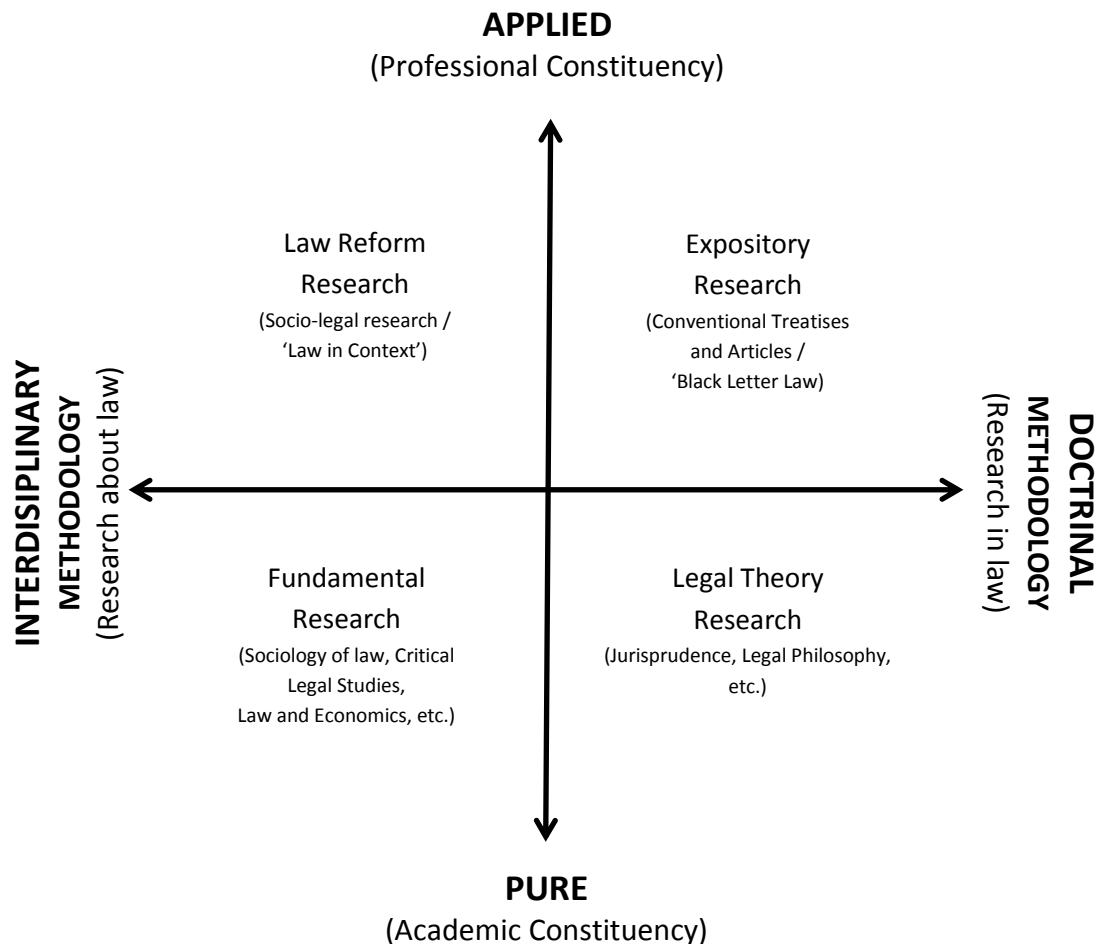


Figure 2: Legal Research Styles (Arthurs, 1983).

### Doctrinal legal research

Doctrinal research (on the right in Figure 2) is concerned with the formulation of legal 'doctrines' through the analysis of legal rules. Within the international law jurisdictions legal rules are to be found within treaties and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.

Deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines (e.g., the doctrine of consideration within the law of contract). These are systematic formulations of the law in particular contexts. They clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules. Doctrinal research is concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions take the form of asking ‘what is the law?’ in particular contexts. At an epistemological level this differs from the questions asked by empirical investigators in most other areas of built environment research.<sup>79</sup>

Legal rules are normative in character as they dictate how individuals ought to behave (Kelsen, 1967). They make no attempt either to explain, predict, or even to understand human behavior. Their sole function is to prescribe it. In short, doctrinal research is not therefore research about law at all. In asking ‘what is the law?’ it takes an internal, participant-orientated epistemological approach to its object of study (Hart, 1961) and, for this reason, is sometimes described as research in law (Arthurs, 1983).<sup>80</sup>

The author contends that, the actual process of analysis by which doctrines are formulated owes more to the subjective, argument-based methodologies of the humanities than to the more detached data-based analysis of the natural and social sciences. The normative character of the law also means that the validity of doctrinal research must inevitably rest upon developing a consensus within the scholastic community, rather than on an appeal to any external reality.

### **Interdisciplinary legal research**

In practice, even doctrinal analysis usually makes at least some reference to other, external, factors as well as seeking answers that are consistent with the existing body of rules. For example, an uncertain or ambiguous legal ruling can often be more easily interpreted when viewed in its proper historical or social context, or when the interpreter has an adequate understanding of the industry or technology to which it relates.

---

<sup>79</sup> H W Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*, (Social Sciences and Humanities Research Council of Canada, Ottawa, 1983).

<sup>80</sup> Ibid.

There comes a point, towards the left-hand side of the matrix in Figure 2, when the epistemological nature of the research changes from that of internal enquiry into the meaning of the law to that of external enquiry into the law as a social entity. This might involve, for example, an evaluation of the effectiveness of a particular piece of legislation in achieving particular social goals or an examination of the extent to which it is being complied with.<sup>81</sup>

In taking an external view of the law, each of these examples could be described as research about law rather than research in law. As one continues to move leftwards along the axis one encounters a greater willingness to embrace the epistemologies and methodologies of the social sciences.

### **Pure and applied legal research**

Within the context of interdisciplinary legal research (to the left of Figure 2) this distinction, in one sense, simply represents that between pure academic knowledge about the operation of the law (at the bottom of the diagram), and knowledge of the same kind which has been produced with a particular purpose in mind (at the top). The purpose of the latter will generally be to facilitate a future change, either in the law itself, or in the manner of its administration. Arthurs (1983) therefore describes this latter category of research as ‘law reform research’. He distinguishes these forms of research from the production of pure, academic knowledge which he refers to as ‘fundamental research’.<sup>82</sup>

The author’s has noted that there is also a strong correlation between pure, fundamental research and the willingness (indeed, the motivation) of researchers in these areas to question not simply the operation of law, but also its underlying philosophical, moral, economic and political assumptions. The nature of current research would include the Sociology of Law as well as the (left wing) Critical Legal Studies and (right wing) Law and Economics movements.

The applied form of doctrinal research (to the right of Figure 2) is concerned with the systematic presentation and explanation of particular legal doctrines and is therefore

---

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

referred to as the ‘expository’ tradition in legal research. This form of scholarship has always been the dominant form of academic legal research (Card, 2002) and has an important role to play in the development of legal doctrines through the publication of conventional legal treatises, articles and textbooks.<sup>83</sup>

When doctrinal research is undertaken in its pure form it is variously described as legal theory, jurisprudence, or (occasionally) legal philosophy. The limitations of this form of research in defining the nature of law as an academic discipline have been noted by the author. Nevertheless, although rarely used as a practical basis for legal analysis, it does provide insights into the nature of the legal methodologies actually employed by lawyers and legal scholars.<sup>84</sup>

### **B. In search of a methodology**

The dominance of the expository, doctrinal tradition in legal scholarship has been noted by the author while realizing that this is not simply a single, isolated category of scholarship. Some element of doctrinal analysis is found in all but the most radical forms of legal research.

Although law reform research appears as a separate category within Figure 2, its practitioners emphasize the importance of traditional legal analysis within their socio-legal work (Cownie, 2004, p. 55). Indeed, even within socio-legal studies, it was once suggested that social scientists should be regarded as ‘intellectual sub-contractors’ who should be kept ‘on tap, not on top’ (Campbell and Wiles, 1976). Doctrinal analysis therefore remains the defining characteristics of this academic legal research and the methodologies employed within it.

The doctrinal approach employed in this research involves the development of scholastic arguments for subsequent criticism and reworking by other scholars, rather than any attempt to deliver results which purport to be definitive and final. Methodology in this research is therefore employed subconsciously by the author who has consider himself to

---

<sup>83</sup> Ibid.

<sup>84</sup> J Bell, *‘The acceptability of legal arguments: the legal mind’*, (Clarendon Press, Oxford, 1986).

be involved in an exercise in logic and common sense rather than in the formal application of a methodology as understood by researchers in the scientific disciplines.

### **Deductive Reasoning**

The author is of the opinion that there is no fundamental distinction between the process of academic doctrinal analysis and the legal analysis undertaken by practicing lawyers or judges. The aim, in each case, is to answer the question ‘what is the law?’ in a particular situation. In the case of practicing lawyers or judges this will be a real and well-defined situation requiring an immediate answer to the question. For the legal scholar, the purpose is to undertake a more in-depth analysis which is capable of informing the deliberations of practitioners and judges in future cases. In either case, the initial process of applying a rule of law to a factual situation can be understood as an exercise in deductive logic.

This, of course, is an idealized account of the process of legal reasoning. If the process were as simple, and as mechanistic as this, society would have no need for lawyers, and still less for legal scholarship. In reality, in almost all cases, the deductive model will fail, without further analysis, to produce a definitive answer to the question of what the law is in a given situation.

Legal rules, of necessity, have to be expressed in general terms and were famously described by Hart (1961) as having an ‘open texture’, and therefore capable of interpretation in more than one sense. In the context of this research, there has, for instance, been considerable judicial and academic discussion over the meaning of ‘investment’ in relation to international investment adjudication. There will, therefore, often be an element of doubt as to whether a rule applies to a particular factual situation.

Although Hart (1961) concluded that adjudicators exercise discretion in these so-called ‘hard cases’, their decisions are actually based on recognized patterns of reasoning employed within the legal community which are used to supplement the deductive model described above. Lawyers and legal scholars are therefore often able to predict the outcomes of future cases by employing, however subconsciously, the same patterns of reasoning that will eventually be used by the judiciary.

## **Analogical reasoning**

The most widely used technique is undoubtedly the process of analogical reasoning. In contrast to deductive reasoning, which entails reasoning from a general rule to a specific case, analogy involves a process of reasoning from one specific case to another specific case. In those many situations where it is unclear whether a particular factual situation falls within the ambit of a rule, it can often be helpful to examine apparently similar cases which have previously come before the courts and arbitral tribunals. If, upon examination, the facts of these cases are found to be sufficiently similar to the facts of the subject case then it can be concluded that the facts of the subject case should be treated by the courts in the same way. Legal researchers in international comparative law are familiar with this process in the context of the operation of the common law doctrine of precedent.<sup>85</sup>

The decision as to whether a case is sufficiently similar to another is ultimately a subjective one as no two cases are ever completely identical. Judges therefore have considerable scope to distinguish the facts of a subject case from those in an established precedent if they choose not to follow it. Nevertheless, this scope is not unlimited and Bell (1986, p. 48) has highlighted how judicial decision making in these circumstances is constrained by social conventions within the legal community which he describes as the ‘rules of legal discourse’. He describes how these ‘provide a framework lying outside the power of the reasoner within which he has to operate if his arguments are to count as legal justifications’. Judges are subject to these rules but so, of course, are lawyers and legal scholars who all participate in the same legal discourse, and who all desire their arguments to be taken seriously.<sup>86</sup>

## **Inductive Reasoning**

A third technique involves the use of inductive reasoning which can be described as the reasoning from specific cases to a general rule. This can be of particular assistance when a particular factual situation does not appear to be addressed directly by a legal rule at all and it therefore becomes necessary to ‘fill the gap’ in the law. As with inductive reasoning in the sciences a general proposition can sometimes be derived from a number of specific

---

<sup>85</sup> N MacCormick, *Legal reasoning and Legal theory*, (Clarendon Press, Oxford 1994).

<sup>86</sup> Ibid.

instances. In the case of legal reasoning this involves the recognition of a new general rule which emerges from a number of earlier authorities which are then regarded simply as particular instances of the new rule.<sup>87</sup>

A variety of other techniques is available which, like those already described, also allow the available body of legal rules to be marshaled into coherent patterns (or ‘doctrines’) and applied to new factual situations in an apparently logical and consistent manner.<sup>88</sup> Indeed most legal discourse revolves around the verbal manipulation of the available sources of law, in the belief that the answer to most legal problems can be found in the underlying logic and structure of the rules if only this can be discovered (Smith, 2004). This approach is usually described as legal formalism (Vandevelde, 1996) and, despite numerous academic criticisms of its assumptions (e.g., Fitzpatrick and Hunt, 1987), continues to represent the dominant paradigm within legal practice and within legal scholarship, at least in terms of external appearances.

In author’s view, it is probably incorrect to describe the process of legal analysis as being dictated by a ‘methodology’, at least in the sense in which that term is used in the sciences. The process involves an exercise in reasoning and a variety of techniques are used, often at a subconscious level, with the aim of constructing an argument which is convincing according to accepted, and instinctive, conventions of discourse within the discipline.

Although the discourse is apparently conducted according to formalistic conventions it is also influenced by shared value (or policy) judgments which often remain unspoken. The ‘methods’ employed in legal scholarship are neither consciously learned, nor consciously employed as is the case with scientific methods. The skills and conventions of legal analysis are instead learned at an instinctive level through exposure to the process, and they are then employed on the same basis in the development of legal argument. In much the same way that the use of an explicit methodology confers legitimacy in scientific research, credibility within legal scholarship is therefore dependent on the researcher’s

---

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.



work demonstrating an understanding and adherence to the accepted conventions and norms of its discourse.<sup>89</sup>

### **C. The cultural dimension**

This lack of a formal research methodology, and the reliance on analysis and the development of argument within a prevailing academic discourse, is of course a particular feature of the arts and humanities family of disciplines to which law belongs. This places law at the ‘soft’ end of the familiar disciplinary spectrum.<sup>90</sup>

The science/arts & humanities distinction reflects genuine epistemological and methodological differences between the families of disciplines about the nature of knowledge, and about the manner of its production. Becher (1987) has described knowledge production in the sciences in terms of the cumulative and piecemeal accumulation of individual segments of knowledge which, over time, contributes to a comprehensive explanation of particular phenomena. He contrasts this with humanities disciplines like law. These, he describes, as being concerned with the organic development of knowledge through an ongoing process of reiterative enquiry. They address multifaceted, rather than discrete, problems and attempt, not to explain the individual components of phenomena, but to develop a holistic understanding of their overall complexity.<sup>91</sup>

The dominance of the scientific disciplines within the built environment inevitably influences prevailing views about knowledge and knowledge production within the field. Indeed, the language of built environment research is often dominated by the rhetoric of the social sciences in particular. This is characterized by a concern with the traditional social science methodologies (see, e.g., Fellows and Liu, 2003) and with an emphasis on empirical investigations rather than the development of theoretical perspectives (Betts and Lansley, 1993; Brandon, 2002).

---

<sup>89</sup> Ibid.

<sup>90</sup> F Cownie, ‘Legal Academics: Culture and Identities’, (Hart Publishing, Oxford and Portland, Oregon 2004).

<sup>91</sup> Ibid.

## Cultural challenges

The epistemological and methodological differences between legal scholarship and most other built environment research styles also generate cultural differences between the two. These produce expectations regarding the external appearance of academic research within the field which legal scholars often struggle to satisfy. These may relate to expectations about the form and appearance of research outputs, about the process which is undertaken in generating the research, and about the more general behavioral characteristics of researchers within the field.<sup>92</sup>

More fundamentally, cultural differences can sometimes obscure the academic merits of doctrinal work from those belonging to different disciplinary traditions. As a consequence, legal scholars' experiences of peer review within the built environment have not always been happy ones. Their work can all too easily be dismissed as lacking a methodology, as being based only on opinion, or even as being 'not research' by peers operating within a scientific, rather than a humanities paradigm.<sup>93</sup>

This research does not involve empirical investigation, but with the analysis and manipulation of theoretical concepts. The methodology employed is probably more accurately categorized, in social science terms, as techniques of qualitative analysis. Deductive and inductive logics and the use of analogical reasoning all feature strongly within this research.

Crucially however, as the process is one of analysis rather than data collection, no purpose would have been served by including a separate methodology chapter within current doctrinal research work. This is perhaps the most striking difference between the appearance of this research output with a scientific work, and the one which has historically caused most difficulty for legal scholars when subject to peer review by other built environment researchers.

---

<sup>92</sup> P Chynoweth, *The built environment interdiscipline: A theoretical model for decision makers in research and teaching, proceedings of the international conference on building education and research*, (Hong Kong Polytechnic University press 2006).

<sup>93</sup> Ibid.

International investment law transpires and develops more in view of arbitral precedent and case law than on the basis of traditional textual approaches to treaty interpretation. Nonetheless, applying investment treaties in practice as well as studying and understanding the field not only requires knowledge about the jurisprudential development but also demands awareness of the historic, economic, and customary international law context of foreign investment activities. This study is thus guided by a number of methodological principles and research techniques.

The main area of the research – *lex juridictio* – is looked at from a diversity of perspectives, which feeds the argument that the leading method to be applied in this study is a doctrinal-applied method. Its overarching aim is to show how the relevant principles operate in practice and how principals such as local legislative acts which promote Foreign Direct Investment (FDI) in a particular country address issues of investment insecurity. The Author would also like to contend that the Historical and Comparative methods were instrumental in fulfilling the research aims and objectives. Similarly sources of public international law that could accommodate the relevant principles related to jurisdictional requirements of investment arbitration were doctrinally analysed with a view to justify the application of the principle.

The jurisprudence of investment treaty tribunals were analysed, the treaty provisions dealing with *ratione personae*, *ratione materiae* and *ratione voluntatis*, and the arbitral awards rendered in this context. The notions of investment, investor and consent were also traced in obiter dicta of arbitral awards. It is noteworthy that it is generally acceptable that law of judicial precedent does not exist in international investment law. However, it is increasingly evident that ICSID jurisprudence hinges largely on reasoning employed in previous decisions. The practice of other international courts and tribunals, such as the International Court of Justice (ICJ), the WTO Panels or the WTO Appellate Body, epitomizes this phenomenon. Such de facto case law was also reflected in the Gas Natural case (Sonatrach vs. Gas Natural Fenosa, ICC arbitration), where the tribunal emphasized that it ‘has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards’, but it ‘thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID

Arbitration Rules’ and found that there were no ‘decisions or awards reaching contrary conclusion.’

Moreover, relying on the comparative approach, similarities and differences between various legal systems were reviewed and the jurisprudence of investment treaty tribunals was compared with jurisprudence of the European Union. The focus was to analyse most importantly the jurisprudence of the European Court of Justice (ECJ). The comparative approach would enable the research to transpose relevant principles adopted by ECJ as to debate existing within the concept of freedom of movement of capital. The theme adopted in one of the research questions is injecting the principles governing the concept of ‘nationality’ adopted by ECJ into the determination of the nationality of foreign investors to uphold the jurisdiction of investment arbitral tribunals. The comparative method also entails analysis of dispute resolution provisions in bilateral and multilateral investment treaties, national legislations, guidelines or regulatory framework, contractual undertakings.

## **1.7. SUMMARY OF THESIS ARGUMENT**

**Chapter 1** revisits the historic development and principles of international investment protection. It focuses on bilateralism and multilateralism as the ordering paradigms of international investment relations. It also covered the aims and objectives of the research, its limitations, methodology and the introduction of analytical tools to be used in the subsequent chapters. It was shown that proliferation of bilateral and regional treaties over the past two decades reflects more stable consensus on the content and scope of international investment protection.

**Chapter 2** offers an outline of the various traditional methods for the settlement of disputes between hosts States and foreign investors and explains the shortcomings of those traditional methods. Theoretical, contractual and judicial nature and concepts of international commercial and investment arbitrations are reviewed. The international investment treaties, the arbitral institutions and arbitration regimes are reviewed. Rubric of growing treaty-based ICSID jurisdiction and the double-filtering as to dispute’s arbitrability under the auspices of ICSID associated therewith is discussed.

**Chapter 3** draws on the importance of getting legal terminology beyond linguistic fidelity to proper usage because the scope of judicial review of the arbitral tribunal's decisions on issues pertaining to its own adjudicative power depends upon the classification of such issues. The taxonomy of preliminary issues in investment arbitration is explained. The chapter focuses on the notion of 'admissibility' - the prerequisite to exercise of the adjudicative power of tribunals in investment arbitration - which has been subject to pronounced ambiguity both in lexicon and solicitation.

**Chapter 4** addresses the other preliminary issue in investment arbitration, namely 'jurisdiction' - the prerequisite to existence of the adjudicative power in investment arbitration - which has also been subject to much argumentative dialogue in jurisprudence and practice of investment arbitration. Admissibility and jurisdiction although very closely defined in lexicon, refer to different set of prerequisite terms in investment arbitration. It will make a preliminary introduction to jurisdictional requirements *raetone materiae*, *ratione personae* and *ratione voluntatis*.

**Chapter 5** draws on other waivers of admissibility which in Author's view challenge the 'arbitrability' of investment claims. It is the agreement to arbitrate - often the arbitration clause embedded in a contract between the parties - which renders an arbitral proceeding possible. An unwilling party might contest the arbitration contract and try to involve the judiciary, to settle the dispute, instead. This notorious maneuver is normally aimed at waiving the arbitrability of the claim/dispute. The chapter furthermore discusses the various legal resolutions to uphold arbitrability and reviews relevant rationales and doctrines.

**Chapter 6** elaborates on the requirement *ratione personae*. It argues that ICSID investment treaty arbitration presupposes that it is fundamental to establish that an entity is indeed 'a national of the contracting state'. The central theme of chapter 2 revolves around definition of nationality and the requirement *ratione personae*. It is submitted that both the treatment and interpretation of incorporation versus real seat/control criteria to establish corporate nationality remain vague and unclear. The chapter proposes that ICSID tribunals have failed to invoke a galvanized mechanism on establishing nationality of corporate investors.

**Chapter 7** deals with the notion of ‘investment’. ICSID jurisprudence is examined in order to expose tribunals’ deliberations as to what constitutes ‘investment’ under article 25 of the ICSID Convention. The analysis of the arbitral awards on jurisdiction affirmed the hypothesis that overlooking the very existence of two separate sets of jurisdictional requirements would lead to misleading conclusions. The Author will address questions on; difference between a dispute arising directly out of an investment and a dispute arising from a direct foreign investment, limitations of party discretion in agreeing that a particular transaction is an investment and decision regarding ICSID’s jurisdiction *ratione materiae*.

**Chapter 8** lays proper foundation for giving a descriptive and analytical account of how consent to arbitrate evolves and should be deciphered if the tribunal is faced with the task of interpreting the disputed consent clause of a treaty. The analysis dwells on the contentious aspects of *ratione voluntatis*: it exposes to legal scrutiny of two central arguments - one being related to the appropriate interpretation in case of ambiguous expressions of consent, and the other being the debate over the nature and time of ‘consent’ and its irrevocability when allegedly given in a treaty and/or the municipal laws.

**Chapter 9** provides the summary conclusion of the research, its limitations, findings and propositions. It concludes with the Author’s propositions for the prospective and projected further academic research on tackling waivers of arbitrability in jurisprudence of international investment arbitration in general and ICSID in particular.

## **2. CHAPTER TWO: SETTLEMENT OF INVESTMENT DISPUTES**

### **2.1. INTRODUCTION**

Chapter one touched on the economic drives and financial incentives behind the rationale of foreign investment, based on which corporate entities established under the municipal laws of one country involve in substantial financial and legal interests (investments) protected under a host country's municipal law on long term basis.

The current chapter offers an outline of the various traditional methods for the settlement of disputes between hosts States and foreign investors and explains the shortcomings of these traditional methods. It will introduce international commercial arbitration and will elaborate on its theoretical, contractual and judicial nature and concepts. International treaties relevant to arbitration will receive careful attention to facilitate fluent realization of various notions discussed in proceeding chapters. The international arbitral regimes are introduced and discussed further on in the chapter and finally the provision of mixed arbitration is discussed in context of ICSID Convention.

The idea underlying the ICSID Convention is to close the gaps caused by shortcomings. This chapter explains the origins and history of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). It also explains why the mechanism created by the ICSID Convention works to the advantage of the investor as well as of the host State.

It also gives a broad description of the leading principles underlying dispute settlement under the ICSID Convention. These include the specialization on investment disputes, the substantive law applicable to investment disputes, the mixed nature of proceedings between a State and a foreign investor, the requirement of consent to ICSID's jurisdiction, the institutional support given by the International Centre for Settlement of Investment Disputes (the Centre), the self-contained and automatic nature of proceedings and the overall effectiveness of the system.

## 2.2. INTERNATIONAL TREATIES ON ARBITRATION

Arbitration rules ensure the orderly conduct of arbitrations. National laws on arbitration offer the support of the courts to arbitration within the State and give recognition to resulting arbitral awards. But in order that arbitration be an effective instrument for the settlement of international disputes it is necessary that agreements to arbitrate and arbitral awards are recognized internationally. This is the essential task addressed by the conventions on international commercial arbitration.

Important milestones in shaping the regulatory framework for international arbitration are, among other things, the ratification of:

- The investment agreements such as BITs or MITs which refer to relevant arbitral institutions such as London Court of International Arbitration, International Chamber of Commerce, etc. for the dispute settlement,
- The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Appendix 2) to establish the possibility of a dispute resolution procedure under the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), and that of
- 1958 United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

These are all discussed further in detail.

### (A) Treaty of Amity, Commerce and Navigation

Jay Treaty, also known as Jay's Treaty, The British Treaty, the Treaty of London of 1794, and officially the Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and The United States of America,<sup>94</sup> was a treaty between the United States and Great Britain that is credited with averting war,<sup>95</sup> resolving issues remaining since the Treaty of Paris of 1783, which ended the American Revolution,<sup>96</sup> and facilitating ten years

---

<sup>94</sup> J S Olsen (ed.) *'Historical Dictionary of European Imperialism'* (Greenwood Press 1991). p. 332.

<sup>95</sup> J E Smith and J Marshall, *'Definer of a Nation'* (1998) p. 177.

<sup>96</sup> T Estes, *'The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture'* (2006) p. 15.



of peaceful trade between the United States and Britain in the midst of the French Revolutionary Wars, which began in 1792.<sup>97</sup>

The origins of modern arbitration are usually dated from the Treaty of Amity, Commerce and Navigation which set up, *inter alia*, mixed tribunals consisting of an equal number of members appointed by each of the two States, with an umpire in the event of disagreement, to consider claims by the nationals of Great Britain and the United States. The Jay Treaty commissions decided many claims by awards expressly applying legal principles.

During the first half of the nineteenth century, however, the practice of rendering unreasoned awards persisted, particularly in cases where a foreign sovereign was designate as the arbitrator.<sup>98</sup> Moreover, there was still a widespread view that ‘arbitral commissions’ were essentially extensions of diplomacy, with the State-appointed arbitrators negotiating a solution with the aid of the neutral umpire, who served a function akin to that of a mediator. What proved to be the decisive step towards the typically modern form of arbitration, with a tribunal reaching by an essentially judicial process a reasoned decision clearly based on law, was taken by the United States and Great Britain in the 1871 Washington Treaty.<sup>99</sup>

The works of 1871 Washington treaty under the so called *Alabama* claims tribunal inspired the States represented at the 1899 Hague Peace Conference, convened by the Tsar of Russia in an attempt to find ways of reducing the risks of armed conflicts in Europe, to adapt a Convention on dispute settlement in which arbitration played a central role.

## **(B) Hague Peace Conferences**

The Hague Conventions were two international treaties negotiated at international peace conferences at The Hague in the Netherlands: The First Hague Conference in 1899 and the Second Hague Conference in 1907. Along with the Geneva Conventions, the Hague

---

<sup>97</sup> Ibid.

<sup>98</sup> e.g. the *Portendik* claim (1843, Mixed Arbitral Commission), Moore, *Int. Arb.*, Vol. 5, 4937, and the *San Juan de Fuca* case (1871, Emperor of Germany), *ibid.*, vol.1, 229.

<sup>99</sup> For the treaty see, J G Wetter, ‘*The International Arbitral Process*’, vol. 1 (New York, 1979), p.27-173.

Conventions were among the first formal statements of the laws of war and war crimes in the body of secular international law.

The German international law scholar and neo-Kantian pacifist Walther Schücking called the assemblies the ‘international union of Hague conferences’<sup>100</sup>, asserting ‘that a definite political union of the states of the world has been created with the First and Second Conference’. A major effort in both the conferences was to create a binding international court for compulsory arbitration to settle international disputes, which was considered necessary to replace the institution of war. This effort, however, failed to realize success either in 1899 or in 1907. The First Conference was a success and was focused on disarmament efforts. The Second Conference failed to create a binding international court for compulsory arbitration but did enlarge the machinery for voluntary arbitration.

The advantages of arbitration, along with good offices and mediation and inquiry, were recognized at the Hague Peace Conference 1899, which sought to facilitate its use as a means of settling international disputes and avoiding a course to the use of force.<sup>101</sup> The Conference created the Permanent Court of Arbitration (‘PCA’). It has often been said that it is neither permanent nor a court nor, itself, does arbitration.

The hay day of the Permanent Court of Arbitration was in the years before World War I. Among the arbitrations under its auspices to which the United Kingdom was a party were the *Venezuelan Preferential Claims* (1904),<sup>102</sup> *Japanese House Tax* (1905),<sup>103</sup> *Muscat Dhows* (1905),<sup>104</sup> *North Atlantic Coast Fishers* (1910),<sup>105</sup> and *Savarkar* (1911)<sup>106</sup> cases.

After the creation of Permanent Court of International Justice in 1923, the PCA was occasionally resorted to, as by the United Kingdom in the *Chevreau* case (1931).<sup>107</sup> It heard a total of twenty cases. No inter-state cases have been referred to the Court, as such,

---

<sup>100</sup> W Schücking, ‘*The international union of the Hague conferences*’, (Clarendon Press, 1918).

<sup>101</sup> See, J B Scott, ‘*The Hague Convention and Declarations of 1899 and 1907*’, (New York, 1915).

<sup>102</sup> 6 UNRIAA 99.

<sup>103</sup> 11 UNRIAA 51.

<sup>104</sup> 11 UNRIAA 83.

<sup>105</sup> 11 UNRIAA 167.

<sup>106</sup> 11 UNRIAA 243.

<sup>107</sup> 2 UNRIAA 1113.

since 1932, although its facilities have often been used for *ad hoc* arbitration. Permanent Court of Arbitration still exists.

### **(C) International Convention on Settlement of Investment Disputes**

In 1961, then-General Counsel of the International Bank for Reconstruction and Development (IBRD) developed the idea for a multilateral agreement on a process for resolving individual investment disputes on a case by case basis as opposed to imposing outcomes based on standards.

He held conferences to consult legal experts from all parts of the world; including Europe, Africa, and Asia, to discuss and compose a preliminary agreement (see Appendix 3). The Board of Directors approved the final draft of the agreement, and the Bank president disseminated the convention to its member states for signature on March 18, 1965. Twenty states immediately ratified the convention. The convention, establishing the International Centre for Settlement of Investment Disputes, entered into force on October 14, 1966.<sup>108</sup> The convention created the International Centre for Settlement of Investment Disputes (ICSID, 'the Centre'). This why, it is commonly referred to as the ICSID Convention. Sometimes the Convention is also referred to as the Washington Convention.

The convention procedures were designed to provide a balance between the interests of investors and of hosts States. It was thought desirable to establish a dispute settlement mechanism to which both the investor and the State could become irrevocably committed and which either could invoke, and which was detached from the municipal laws of both the investor and host States. It was also meant to provide a standing system which States and investors could incorporate in their agreements by reference, thus avoiding the need for the negotiation of a new settlement procedure in every case.

The ICSID Convention has been a great success. As of 2012, 158 countries are signatories to the Convention and 148 countries have already ratified it from all geographical and

---

<sup>108</sup> See, L Reed, J Paulsson and N Blackaby, '*Guide to ICSID Arbitration*' (2nd Edition, Kluwer Law International 2010).

political blocs, among them the United States of America, the United Kingdom, France and Germany. Accession to the Convention appears to be a high priority for newly independent States keen to attract foreign investment. The United Kingdom gave effect to it by the *Arbitration (International Investment disputes) Act 1966*,<sup>109</sup> as amended.<sup>110</sup>

The aim of the ICSID, as expressed in its preamble (see Appendix 2), is to promote economic development through the creation of a favourable investment climate. ICSID provides a system of dispute settlement that is specialized in investor-State disputes. It offers standard clauses for the use of the parties, detailed rules of procedure, and institutional support.<sup>111</sup> Proceedings under the ICSID Convention are self-contained. In particular, domestic courts have no power to stay, to compel, or to otherwise influence ICSID proceedings. Nor do domestic courts have the power to set aside or otherwise review ICSID awards.

ICSID awards are binding and final and not subject to review except under the narrow conditions provided by the Convention itself (Article 49-52). Non-compliance with an award by a State would be a breach of the Convention and would lead to a revival of the right to diplomatic protection by the investor's State of nationality (Article 53 and 27). The Convention provides an effective system of enforcement. The obligations arising from awards are to be enforced like final judgement of the local courts in all States parties to the Convention (article 54).

ICSID had a slow start. The Convention entered into force in 1966 but the first case was not registered before 1972. The 1970s and 1980s saw steady but only intermittent action. One or two cases per year were typical for that period. Since the mid-1990s, there has been a dramatic increase in activity. In 1995 there were four ICSID arbitrations pending. In early 2007 more than 100 were pending.<sup>112</sup> On average about two new cases are registered every month.

---

<sup>109</sup> The Convention entered into force for the UK on January 18, 1967 (treaty Series No.25/1967); Cmnd 3255. The Convention has been extended to various territories; see S.I.1967 Nos 159,249,585. 1968/1199 and 1979/572.

<sup>110</sup> By the Evidence (Proceedings in Other Jurisdictions) Act 1975 s.8 (20 and Sch.2 and the Supreme Court Act 1981 Sch.5

<sup>111</sup> For a concise overview, see I. Reed, J Paulsson, and N Blackaby, *Guide to ICSID Arbitration* (2004). For a more detailed exposition, see C Schreuer, *The ICSID Convention: a Commentary* (2001).

<sup>112</sup> For detailed information on pending cases, see < <http://www.worldbank.org/icsid/cases/pending.htm> >.

#### **(D) Convention on Recognition and Enforcement of Foreign Arbitral Awards**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting States to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important.<sup>113</sup>

In 1953, the International Chamber of Commerce (ICC) produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the *United Nations Economic and Social Council*. With slight modifications, the Council submitted the convention to the International Conference in the spring of 1958. As of May 2012, 146 of the 193 United Nations Member States have adopted the New York Convention. About fifty of the U.N. Member States have not adopted the Convention.<sup>114</sup>

Under American law, the recognition of foreign arbitral awards is governed by chapter 2 of the Federal Arbitration Act, which incorporates the New York Convention. However, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the ‘Convention’) does not pre-empt state law. In *Foster v. Neilson*,<sup>115</sup> the Supreme Court held;

‘Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself without the aid of any legislative provision.’

---

<sup>113</sup> ‘*New York Convention*’, <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)>, accessed 10 March 2013.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Foster v. Neilson*, 27 U.S. 253, 314 (1829). See also *Valentine v. U.S. ex rel. Neidecker*, 57 S.Ct. 100, 103 (1936); *Medellin v. Dretke*, 125 S.Ct. 2088, 2103 (2005); *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2695 (2006).

Thus, over a course of 181 years, the United States Supreme Court has repeatedly held that a self-executing treaty is an act of the Legislature (i.e., act of Congress).

The provisions involving the enforcement of New York Convention awards in the English courts mirror closely the procedures enacted in other contracting States whereby an English award may be enforced. An award creditor will be able to rely on the enforcement scheme in order that an award made in England will be enforced in another Convention territory.

The Convention provides a systematic and comprehensive system for international arbitration enforcement of awards, much more so than the provisions of the Judgments Regulations, which apply within EU only. The widespread ratification of the Convention therefore makes the law on recognition and enforcement of arbitral awards significantly more predictable and uniform than that relating to recognition of judgements, which has been viewed as one of the advantages enjoyed by arbitration as a form of international investment dispute resolution.

### **2.3. INTERNATIONAL ARBITRATION RULES AND REGIMES**

Arbitration between a host State and a foreign investor may take place in the framework of a variety of institutions or rules. If arbitration is not supported by a particular arbitration institution, it is referred to as *ad hoc* arbitration. *Ad hoc* arbitration requires an arbitration agreement that regulates a number of issues. These include the selection of arbitrators, the applicable law, and a large number of procedural questions. The drafting of such rules represents a potentially lengthy and troublesome preliminary to the settlement of the dispute which necessarily falls for completion at a time when relations between the parties are likely to be strained.

It is clearly preferred to have predetermined rules to which the parties can swiftly and easily resort. Many institutions, in countries throughout the world, have drafted sets of rules that may be incorporated into the parties' agreement for the conduct of arbitrations, in the hope of attracting lucrative business to their centers. The judicial regimes and institutions specified for the resolution of international commercial and investment

disputes generally include one or more of the following at the option of the claimant investor:

- International Court of Justice.
- Municipal courts of the host state.
- Arbitration pursuant to the ICSID Arbitration Rules or the ICSID Additional Facility Rules.
- *Ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules.
- Arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce (ICC).
- Arbitration pursuant to the Rules of Arbitration of the Stockholm Chamber of Commerce.
- Arbitration pursuant to the Rules of the Cour Commune de Justice et d'Arbitrage (CCJA).
- Arbitration pursuant to the Rules of Arbitration of the London Court of International Arbitration (LCIA).
- Arbitration pursuant to the Rules of Arbitration of the Euro-Arab Chambers of Commerce.
- Arbitration pursuant to the Rules of Arbitration of the Netherlands Arbitration Institute.
- Arbitration pursuant to the Rules of Arbitration of the former USSR Chamber of Commerce and Industry.
- A settlement procedure previously agreed to between the investor and host stat.

It would not be possible to discuss each of these in detail; and the rules are in any event much alike. In this chapter attention will be focused on four systems which have been used extensively in practice, and which illustrate the main variations in arbitration structures.

#### **A. The International Court of Justice (ICJ)**

The international Court of Justice was created in 1945 by its Statute, which forms part of the Charter of the United Nations. Unlike its predecessor, the Permanent Court of International Justice, the International Court is the principal judicial organ of the United Nations (charter, article 92). The International Court of Justice acts as a world court. The

Court has a dual jurisdiction : it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (jurisdiction in contentious cases); and it gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request (advisory jurisdiction).

The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York (United States of America). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

Investors rarely refer to their home governments to bring a claim on their behalf at the International Court of Justice (the 'ICJ'). The only case involving FDI which the International Court of Justice addressed on the merits as of today was the Case Concerning Elettronica Sicula S.p.A. (hereinafter, Elsi case).

In Elsi case, the International Court of Justice reviewed and rejected a claim by the United States that the Italian government had interfered with the investment of a United States corporation in Italy, in violation of the Treaty of Friendship, Commerce and Navigation between the two countries. The United States failed to persuade the International Court of Justice that Italy's actions represented an illegal intervention in management and control, an illegal impairment of investment rights, an unfair expropriation of property, and an unlawful failure to provide protection and security of property.<sup>116</sup>

## **B. The International Chamber of Commerce (ICC)**

The best established arbitral institution is the International Chamber of Commerce (ICC). It is one of the most important institutions for the arbitration of international trade disputes. ICC was founded in 1919 and has its headquarters in Paris. Its most distinct feature is the administrative assistance and guidance provided by the central institution in individual cases.

---

<sup>116</sup> S Murphy, 'The *ELSI* case: an investment dispute at the international court of Justice' (1991) Yale Journal of Int'l Law 16, p. 392.



A major role within the institution is played by the so called '*International Court of Arbitration*'. Despite its name, this is an administrative body made up of representatives from different countries. Similar to the '*Permanent Court of Arbitration*', the ICC Court only provides technical assistance and a list of arbitrators, but will not itself render a judgment or award.

A special feature in ICC proceedings is the 'Term of Reference'. These terms will provide for a short characterization of the case, including a summary of the claims and, specially a list of issues to be decided. Another peculiar feature concerns the manner in which an ICC tribunal reaches its final award. The role of the Court is limited. Article 27 of the Rules of Arbitration states that:

'... The Court may lay down modifications as to the form of the award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'

Nonetheless, the prior scrutiny by the Court is a valuable precaution which should ensure the validity and enforceability of the final award. Article 6(4) provides:<sup>117</sup>

'Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the arbitral tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and please even though the contract itself may be non-existent or null and void.'

This provision constitutes an agreement of the parties to empower the arbitrator to decide on his own jurisdiction and to have jurisdiction even if the contract containing the arbitration clause is non-existent, i.e. void *ab initio* or invalid or illegal when he gives his award. The rules also provide that the award shall be 'binding' on the parties who will be deemed to have waived their right to any form of recourse. In normal circumstances the finality of the ICC arbitration award is accepted by the English courts.<sup>118</sup>

---

<sup>117</sup> Rules of Arbitration of the ICC 1998 Art.4(2). A prior nomination of the arbitrator does not 'commence' the arbitration.: *Offshore International SA v Banco Central SA* (1976) 2 Lloyd's Rep. 402 at 407.

<sup>118</sup> *Sanghi Polyesters Ltd (India) v KCFC (Kuwait)* [2000] 1 Lloyd's Rep. 480.

### **C. The London Court of International Arbitration (LCIA)**

The London Court of Arbitration (LCIA)<sup>119</sup> has existed since 1986, following the previous London Chamber of Arbitration established in 1892. It is a tripartite organization sponsored by the London Chamber of Commerce, the City of London Corporation, and the Chartered Institute of Arbitrators, and is administered by the latter. Its seat is at International Arbitration Centre in London. The Rules of London Court of International Arbitration are known as LCIA rules. Regardless of the nationalities of the parties, the London Court is designed to deal with disputes arising out of commercial transactions, including investor-State disputes. The 'Arbitration Court' includes practitioners from all the major trading countries.

Similar to ICC in terms of private nature of its establishment, the London Court of International Arbitration is composed to arrange and administer arbitrations under any system of law in any part of the world. According to Connerty, the tribunal adjudicates the disputes either under its own Rules or under the UNCITRAL Rules, and 'there is no more need for an LCIA arbitration to be conducted in London than there is for an ICC arbitration to be held in Paris'.<sup>120</sup>

As for jurisdiction of the arbitral tribunal, Article 23(1) states that:

'The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause.'

Article 23(4) on jurisdiction of Arbitral Tribunals provides:

'By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority.'

---

<sup>119</sup> For detailed information, see <<http://www.lcia-arbitration.com/>>.

<sup>120</sup> See A Connerty, 'Dispute resolution in the oil and gas industry – recent trends' <<http://www.dundee.ac.uk/cepmpl/journal/html/vol8/article8-8.html>> accessed 2 January 2010.

Based on Article 26(9), all awards shall be final and binding on the parties. By agreeing to arbitration under LCIA Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

#### **D. The United Nations Commission on International Trade Law (UNCITRAL)**

UNCITRAL, the United Nations Commission on International Trade Law, was established in 1966 to harmonize and unify the laws of international trade. UNCITRAL was seen as well placed to produce a ‘neutral’ set of rules, acceptable to States and parties from all regions and of all political complexions, including those who might harbor suspicions that ICC and other rules prepared by Western arbitration institutions were somehow colored by their capitalist origins.

The UNCITRAL Arbitration Rules were adopted in 1976,<sup>121</sup> and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. As a result of their employment by regional arbitration centers in Cairo, Kuala Lumpur and elsewhere, and in modified form by the Iran-US Claims tribunal, they have been well tried and tested in practice.

The UNCITRAL has also influenced the development of international arbitration by way of a proposal for national legislation called 1985 UNCITRAL Model Law on International Commercial Arbitration (1985) and a corresponding proposal on international conciliation (2002).

The UNCITRAL Rules are similar in many respects to the ICC Rules, although they are more detailed on certain procedural matters. The differences between the two systems derive chiefly from the fact that UNCITRAL system, unlike the ICC has no permanent institutions to supervise the arbitration process.

---

<sup>121</sup> See (1976) 15 *ILM* 701. UNCITRAL also adopted a set of Conciliation Rules in 1980; See (1981) 20 *ILM* 301.

Article 23 of UNCITRAL Rules ‘*Pleas as to the jurisdiction of the arbitral tribunal*’ in paragraph 1 provides that:

‘The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.’

## **2.4. INTERNATIONAL COMMERCIAL ARBITRATION**

Under traditional international law, investors did not have direct access to international remedies to pursue claims against foreign States for violation of their rights and had to depend on diplomatic protection by their home states. A State exercising diplomatic protection espouses the claim of its national against another State and pursues it in its own name.<sup>122</sup> The International Court of Justice explained in the *Mavrommatis Palestine Concessions*<sup>123</sup> case;

‘It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the international law.’<sup>124</sup>

Diplomatic protections depend on a number of factors. The investor whether it is an individual or a corporation, must be a national of the protecting State. This bond of nationality must have existed continuously from the time of the injury until the claim is presented or, according to some, until the claim is settled. In addition the investor must have exhausted the local remedies in the state that has allegedly committed the violation.

The usefulness of diplomatic protection is limited. The investor has no right to diplomatic protection but depends on the political discretion of his government. The government may refuse to take up the claim. It may discontinue diplomatic protection at any time. It may

---

<sup>122</sup> The International Law Commission has adopted draft Articles on Diplomatic Protection in 2006. See Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10). The General Assembly took note of the draft articles in Resolution 61/35.

<sup>123</sup> *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

<sup>124</sup> *Mavrommatis Palestine Concessions* case, PCIJ, Ser. A, No. 2, p. 12.

even waive the national's claim or agree to a reduced settlement. In other words the investor is never in control of the process. As the ICJ said in the *Barcelona Traction* case:

'The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.'<sup>125</sup>

The primary method of dispute settlement through diplomatic protection is negotiation. If negotiations fail, States may resort to international adjudication, including the International Court of Justice (ICJ). Diplomatic protection may also lead to arbitration between the two states.<sup>126</sup> Alternatively, States may resort to unfriendly measures or countermeasures (reprisals). This is limited by the prohibition of the use of force treaties.

Alternatively in many cases investors have also been granted direct access to effective means of international dispute settlements that no longer depend on the diplomatic protection by their home States. In the absence of an agreement to the contrary an investment dispute between a state and a foreign investor could be settled by referral to the host State's courts. Conflict of laws rules will normally refer to these courts, since the dispute is likely to have the closest connection to the State in which the investment is made.

From an investor's perspective, this is not an attractive solution in view of the fear for lack of partiality from the courts of the State against whom it wishes to pursue its claim. In addition, domestic courts may be bound to apply the local law even if it is at odds with international legal rules. Domestic courts may also lack the expertise to deal with the highly technical nature of investment disputes and the interpretation of the international investment law.

The gap left by the traditional methods of dispute settlement (diplomatic protection and action in domestic courts) has led to the idea of granting direct access to the investors to

---

<sup>125</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, p. 44.

<sup>126</sup> See eg *Martini*, Award, 3 May 1930, 2 RIAA 974; *Canevaro*, Award, 3 May 1912, 11 RIAA 379.

effective international procedures, especially arbitration. Through arbitration investors gain access to an effective international remedy while hosts States, by consenting to such international procedure, are likely to attract more foreign investors and shield themselves against other processes such as diplomatic protection.

### **A. The Theoretical Concept of Arbitration**

Arbitration is the name given to the determination of a difference between States (or between a State and a non-State entity) through a legal decision of one or more arbitrators and an umpire, or of a tribunal other than the International Court of Justice or other permanent tribunals. The arbitration may be concerned with one particular matter or may be concerned with the claims of nationals of either of the two States against the other State. Arbitration can be *ad hoc*, for the settlement of a particular dispute or institutional, for the settlement of a class of disputes.<sup>127</sup>

Whilst there is no universally accepted comprehensive definition of ‘arbitration’,<sup>128</sup> there is a general consensus about the characteristics of main features of arbitration. These include:

- Agreement: Arbitration is a consensual dispute resolution process; it requires an agreement between the parties to refer their disputes to arbitration as opposed to resolving them in the courts. The agreement may be set out in a clause of the main contract or may be entirely distinct contract;<sup>129</sup>
- A tribunal: the process of arbitration requires a neutral third party to resolve the dispute. This may be a neutral individual, or panel of individuals, chosen by the parties, or by means of a process agreed by the parties, or by law as a default mechanism;

---

<sup>127</sup> J Collier and V Lowe, *The Settlement of Disputes in International Law* (Oxford University Press 1999) p.31.

<sup>128</sup> Which is why, traditionally these appear at the end of contracts. Failure to negotiate a clear jurisdiction, arbitration or choice of law clause at the outset can result in protracted and expensive disputes about the proper forum, the validity of the arbitration clause, the proper law, etc.

<sup>129</sup> See Fouchard, Gaillard and Goldman, at para. 9 in J Savage (ed.), *International Commercial Arbitration* (Kluwer Law International 2 September 1999).

- A dispute between the parties: the process of arbitration is founded upon the existence of disputes between the parties which are capable of being resolved by arbitration (National laws and international agreements may provide limits to the kinds of disputes which are capable of being resolved by arbitration);
- A Judicial procedure: the purpose of arbitration is to have the parties' disputes resolved fairly and finally. The procedure adopted to resolve the dispute can, to a large extent, be chosen by the parties, but most national laws and international agreements provide that the procedure must contain a minimum requirement of due process;
- A Binding Award: the culmination of the process of arbitration is the resolution of the dispute between the parties by means of a decision of the tribunal. The binding nature of the award may be seen as a consequence of the parties' agreement to arbitrate and is often guaranteed by national law.<sup>130</sup> An award may not be binding in circumstances where it was made without jurisdiction or if the process by which the award was made was somehow defective or unfair.<sup>131</sup>

## **B. The Contractual Nature of Arbitration**

As mentioned above there can be no arbitration without the agreement of the parties to submit to this method of dispute resolution<sup>132</sup> even after the dispute has arisen.<sup>133</sup> An argument commonly raised by parties who are unhappy with the decision of a tribunal is that the decision of the tribunal is not binding because one of the parties did not agree to arbitration in the first place or alternatively because the entire agreement was in some way invalid.<sup>134</sup>

Section 7 of the English Arbitration Act 1996 provides that an arbitration agreement, unless otherwise agreed by the parties, should be treated as a separate agreement distinct from the main contract. The arbitration agreement therefore 'floats' clear of the agreement embodying the main obligations between the parties. The section enacts in English law the

---

<sup>130</sup> See S.58 of the Arbitration Act 1996.

<sup>131</sup> Schmitthoff, 'International Commercial Arbitration' in C Murray, D Holloway and D Timson-Hunt (ed.), *Export Trade: The Law and Practice of International Trade* (1999).

<sup>132</sup> See *Kenya Railways v Antares Co Pte Ltd (The Antares)* (Nos 1 and 2) (1987) 1 Lloyd's Rep. 424.

<sup>133</sup> Arbitration Act 1996 s.6, which generally defines an arbitration agreement.

<sup>134</sup> For example that it was procured by fraud, mistake or misrepresentation.

concept of separability, recognized in international arbitral jurisprudence,<sup>135</sup> which was fully acknowledged in *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd*.<sup>136</sup>

Additionally, s.30 of the English Arbitration Act 1996 confirms that the tribunal may decide on its own jurisdiction.<sup>137</sup> The Act therefore enacts the principle of *compétence compétence* (or *Kompetenz Kompetenz*), which is also part of international arbitration jurisprudence.<sup>138</sup> These principles taken together provide that once an arbitral is constituted, a party cannot derail the arbitral process by means of an allegation:

- That the underlying contract is void and therefore that there is no valid arbitration agreement/clause and, and/or;
- That the tribunal has no jurisdiction and that the matter must be referred to court.

The principles of separability and *Kompetenz Kompetenz* referred to above ensure that if such allegations are raised, the tribunal has the authority to decide on these matters. Many legal systems, including the English legal system provide that the courts may ultimately review questions of jurisdiction and have the final say on the matter if one party is dissatisfied with the tribunal's decision on these questions.<sup>139</sup> English law, in line with that of many other legal systems however, provides that a party who objects to the jurisdiction of the tribunal must comply with a strict procedure for raising the objection, laid down in ss.31 and 32 of the arbitration Act. A party may lose the right to object and ultimately be bound by the decision of the tribunal if he fails to raise the objection in accordance with the provisions of the Arbitration Act.<sup>140</sup>

The contractual nature of arbitration also had to be borne in mind when it was contended that the prolonged inactivity of the parties in the prosecution of the arbitration resulted in 'frustration' of the arbitration by delay on the ground that after a lapse of time it is no

---

<sup>135</sup> See Art. 16(1) of the UNCITRAL Model Law on Commercial Arbitration ('the Model Law').

<sup>136</sup> *Harbour Assurance Co. Ltd. V. Kansa General International Insurance Co. Ltd.*, (1992) 1 Lloyd's Rep. 81.

<sup>137</sup> S.30 states that the arbitral tribunal may rule on whether there is a valid arbitration agreement, s.30(1)(a); whether the tribunal is properly constituted, s.30(1)(b); and what matters have been submitted in accordance with the agreement, s.30(1)(c).

<sup>138</sup> See Art.21 of the UNCITRAL Arbitration Rules, ICC Arbitration rules Art.6.

<sup>139</sup> *Christopher Brown Ltd v Genossenschaft* (1954)1 Q.B. 8,12.

<sup>140</sup> See s.73 of the 1996 Act.



longer possible to do justice between the parties.<sup>141</sup> This was not frustration in the legal sense but simply that inactivity by both parties may prompt the conclusion that the parties have agreed to abandon the arbitration or that one has repudiated the agreement and that other has accepted that repudiation.<sup>142</sup>

Both conclusions were possible owing to the contractual nature of the arbitration agreement. Prior to the Courts and Legal Services Act 1990 s.102, inserting s.13A in the Arbitration Act 1950, the arbitrator had no power to strike out a claim for want of prosecution. This is now dealt with under s.41 (3) of the Arbitration Act 1996 where the arbitrator, in the absence of contrary agreement by the parties may, in the event of inordinate and inexcusable delay, make an award dismissing the claim.

### **C. The Judicial Nature of Arbitration**

The arbitrator, although chosen by the parties or otherwise appointed under the arbitration agreement, must approach the issues before him in the same spirit as a judge appointed by the state. The parties to an arbitration agreement (unlike litigants before the national courts) enjoy a great degree of freedom to choose the procedure by which their dispute is to be resolved. Nevertheless most national arbitration laws provide that the process must provide both parties with a basic procedural right of equal treatment.<sup>143</sup> The basic procedural right of due process is a fundamental characteristic of arbitration; it corresponds to the judicial nature of the process and has been referred to as the ‘Magna Carta’ of the arbitral process.<sup>144</sup>

The judicial nature of arbitration can be seen most clearly by reference to the end result of the process. It is internationally accepted that an arbitration award will have the same effect as a court judgment between the parties. On the other hand, a failure by a tribunal to

---

<sup>141</sup> See *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corporation* (1981) 1 A.C. 909 and *Food Corporation of India v Antclizo Shipping Corporation* (1988) 1 W.I.R. 603. In the latter case it was suggested that where arbitration have not been pursued for many years, the court should be empowered by legislation to dismiss the arbitration for want of prosecution.

<sup>142</sup> See *Bremer Vulcan* above.

<sup>143</sup> See Art. 18 of the Model Law.

<sup>144</sup> This Principle is reflected in the English Arbitration Act ss.1 and 33 which require the tribunal to act fairly between the parties. The basic procedural rights afforded by most arbitration laws have not been held to be incompatible with Human Rights legislation, see *Stretford v FA* (2007) 2 Lloyd’s Rep. 31 and Schulz, Human Rights, Sped Bumps in the Arbitral Process (2006) IALR Vol 9 (1).

observe the 'Magna Carta' of procedural fairness is one of the few accepted reasons why an award may be challenged or not enforced by a municipal court. This again illustrates the importance of the judicial nature of the process. An award which was arrived at by a process which was not 'judicial' can be seen to be open to serious challenge and there is a serious risk that such an award will not be enforced.

The ultimate objective of referring a dispute to international commercial arbitration is the eventual enforcement of the award rendered by the arbitral tribunal. Admittedly, the mere possibility of non-compliance with arbitral awards ostensibly undermines the fundamental rationale for arbitrating the disputes. The practice revealed that states may pursue the course of evading the authority of the forum. For instance, MidAmerican Energy Holdings Co. sued in the arbitration proceedings its Indonesian partner on the ground of lost investments. The forum granted an award of almost USD 400 million, but the Indonesian partner ignored it. MidAmerican commenced UNCITRAL proceedings against Indonesia under Indonesian investment guarantee.

As the parties to arbitral proceedings may appoint the arbitrator, Indonesia seized this opportunity to influence the former by numerous ex parte communications. When the maneuver failed, Indonesia forwarded its agents to a Netherlands airport to escort the arbitrator to Indonesia so that a full tribunal could not be constituted. Even though the incomplete tribunal adjudicated the dispute to the benefit of MidAmerican, Indonesia persistently continued to ignore the award. Consequently, MidAmerican had to refer to its insurance policy coverage by claiming USD 290 million for its losses.

Nevertheless, the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter, the New York Convention) was once described as 'the most important international treaty relating to international commercial arbitration' and as one of the major contributing factors to the rapid growth and development of arbitration as a mechanism for the settlement of international disputes. The New York Convention is congruous with the very objective of arbitral awards and aims to provide for their mutual recognition and enforcement, which became possible due to the fact that the majority of the world nations have ratified the New York Convention. An award made against a UK company could be effectively enforced by the German

company in the United Kingdom through the UK courts, or if the UK company had assets in France and Italy, for instance, the German company could likewise enforce the award through the French and Italian courts since both France and Italy have ratified the Convention.

#### **D. The Regulatory Framework of Arbitration**

As indicated above, arbitration is considered to be most appropriate vehicle for settling investment and commercial disputes all over the world.<sup>145</sup> In fact, there are a number of benefits that drive a party to a commercial or an investment agreement to choose arbitration proceeding over litigation.<sup>146</sup> Namely, compared to litigation, arbitration is referred to as an effective tool for the resolution of commercial and investment disputes within the international context due to its confidentiality, neutrality and time efficiency.<sup>147</sup> Where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill adapted to the exigencies of commercial life, arbitrators offered an attractive alternative.<sup>148</sup>

The fundamental rationale behind referring a dispute to arbitration is the expectation of its neutrality. According to the logic of a foreign investor, host countries' judges may have real bias in adjudicating investment disputes.<sup>149</sup> In other words, the perception is that the arbitration is a forum more neutral than the local courts of a host country, and the neutrality entails both political and procedural perspectives.

For instance, in 1994 the above mentioned North American Free Trade Agreement (NAFTA) introduced an adjudicatory regime that gives investors the right to require arbitration of disputes arising out of investments *in another member country* in connection

---

<sup>145</sup> E Bergsten, 'The Course on Dispute Settlement in International Trade, Investment and Intellectual Property', United Nations Conference on Trade and Development, at <<http://r0.unctad.org/disputesettlement/course.htm>> accessed 21 December 2009, pp.4-9.

<sup>146</sup> The Honorable Justice Jyoti Sharan Verma, 'Defining the Proper Limits of Judicial Intervention in and Assistance for the Arbitral Process; How A-National Can an International Arbitration Be?' (24 October 1997), at <<http://www.wipo.int/amc/en/events/conferences/1997/october/verma.html>> accessed 19.12.2009.

<sup>147</sup> J Rajski, 'Arbitration in Central and Eastern Europe' (1999), 2 Int. A.L.R. 1999, p.47.

<sup>148</sup> J Collier and V Lowe, 'The Settlement of Disputes in International Law' (Oxford University Press, 2000) p. 45.

<sup>149</sup> K Clermont, T Eisenberg, 'Xenophilia in American Courts' (1996) Harvard Law Review 109, pp. 1133-1134, see also W Park, 'Neutrality, Predictability and Economic Co-operation' (1995) J.Int'l Arb. 12, p.99.

with matters such as expropriation, discrimination, and unfair treatment.<sup>150</sup> In other words, NAFTA Chapter 11 gives entrepreneurs from a member country the opportunity to arbitrate investment complaints with the government of another NAFTA country, regardless of whether an agreement to arbitrate actually exists in a negotiated investment concession or not.<sup>151</sup>

Admittedly, the underlying maxim of arbitration is that it can only be referred to where both parties agree to submit to the jurisdiction of the relevant arbitral institution. Entrenching the consent of a state is of prevalent importance. In addition to possibility of expressing its consent in an investment agreement, a state may articulate it in the contractual agreement with the investor – e.g. a production sharing agreement or a service contract, - or in the unilateral offer expressed in its national legislation, which is commonly referred to as “arbitration without privity”.<sup>152</sup> However, the extent of the commitment by a state to that arbitration clause, and the fact that states tend to seek immunity from jurisdiction of the arbitral tribunal have been and still are among the most problematic issues of investment arbitration.

As to waivers of admissibility, arguments in respect of *forum non conveniens* (Latin for forum not agreeing) may stem from the invalidity of the contractual agreement between the parties, hence, absence of consent to arbitrate. Indeed, arbitration clauses are continuously being attacked and cited as void, and so is the contract containing that arbitration clause. It is commonplace for a party seeking to waive the jurisdiction of the arbitral tribunal to claim that the contract as a whole was induced by fraud, was rescinded or terminated by its own terms.<sup>153</sup> And this is where the fundamental principle of separability of arbitration clause and that of kompetenz-kompetenz transpire.

---

<sup>150</sup> G A Alvarez, W Park, ‘*The new face of investment arbitration: NAFTA Chapter 11*’ (2003) Yale Journal of International Law 28, p. 365

<sup>151</sup> T Weiler, ‘*The Ethyl Arbitration: first of its kind and a harbinger of things to come*’ (2000) American Review of International Arbitration 11, p. 187.

<sup>152</sup> J Paulsson, ‘*Arbitration Without Privity*’ (1995), ICSID Review – Foreign Investment Law Journal 10, p. 232.

<sup>153</sup> R Bishop, ‘*A practical guide for drafting international arbitration clauses*’ (2000), International Energy Law and Taxation Review 1, p. 16.

## 2.5. INTERNATIONAL INVESTMENT (MIXED) ARBITRATION

Investor-State arbitrations are governed by the express provisions of the investment treaty, the relevant procedural rules chosen by the parties (such as the UNCITRAL Arbitration Rules) and the municipal law of the seat of the arbitration (*lex loci arbitri*). The municipal courts at the seat of the arbitration are competent to exercise a supervisory jurisdiction over the arbitral process and hear applications by the parties for intervention in that process, such as for interim or conservatory measures of the appointment of an arbitrator, and can also hear challenges to investment treaty awards.

In an attempt to further protect foreign investors from the procedural angle by providing reliable multilateral mechanism for the settlement of international investment disputes it was thought desirable to establish dispute settlement machinery detached from the municipal laws of both the investor and the host State to which both could become irrevocably committed and which either could invoke.<sup>154</sup>

An international consensus would have been required to provide effective procedures for impartial settlement of disputes in a manner different to that of traditional mixed (State/non-State) arbitrations over investment disputes in the past organized on an *ad hoc* basis.<sup>155</sup> Those had been organized on the basis of contractual agreements made between the States and the company, and followed the pattern of private international commercial arbitration.<sup>156</sup> What was needed now was a standing system which States and investors could incorporate in their agreements by reference, thus avoiding the need for the negotiation of a new settlement procedure in every case.

---

<sup>154</sup> J Collier and V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 1999) p.60.

<sup>155</sup> See e.g.: *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi* (1951) 18 ILR 122, (1952) 1 ICLQ 247; *Saudi Arabia v. Arabian American Oil Co. (Aramco)* (1958) 27 ILR 117; *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (1963) 35 ILR 136, (1964) 13 ICLQ 1011. And, for a brilliant account of the shortcomings of mixed arbitrations, see V V Veeder, *The Lena Goldfields arbitration: the historical roots of three ideas* (1998) 47 ICLQ 747.

<sup>156</sup> See, for example of agreements containing such clauses, Egypt-Egyptian Petroleum Corporation /ESSO, Concession Agreement of 14 December 1974, (1975) 14 ILM 915, art. XXI; Libyan National Oil Co./Occidental of Libya Inc., Agreement of 7 February 1974, (1975) 14 ILM 645, section XII; Syria-Syrian Petroleum Co.-Pecten Ash Shams Co./Syria Shell Petroleum Development BV/Deminex Petroleum Syria GmbH, Contract for the Exploration, Development and Production of petroleum, 21 August 1985, (1987) 26 ILM 1186, art. XXIII.

Against this background it is necessary to return to the *sui generis* regime of arbitrations conducted under the aegis of the ICSID Convention and the CSID Arbitration Rules. It is normally assumed that *lex arbitri* for ICSID arbitrations is international law. But what does this simple designation actually mean? Does it entail, for instance, that general international law on the admissibility of claims should supplement the ICSID Convention and Arbitration Rules?

One of the most remarkable developments in international dispute settlement procedures has been the rapid growth of the institution of mixed arbitration; that is to say, arbitration between States on the one hand and non-State entities, usually corporations or, less frequently, individuals, on the other. The two most striking examples of tribunals handling mixed arbitration are the tribunals established under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID'), and the Iran-US Claims Tribunal.

#### **A. The ICSID Arbitration<sup>157</sup>**

ICSID arbitrations are more 'international' than other forms of investor-State arbitration because ICSID Convention facilitates a high degree of detachment from municipal legal systems in relation to the conduct of the arbitration and the review of awards. This detachment is not, however, absolute: ICSID arbitration is neither completely 'self-contained' nor 'autonomous'.

First, the parties to an ICSID arbitration can apply to municipal courts and other authorities for provisional measures for the preservation of their rights and interests either before the institution of ICSID proceedings or thereafter. Investment treaties often contain a provision to the effect that the submission of an investment dispute is without prejudice to the parties' rights to apply for injunctive relief before municipal courts. For instance, Article 26(3) of the USA Model BIT (2004) provides that the investor:

'[M]ay initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of

---

<sup>157</sup> Z Douglas, '*The International Law of Investment Claims*', (Cambridge University Press 2009) p.120-125.

the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.'

Any such application for injunction relief will naturally be governed by the *lex fori*.<sup>158</sup>

Second, the municipal rules for the enforcement and execution of final judgments apply to the enforcement and execution of ICSID awards in the territories of contracting States.<sup>159</sup> For example in *AIG Capital Partners v Republic of Kazakhstan*,<sup>160</sup> and the joint venture company established for its investment in Kazakhstan petitioned the English High Court to enforce an ICSID award rendered in their favor against assets in London held by third party custodians on behalf of the National Bank of Kazakhstan. The orders sought by the claimants were denied because, inter alia, the assets of the national Bank of Kazakhstan were protected by sovereign immunity from execution pursuant to section 14(4) of the State Immunity Act 1978.

Third, the law on sovereign immunity from execution (whether found in international custom, treaty or municipal law) applies to the execution of ICSID awards in the territories of both contracting States (Article 55) and non-contracting States. Again in *AIG Capital Partners v Republic of Kazakhstan*,<sup>161</sup> the execution of an ICSID award was refused by an English court due to a blanket immunity attaching to the 'property of a State's central bank' pursuant to section 14(4) of the State Immunity Act 1978.

Forth, In the territories of non-contracting states, ICSID awards are likely to be enforced in accordance with the municipal rules for the enforcement of foreign arbitral awards (such as, where applicable, those contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or in municipal enactment giving effect to this Convention).

Fifth, when a party has instituted parallel proceedings in a municipal court in breach of Article 26 of the ICSID Convention, municipal rules for a granting of a stay of court

---

<sup>158</sup> In *ETI Euro Telecom Intrenational BV v Republic of Bulivia and Empresa Nacional de Telecomunicaciones Entel SA* [2008] EWCA Civ 880, paras 29-31, it was revealed that the US Federal District Court for the Southern District of New York had granted an *ex parte* order to attach assets in aid of ICSID arbitration proceedings.

<sup>159</sup> ICSID Convention, Arts 54(1), 54(3).

<sup>160</sup> [2005] EWHC 2239, [2006] 1 WLR 1420.

<sup>161</sup> *Ibid.*

proceedings apply. In *Attorney-General v Mobil Oil NZ Ltd*,<sup>162</sup> the New Zealand High Court stayed proceedings brought by the New Zealand Government because there was a ‘relevant relationship or nexus’ between the issue raised in these court proceedings and the pending ICSID arbitration that had been commenced by Mobil.<sup>163</sup>

Sixth, some contracting States have, by their implementing legislation passed in accordance with Article 69 of the ICSID Convention, reserved the possibility of subjecting ICSID arbitration to certain procedural rules contained in their municipal laws.<sup>164</sup> To the extent that such municipal procedural rules supplement rather than modify the ICSID Arbitration Rules, it is doubtful that the contracting State could be in violation of the ICSID Convention.

Seventh, ICSID arbitration proceedings are conducted within the normative framework for the protection of human rights existing at the international and municipal level. Particularly at the enforcement stage, municipal courts are likely to scrutinize the impact of ICSID awards on the human rights of the disputing parties. In *Hornsby v Greece*,<sup>165</sup> the European Court of Human Rights held that:

‘[E]xecution of a judgment given by any court must therefore be regarded as integral part of the ‘trial’ for the purpose of Article 6 [of the European Convention on Human Rights concerning the right to a fair trial].’<sup>166</sup>

Eight, there have been rare instances where the arbitration clause in the investment agreement has provided for ICSID arbitration in conjunction with the application of the law at the seat of the arbitration. For instance, in *Tanzania Electric v Independent Power Tanzanian*,<sup>167</sup> the arbitration clause in the contract provided for ICSID arbitration but at the same time specified that ‘*the law governing the procedure and administration of the arbitration ... shall be the English law [sic]*’, with the English High Court nominated as the appointing authority for the chairperson of the tribunal, should the party-appointed

---

<sup>162</sup> 118 ILR 620.

<sup>163</sup> *Ibid.* 630.

<sup>164</sup> See, e.g. in England : Arbitration (International Investment Disputes) Act 1966, s. 3(1), by which the Lord Chancellor can direct that ss. 36 and 38-44 of the Arbitration Act 1996 apply to ICSID arbitration. This power has not been exercised to date. See: *Mayor and Commonalty and Citizens of the City of London v Ashok Sancheti* [2008] EWCA Civ 1283, paras. 12-14.

<sup>165</sup> 24 EHRR 250.

<sup>166</sup> *Ibid.* Para. 40.

<sup>167</sup> (Provisional Measures) 8 ICSID Rep 239.



arbitrators fail to agree. In ruling, the tribunal referred to section 39 of the English Arbitration Act 1996, but did not reach any firm conclusion as to whether it applied to the ICSID proceedings.<sup>168</sup>

## **B. The ICSID Institution**

Somewhat like the Permanent Court of Arbitration (PCA), ICSID is not itself a tribunal but rather a framework within which arbitration and conciliation can occur. It provides the institutional infrastructure for administering investment arbitration. ICSID has its seat at the World Bank headquarters in Washington DC, has an Administrative Council chaired by the president of the World Bank, in which each Member State has one vote, usually exercised by its World bank representative.<sup>169</sup> The administrative Council is responsible for the adoption of the rules of procedure for arbitration proceedings.

Again like PCA, ICSID maintains lists of persons 'of high moral character and recognized competence in the fields of law, industry or finance, who may be relied upon to exercise independent judgment',<sup>170</sup> and who may serve as arbitrators. Each State party may designate four persons, who need not be its nationals, to the panel of Arbitrators. Panel members serve for renewable six year terms.<sup>171</sup> It is from the Panels that parties to investment disputes are expected to select arbitrators.

Institutional support by the International Centre for Settlement of Investment Disputes (ICSID, the Centre) is one of the main advantages of arbitration under the ICSID Convention. The Centre performs a number of supportive functions in relation to arbitration. The Secretary-General of ICSID keeps a list of Contracting States that contains all information relevant to their participation in the Convention. In addition, the Secretary-General maintains lists of the Panels of Arbitrators, a register for requests for arbitration containing all significant procedural developments and archives containing the original texts of all instruments and documents in connexion with any proceeding.

---

<sup>168</sup> Ibid. 240-1/7-11.

<sup>169</sup> ICSID Convention, arts. 2-8.

<sup>170</sup> ICSID Convention, art. 14(1).

<sup>171</sup> ICSID Convention, arts. 12-16.

The Secretary-General of ICSID and the staff of the Secretariat provide administrative support in arbitration proceedings. This support includes provision of a place for meetings at the Centre or elsewhere. ICSID also provides other assistance such as translations, interpretations and copying. The Secretary-General appoints an experienced member of the Centre's staff as Secretary for each tribunal. The Secretary of the tribunal makes the necessary arrangements for hearings, keeps minutes of hearings and prepares drafts of procedural orders. The Secretary also serves as the channel of communication between the parties and the arbitrators.

The Secretary-General determines the charges payable to the Centre and consults with the tribunal on fees and expenses. He determines the fees of arbitrators. He receives advance payments from the parties and makes the payments necessary for the conduct of proceedings. He determines and receives the fees for lodging requests and the charges for specific services. In a particular proceeding, the Secretary of the tribunal administers this system on behalf of the Secretary-General.

Either party to a dispute within the jurisdiction of ICSID may request the Secretary-General to establish an Arbitral Tribunal. The tribunals determine their own competence. So, it may or instance, decide whether a dispute exists in case where the respondent alleges that there is none.

### **C. The ICSID Jurisdiction**

The Jurisdiction of ICSID is set out in Article 25 of the ICSID Convention (see Appendix 2):

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting 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.’

The jurisdiction is tightly defined. It extends only to disputes which are both legal and arise directly out of an investment. The ICSID Convention is specialized in the settlement of investment disputes. Therefore, the existence of a legal dispute arising directly out of an investment is a prerequisite for ICSID's jurisdiction. The concept of an investment is not

defined in the Convention. Many BITs and multilateral treaties contain definitions of investment. But these definitions are not necessarily decisive for the meaning of the concept under the ICSID Convention. For instance, whereas some of these treaties extend rights also for the establishment of an investment, the Convention only applies once an investment has actually been made.

In actual practice, the concept of “investment” has been given a wide meaning. A variety of activities in a large number of economic fields have been accepted as investments. In addition to traditional typical investment activities, these include pure financial instruments like the purchase of government bonds and the extension of loans. Decisive criteria have been; a certain duration of the relevant activities, the regularity of profit and return, the presence of a certain economic risk, a substantial commitment as well as the relevance of the project for the host State’s development.

Two levels of submission to ICSID must both exist: the reference to Contracting States and nationals of other Contracting States require that the ICSID Convention should have been ratified by both of the States in question; and the reference to the written consent of the parties to the dispute requires that there have been a further, explicit acceptance of ICSID procedures by the disputing parties. Participation in the ICSID Convention does not, by itself, constitute a submission to the Centre’s jurisdiction. For jurisdiction to exist, the Convention requires separate consent in writing by both parties. Consent to the Centre’s jurisdiction may be given in one of several ways. This will be discussed in details in Chapter 8.

A particular problem arises from the requirement that the dispute arise between one State and the nationals of another. Although ICSID Convention recognizes this difficulty and the provisions of Article 25(2) of the ICSID deals with nationality of individuals and companies, yet determination of nationality of investors has been the subject of continued challenge in ICSID investment arbitration. Article 25(2) of the ICSID Convention deals, at the outset, with the individual national investors (see Appendix 2).

They are persons who had the nationality of a Contracting State other than the State party to the dispute on the date which the parties consented to submit to ICSID arbitration and

also at the date when the application invoking the ICSID procedures was registered by the applicant with the ICSID Secretariat – an application of the continuous nationality principle. The definition therefore falls back on each State's own definition of its nationals.

#### **D. The ICSID Proceedings**

Proceedings under the ICSID Convention are self-contained. This means that they are independent of the intervention of any outside bodies. In particular, domestic courts have no power to stay, to compel or to otherwise influence ICSID proceedings. Domestic courts would have the power to order provisional measures only in the unlikely case that the parties agree thereto.<sup>172</sup> An ICSID tribunal has to obtain evidence without the legal assistance of domestic courts. An annulment or other form of review of an ICSID award by a domestic court is not permitted.<sup>173</sup> It follows that the place of proceedings has no practical legal consequences under the ICSID Convention.<sup>174</sup>

ICSID proceedings are not threatened by the non-cooperation of a party. The parties have much flexibility in shaping and influencing the proceedings. But if one of them should fail to act, the proceedings will not be stalled. The Convention provides a watertight system against the frustration of proceedings by a recalcitrant party. Arbitrators not appointed by the parties will be appointed by the Centre.<sup>175</sup> The decision on whether there is jurisdiction in a particular case is with the tribunal.<sup>176</sup> Non-submission of memorials or non-appearance at hearings by a party will not stall the proceedings.<sup>177</sup> Non-cooperation by a party will not affect the award's binding force and enforceability.

The system of arbitration is highly effective. This effectiveness is the result of several factors. Submission to ICSID's jurisdiction is voluntary but once it has been given it may

---

<sup>172</sup> Under Article 47 of the Convention a tribunal has the power to recommend provisional measures.

<sup>173</sup> Article 52 of the Convention provides for an autonomous system for the annulment of awards under narrowly defined circumstances.

<sup>174</sup> It is advisable to hold proceedings in a State that is a party to the ICSID Convention since another State would not be bound by the guarantees of independence and non-interference provided by the Convention.

<sup>175</sup> Article 38 of the Convention.

<sup>176</sup> Article 41 of the Convention.

<sup>177</sup> Article 45 of the Convention.

not be withdrawn unilaterally. The principle of non-frustration means that a case will proceed even if one party fails to cooperate.

This circumstance alone will be a strong incentive to cooperate. Awards are binding and final and not subject to review except under the narrow conditions provided by the Convention itself.<sup>178</sup> Noncompliance with an award by a State would be a breach of the Convention<sup>179</sup> and would lead to a revival of the right to diplomatic protection by the investor's State of nationality.<sup>180</sup>

The Convention provides an effective system of enforcement. Awards are recognized as final in all States parties to the Convention. The pecuniary obligations arising from awards are to be enforced like final judgments of the local courts in all States parties to the Convention.<sup>181</sup> Domestic courts have no power to review ICSID awards in the course of their enforcement. However, in the case of an award against a State the normal rules on immunity from execution will apply. In actual practice this will usually mean that execution is not possible against assets that serve the State's public functions.<sup>182</sup>

The system of dispute settlement under the ICSID Convention is likely to be effective even without its actual use. The mere availability of an effective remedy tends to affect the behavior of parties to potential disputes. It is likely to have a restraining influence on investors as well as on host States. Both sides will try to avoid actions that might involve them in arbitration that they are likely to lose. In addition, the prospect of litigation will strengthen the parties' willingness to settle a dispute amicably.

During ongoing investment arbitration under the ICSID Convention, the investor's home State is prevented from granting diplomatic protection, from bringing a claim in its own name, or from otherwise interfering with the settlement of the dispute between investor and host State.<sup>183</sup>

---

<sup>178</sup> Articles 49-52 of the Convention.

<sup>179</sup> Article 53 of the Convention.

<sup>180</sup> Article 27 of the Convention.

<sup>181</sup> Article 54 of the Convention.

<sup>182</sup> Article 55 of the Convention.

<sup>183</sup> Article 27, ICSID Convention.

## 2.6. CONCLUSION

There are a number of patterns of compliance with investment norms and enforcement mechanisms that inevitably draw a picture for investor behavior should he wish to lodge a claim for enforcement of his rights. Namely, arbitral tribunals and international courts are usually alluded to as fundamental institutions where investor-state disputes are adjudicated.

Domestic courts of the host State are usually not seen as offering sufficient guarantees to foreign investors. Domestic courts of the investor's home State and of third States are usually not available for the settlement of investment disputes. Diplomatic protection is a form of dispute settlement that carries uncertainties for the investor and inconvenience for the host State. Ad hoc arbitration between the investor and the host State is a useful option but carries several procedural disadvantages.

For investor-state disputes International Centre for the Settlement of Investment Disputes (ICSID) is the most popular venue, and a great majority of investment agreements refer to ICSID as an exclusive forum for dispute resolution. International Chamber of Commerce is also amongst the world's foremost arbitral institutions, however, it should be noted that a tribunal constituted by the International Chamber of Commerce is in no way akin to ICSID, which was created by voluntary will of sovereign governments.

In retrospect, it has become clear that the creation of ICSID amounted to the boldest innovative steps in the modern history of international cooperation concerning the role and protection of foreign investment. This is so because of the combination of pertinent features of ICSID.

Next two chapters will focus at taxonomy of preliminary issues relating to *jurisdiction* and *admissibility* in investment treaty arbitration, in other words the principals and rules that govern the arbitral tribunal's power to adjudge the merits of investment treaty. Such attempt has rendered unreasonably problematic and polemic, in the past, by the existing lexis.

### **3. CHAPTER THREE: PREREQUISITES FOR INVESTMENT**

#### **ARBITRATION – *ADMISSIBILITY***

##### **3.1. Introduction**

There are certain stages and problems common to all judicial procedures for the settlement of international disputes. The identity of the problems, and of the solutions, is evident when tribunals operate under same rules. The following account of the law is in principal applicable to all international tribunals subject, of course, to express stipulations to the contrary in the rules under which they operate. For convenience, however, reference will ordinarily be made to the law as it operates in the context of arbitration.

The question of submission to the jurisdiction of the tribunal may appear to be the obvious starting point. It is, however, common to raise objections to continuation of proceedings by a tribunal that appears to have jurisdiction. Many such preliminary objections are concerned with the question whether there exists a dispute of a nature that can probably be put to the dispute settlement procedure. This question ought, logically, to be determined before the procedure is initiated; and so this chapter considers it first. This discussion is followed by a consideration of the question of submission to the jurisdiction of the tribunal, and the rules concerning the establishment and operation of the tribunal, and then of the question of the law applicable to the proceedings, the *lex arbitri*.

This research proposes the hypothesis that there are clear signs of a missing body of international jurisdictional rules and principals within the purview of international investment law concerning the admission of claims ,establishment and uphold of jurisdiction of the arbitral tribunal which in author's view should be named *lex Juridictio*. The determination of the law applicable to the substance of the dispute and the particular problems of 'internationalized' contracts are discussed in this chapter. The purpose of this chapter is to present taxonomy of the principles and rules that govern the decision concerning whether a claim qualifies for determination by an international treaty tribunal based on the merits of an investment dispute. This task is rendered unnecessarily difficult by the lexicon available.

### 3.2. TAXONOMY OF THE PRELIMINARY ISSUES IN INVESTMENT ARBITRATION

The importance of getting terminology right goes beyond linguistic fidelity to proper usage because the scope of judicial review of the arbitral tribunal's decisions on issues pertaining to its own adjudicative power depends upon the classification of such issues. In particular the investor or the host State has the opportunity of contesting the arbitral tribunal's decisions with respect to the existence of its adjudicative power (jurisdiction), but not to the exercise of that adjudicative power (admissibility or the merits).

It is arguable that this is the case both before the municipal courts at the seat of the arbitration or before and ICSID *ad hoc* committee. In contrast, the distinction does not assume such importance for other international tribunals, such as the International Court of Justice or the International Tribunal for the law of the Sea, for there is no superior judicial forum with the power to review their decisions.

There are other reasons for distinguishing between terminological questions, for example the quest of jurisdiction and admissibility. Where the impediment to exercising jurisdiction is embodied in a provision of a multilateral treaty, then it cannot be waived by the respondent host State whether expressly or by its conduct in the proceedings. No such problem arises in respect of objections to the admissibility of a claim. Moreover, a question relating to jurisdiction can and must be raised by a tribunal *proprio motu*,<sup>184</sup> whereas that would be inappropriate for issues of admissibility.

#### A. Justiciability

Not all disputes are suitable for judicial settlement. To be suitable, the dispute must be justiciable. A dispute is said to be justiciable if, first, a specific disagreement exists, and secondly that disagreement is of a kind which can be resolved by the application of rules of law by judicial (including arbitral) processes. These elements are reflected in the classic definition given by the Permanent Court of International Justice in the *Mavrommatics*

---

<sup>184</sup> This is made explicit in the ICSID Arbitration Rules 41(2). International tribunals have come to the same conclusion even in the absence of an explicit authorization in the applicable statutes: *Burton Marks & Harry Umann v Iran* (Case ITL, 53-458-3, 26 June 1985) 8 Iran-US CTR 290, 296; *Rio Grande Irrigation and Land Company Ltd* (UK v USA) 6 RIAA 131, 135 (1923); *Belgium, France, Switzerland & UK v Federal Republic of Germany*, 59 ILR 524 (1980).



case: ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two parties between two persons.’<sup>185</sup>

The existence of the dispute may seem an unproblematic question, but it is not. For instance, in *Peace Treaties* case,<sup>186</sup> complaints had been made by the United Kingdom and United States of America that Bulgaria, Hungary and Romania were failing to comply with certain human rights obligations imposed upon them by the Peace Treaties concluded at the end of World War. The International Court concluded that ‘*international disputes have arisen*’, and asserted that ‘*whether there exists an international dispute is a matter for objective determination*’.<sup>187</sup>

A rather fuller statement of the principle was subsequently given by the International Court of Justice in the *South West Africa-contentious* cases:

‘... it is not sufficient for one party to contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.’

In the case of most tribunals a further aspect of this precondition of justiciability is that the dispute remains in existence up to the point that the judgment or award is given. To put it in another way, most tribunals will refuse to give rulings on disputes that are hypothetical or have become moot. As Judge Fitzmaurice put in the *Northern Cameroons-Contentious* case (ICJ):

‘ Courts of law are not there to make legal pronouncements in abstracto ... They are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to an existing and concrete legal situation.’

We turn now to the second element of justiciability. In order to be justiciable it is not only necessary that the disagreement should have hardened into a dispute; it is also necessary that the dispute should be capable of solution by the application of judicial or arbitral

---

<sup>185</sup> (1924) PCIJ Ser. A, No. 2, 11. The reference to ‘a conflict of interests’ is unfortunate. A mere conflict of interests, without more, does not constitute a dispute, as the Court recognized in the *South West Africa* case, ICJ Rep. 1962, 319 at 328.

<sup>186</sup> ICJ Rep. 1950, 65 (First Phase), 221 (Second Phase).

<sup>187</sup> ICJ Rep. 1950, 65, at 74. The dictum was applied in the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)* case, ICJ Rep. 1996, 595, at 614.

process, and susceptible to decision upon the basis of law.<sup>188</sup> In other words, the dispute must be a *legal* dispute, to which the tribunal can apply rules and principles of law so as to decide the dispute.<sup>189</sup>

While it is not possible to draw up an exhaustive list of the kinds of disputes that are legal disputes, it is quite clear that some disputes are not legal. This willingness to separate the legal and non-legal aspects of a dispute is evident also in the principle that the concurrent pursuit of other dispute settlement procedures is not obstacle to a tribunal proceeding to hear and determine a case. This point was prominent in the *Hostages* case, where the Security Council was considering the dispute concurrently with the International Court,<sup>190</sup> and in *Nicaragua v. US* case where it was argued that the International Court proceeding would interfere with the Contadora peace process.<sup>191</sup>

Justiciability is an aspect of a disagreement or clash of interests into a concrete dispute, capable of resolution by a judicial or arbitral process on the basis of law. Disputes that do not have those characteristics ought not to be submitted to the judicial procedures;<sup>192</sup> and if they are so submitted, a preliminary objection by one of the parties ought to result in the dismissal off the case by the tribunal. However it is important to note that, in the context of international commercial arbitration, the concept may operate at a different level.

Even if the dispute is justiciable according to the criteria discussed above, the provisions of the municipal legal systems governing the various aspects of the arbitral process may stipulate that certain categories of dispute must be submitted to the courts, and may not be settled by arbitration. For instance, it might be stipulated that patent disputes are not arbitrable, but must be submitted to the national courts. Author will return to this question of the limits of arbitrability under national laws below.

---

<sup>188</sup> See *British Claims in the Spanish Zone of Morocco* (1925) 2 UNRIAA 615, where Judge Huber made a report on the Notion of Arbitrability, under the terms of an arbitration agreement made between Great Britain and Spain on 29 May 1923. Arbitrability and justiciability were essentially interchangeable terms, in his view.

<sup>189</sup> There is no possibility of a *non liquet*. If the dispute is a legal dispute, the tribunal must decide it according to law. This is at least the rule in contentious proceedings. As Judge Higgins pointed out in her dissenting opinion in the advisory Opinion of the International court of Justice on the *Legality of the Threat or Use of Nuclear weapons*, ICJ Rep. 1996, 226, at 583-4, 591-2, the doctrine on *non liquet* appears not to have been applied in these advisory proceedings.

<sup>190</sup> ICJ Rep. 1980, 3, at 21.

<sup>191</sup> ICJ Rep. 1984, 392 at 440.

<sup>192</sup> But those that do have this characteristic should be accepted by courts and decided by them even if the subject matter is embarrassing. See the decision of the House of Lords in *Buttes Gas and Oil Co. v Hammer* [1982] AC 888.

## B. Arbitrability

States are, in principle, free to submit disputes of any kind to arbitration. Only the possibility of a tribunal giving a ruling of *non liquet*<sup>193</sup> or non-justiciability operates to circumscribe the concept of an arbitrable dispute. In the case of disputes involving private parties, however, States may insist upon certain categories of dispute remaining within the jurisdiction of national courts. No municipal law permits private parties completely to exclude the jurisdiction of national legal systems.

One way of describing such limitations on the freedom to arbitrate is to say that certain disputes are non-arbitrable. Under the New York Convention States are not bound either to recognize arbitration agreements (article II.1), or to recognize and enforce awards resulting from arbitration agreements (article V.2), in cases where the subject matter of the dispute is not considered by the State to be capable of settlement by arbitration.

Neither the New York Convention, nor any other convention, stipulates that certain disputes are inherently non-arbitrable. Conventions merely limit their own fields of application. This may be done by stipulating in the convention a particular limitation, such as the provision which limits ICSID arbitration to disputes arising out of investments. But it is more generally done by reference to the provisions of national laws concerning arbitrability. It is national law which determines what disputes are or are not arbitrable.

This question would typically arise before the courts of the State where the arbitration is to take place, or where enforcement of the award is sought, in which case the court would determine the question of arbitrability under its own law. However, if the parties had chosen as the law governing the arbitration (the *lex arbitri*) the law of a third State, the court could also rest a refusal of recognition or enforcement upon the non-arbitrability of the dispute under the *lex arbitri*.

---

<sup>193</sup> In essence, *non liquet* is an acknowledgement that the matter is in principle one regulated by the law, but that the tribunal cannot determine the rule that can be applied. Non-justiciability is a term used in two senses: (i) the matter is not susceptible of legal decision at all, or (ii) the matter is regulated by law but it is inappropriate for the tribunal to apply the relevant rule. Meaning (ii) is sometimes found in decisions of municipal tribunals in which they refuse to rule upon questions of international law, regarding them as the proper preserve of international tribunals: see e.g., *Buttes Gas and Oil Co. v. Hammer* [1982] 41 CLJ 18.

There is a considerable variety among national laws in the categories of disputes that are stipulated to be not arbitrable. To put it another way, only those disputes which can be compromised by the parties can be arbitrated. The trend in State practice is towards widening the category of arbitrable disputes. One notable development was the decision of the US Supreme Court in the *Mitsubishi* case,<sup>194</sup> in which the Court, reversing the effect of earlier decisions, upheld the arbitrability of issues of US antitrust law arising out of international commercial disputes.

Similar developments are evident elsewhere. For instance, Decisions in the 1990s in several European civil law jurisdictions held competition law and consumer law disputes to be arbitrable: the trend is clearly away from the approach represented by article 2061 of the French Civil Code, which states that ‘*an arbitration clause shall be void unless the law provides otherwise*’ and towards that represented by article 177 of the 1987 Swiss Law on private international law, which states that ‘*any claim of a patrimonial nature may be the subject of arbitration*’.<sup>195</sup>

About one-third of the States Parties to the New York Convention have exercised their right under article I.3 to confine the application of the Convention to disputes arising from relationships which are, under their own laws, considered to be ‘commercial’.

### **C. Admissibility**

Admissibility is a main focus in this research and will be dealt with broadly in sub-section 3.3 of this chapter.

### **D. Jurisdiction**

Jurisdiction is a main focus in this research and will be dealt with broadly in Chapter 4.

---

<sup>194</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 US 614 (1985), (1985) 24 *ILM* 1064. Cf. W. F. Fox, ‘*Mitsubishi v Soler and its Impact on International Commercial Arbitration*’ (1985) 19 *Journal of World Trade Law* 579; T. E. Carbonneau, ‘*Mitsubishi: The folly of Quixotic International*’ (1986) 2 *Arbitration International* 178; W. Park, ‘*National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*’ (1989) 63 *Tulane Law Review* 647; J. H. Dalhuisen, ‘*The arbitrability of competition issues*’ (1995) 11 *Arbitration International* 151. Volume 12(2) of *Arbitration International* (1996) is a special issue on arbitrability in international commercial arbitration.

<sup>195</sup> A Kirry, ‘*Arbitrability: current trends in Europe*’ (1996) *Arbitration International* 373; M. de Boissession and T. Clay, ‘*Recent developments in arbitration in civil law countries*’ [1998] *int. ALR* 150.

### 3.3. THE EXERCISE OF THE ADJUDICATIVE POWER - (ADMISSIBILITY)

The classic statement on the distinction between jurisdiction and admissibility is to be found in Fitzmaurice's study on the jurisprudence of the International Court:

‘[T]here are a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits; the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim.’<sup>196</sup>

The distinction between jurisdiction and admissibility is critically important in investment treaty arbitration because a party has the opportunity of contesting the tribunal's decision with respect to the former but not the latter in the municipal courts at the seat of the arbitration<sup>197</sup> and before an ICSID ad hoc committee pursuant to Article 52 of the ICSID Convention.

Article 52(1)(b) of the ICSID Convention refers to a ‘manifest excess of power’ as a ground for annulment (see Appendix 2). It might be thought that this formulation is infected by a tautology: the tribunal has the power to make the order or decision complained of or it does not; what sense does it make to insist upon a ‘manifest’ absence of power? The key to a rational interpretation of Article 52(1)(b) is to differentiate between the types of powers that are possessed by an ICSID tribunal. Where the tribunal has determined an issue going to the merits of the dispute by exercising a power that it does not possess or failing to exercise a power that it does possess, and this misfeasance or nonfeasance is adjudged to have had a ‘manifest’ impact on the tribunal's award, then it will be susceptible to censure by an annulment committee. Where, however the tribunal has ruled upon an issue going to the existence or scope of its adjudicatory power (jurisdiction) by the same form of misfeasance or nonfeasance, the ‘manifest’ threshold has been satisfied *per se* because the tribunal's decision on all other aspects of the dispute are infected by that ‘excess power’.

---

<sup>196</sup> G Fitzmaurice, *The law and Procedure of the International Court of Justice* (1996) 438-9.

<sup>197</sup> See, e.g. English Arbitration Act 1996, Art. 67; French Code of Civil Procedure, Art 1502; United States Federal Arbitration Act, Art. 10(a)(4); UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(a)(iii); Swiss Private International Law Statute, Arts. 190(2)(b), 190(2)(c).

Unfortunately ICSID annulment committees to date appear to have applied a uniform threshold to all issues arising in an ICSID arbitration, despite the conceptual difficulties in approaching the review of jurisdictional questions in the same way as questions pertaining to the merits. A justification for this uniform approach to the interpretation of Article 52(1)(b) has never been articulated.

On which side of this distinction between jurisdiction and the merits do the questions of admissibility fall in relation to article 52(1)(b) of the ICSID Convention? The answer on balance should be on the side of the tribunal's adjudication of the merits so that the 'manifest' threshold must be applied to the outcome of the exercise of power as reflected in the tribunal's award.

The supervisory competence of municipal courts or ICSID ad hoc Committees with respect to tribunal's decision on its own jurisdiction is founded upon the idea that the tribunal should not have the final word on the issue of whether or not it is vested with adjudicatory power. If the tribunal does have adjudicatory power then, provided it exercises that power consistently with fundamental procedural norms, its decisions should not be reviewable by another judicial forum. This division is most likely being in accord with the legitimate procedural expectations of the parties.

The rules of admissibility, if properly invoked may require the dismissal of the claim or counterclaim before the determination of its merits. The grounds for inadmissibility at base represent certain legal defects in a claim that are independent of, and yet, often closely connected to, the substantive grounds upon which a claim or counterclaim is to be adjudicated on the merits. Admissibility deals with the *suitability* of the claim for adjudication on the merits.

An objective test to distinguish between preliminary objections relating to jurisdiction and admissibility is therefore required.<sup>198</sup> The principles are twofold. First, if the preliminary objections were to be sustained, would it lead to the conclusion that it is inappropriate for the tribunal to exercise its adjudicative power in *any* circumstances? If the answer is if

---

<sup>198</sup> J Paulsson, 'Jurisdiction and Admissibility', in *Global Reflection on International Law, Commerce and dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005) 601; A Rau, 'The Arbitrability Question Itself' (1999) 10 *American Rev of Int Arbitration* 287.

affirmative, then the issue is properly characterized as one of jurisdiction and the possibility of judicial review is justified because the issue relates to whether the tribunal has adjudicative power at all. Second, if the preliminary objection were to be sustained, would it lead to the conclusion that it is inappropriate for the tribunal to rule upon the *specific* claim or counterclaim on the merits? If the answer is affirmative, then the issue is properly characterized as one of ‘admissibility’ and the exclusion of the possibility of judicial review are justified because the issue is within the adjudicative power of the tribunal to resolve.<sup>199</sup> The following grounds for inadmissibility are analyzed in this chapter:

- Contractual choice of forum.
- Shareholder claims.
- Dispositions relating to the legal and beneficial ownership of the investment.
- Denial of benefits.

The investment treaty jurisprudence discloses a great deal of confusion about the extent to which a determination made by the tribunal on its jurisdiction or the admissibility of claims in a preliminary decision must be conclusive in respect of such issues. It is often asserted, for example, that the tribunal need only be satisfied to a *prima facie* standard that the claim is within its jurisdiction. As a general proposition this is incorrect. If an issue relating to jurisdiction or admissibility is to be decided in a preliminary decision separately from the merits, then that issue, by definition, will not surface again in the tribunal’s award on the merits. Hence such an issue must be determined conclusively by the tribunal in the preliminary decision because there is no later opportunity in the normal course of the procedure to revisit that issue.

The confusion arises because there are certain issues of jurisdiction and admissibility which, for their disposal in a preliminary decision, require the tribunal to make an assessment of the facts asserted by the claimant in support of its claims on the merits. The most common issue of this nature is the *ratione materiae* jurisdiction of the tribunal, the legal foundation of which is a contract rather than an investment treaty obligation.

---

<sup>199</sup> *Waste Management v Mexico* No. 1 (Merits: Dissenting Opinion) 5 ICSID Rep 462,478/58 (‘Jurisdiction is the power for the tribunal to hear the case; admissibility is whether the case itself is defective – whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act.’)

## **A. Contractual Choice of Forum**

A 'forum selection clause' or 'choice of forum clause' in a contract with a conflict of laws element allows the parties to agree that any litigation resulting from that contract will be initiated in a specific forum. There are three types of clause:

- The reference might be to a particular court in a jurisdiction agreed upon by the parties (although, if the parties make a mistake as to the power of the nominated court to hear the matter, the civil procedures of the nominated jurisdiction will be applied to identify the appropriate court); or
- The clause might refer to a specific kind of dispute resolution process, such as mediation, arbitration (see arbitration clause, *lex loci arbitri*), or a hearing before a special referee; or
- The clause might refer to both, requiring a specific process to be carried out in a specific location.

A simple forum selection clause covering both the proper law of the contract and the forum for resolving disputes might read:

'This contract is governed by the laws of England and any dispute shall be finally resolved by the English courts.'

In many cross-border contracts, the forum for resolving disputes may not be the same as the country whose law governs the contract. And the contract may provide for a staged procedure for resolving disputes. For example:

'1. This agreement shall be governed by and interpreted in accordance with the laws of ....  
2. The parties shall endeavor to settle any dispute that arises by direct negotiation but if direct negotiation does not result in a resolution of the dispute, either Party may require that it be referred to mediation in accordance with the ... Mediation Rules. 3. Any dispute that is not settled by direct negotiation or by mediation shall be finally settled under the Rules of Arbitration of the ... by one or more arbitrators appointed in accordance with the said Rules.'

The object of all claims founded upon an investment treaty obligation is rights constituting an investment. Those rights are private rights that are derived from the law of property or contract of the host State or its public or administrative law. An investment treaty



obligation prescribes a certain minimum standard of regulatory conduct for the host State in respect of acts affecting the private or public law rights that constitute that investment. An investment treaty claim is the means of vindicating these private or public rights where the host State's conduct has fallen short of the minimum standard of treatment prescribed by the investment treaty obligations.

Where the object of an investment treaty claim is the vindication of contractual rights forming part of the claimant's investment, complexities can emerge because of a contractual stipulation that disputes arising out of the investment agreement must be submitted to the exclusive jurisdiction of a particular court or tribunal. The claimant's prior agreement to an alternative judicial or arbitral forum in a contract with the host State or one of its emanations gives rise to two distinct problems of admissibility.

The first, and more pervasive, problem is where the claimant advances a claim based upon an investment treaty obligation but the object of that claim is the vindication of contractual rights arising out of an investment agreement with the host State or one of its emanations. The second problem, which has occurred much less frequently in practice, is where the claimant advances a claim for breach of contract before an investment treaty tribunal in circumstances where host State's consent to arbitration in the treaty extends to contractual disputes.

Where the tribunal has determined that the legal foundation of the claim is an investment treaty obligation, and the object of that claim is the vindication of contractual rights forming part of the claimant's investment, and there is a bona fide dispute concerning the existence or scope of those rights, then the tribunal should generally stay its jurisdiction in favor of a judicial or arbitral forum stipulated in the contract as having exclusive jurisdiction in relation to disputes arising out of the contract.

Where the tribunal has determined that the legal foundation of the claim is a contractual obligation, the tribunal should decline its jurisdiction in favor of a judicial or arbitral forum stipulated in the contract as having exclusive jurisdiction in relation to disputes arising out of the contract.

The tribunal should exercise its jurisdiction over the claim if the tribunal is satisfied on the basis of compelling evidence that the claimant will be subjected to a denial of justice in the forum stipulated in the contract.

Above solutions are concerned to preserve the efficacy of exclusive choice of forum clauses in investment agreements. There are compelling reasons of principle and policy that mandate such resolutions. It is not acceptable for a party to ‘be able to approbate and reprobate in respect of the same contract’.<sup>200</sup> In other words, the integrity of contractual bargain must be preserved; one of the essential terms of that bargain cannot be bypassed at the suit of one of the parties. It is important to realize that the parties’ consent to investment treaty arbitration is no more ‘solemn’ than their consent to the submission of their contractual disputes to a different forum.

In *Lanco International Inc v Argentine Republic*<sup>201</sup> the Argentine Ministry of Economy and Public Works awarded a concession contract for the development and operation of a port terminal with Lanco. Argentina objected to the jurisdiction of ICSID tribunal, established in accordance with the Argentine/USA BIT, on the basis that Lancon had already agreed to refer contractual disputes to state courts of Argentina.<sup>202</sup> In its discussion of the effect of Clause 12, the tribunal noted that:

‘The jurisdiction of the Federal Contentious –Administrative Tribunals over disputes relating to the concession arose by operation of the law and thus would exist even in the absence of any specific contractual designation. Clause 12 was not, therefore, a selection of a previously agreed dispute settlement procedure for the purposes of the fork in the road provision of the treaty.’

The Lanco tribunal’s decision, on this narrow basis, is no doubt correct. If the investor has made no previous election of an alternative jurisdiction for the resolution of disputes arising out of its contract, then there is no scope for conflict with its election of ICSID arbitration for its contractual claims subsequent to the conclusion of that contract. It must be recognized that tribunals have subsequently interpreted the Lanco ruling as a general statement of principle, with the effect that any pre-existing contractual choice of forum for

---

<sup>200</sup> *SGS v Philippines* (Preliminary Objections) 8 ICSID Rep 518, 561-2/155.

<sup>201</sup> (Preliminary Objections) 5 ICSID Rep 367.

<sup>202</sup> *Ibid.* 377/24, 380-1/34.

the settlement of disputes might be unilaterally avoided at the investor's option in relation to disputes falling within the proper scope of this contractual choice.

In *Salini Costruttori SpA and Italstrade SpA v Morocco*, Morocco objected to the jurisdiction of the tribunal because the regulations incorporated into the construction contract vested jurisdiction in the tribunals of Rabat over claims arising from the performance of the contract.<sup>203</sup> The tribunal held:

‘As the jurisdiction of the administrative courts cannot be extended, the consent to ICSID jurisdiction described above will prevail over article 52 of Cahier des Clauses Administratives Générales, since this article cannot be taken to be a clause truly extending the scope of jurisdiction and covered by the principle of the freedom of the Parties’ will’.<sup>204</sup>

The tribunal ruled that the submission to the Rabat tribunals did not constitute a true contractual choice of jurisdiction, but rather confirmed a jurisdiction that was otherwise imposed by operation of law.

The principle discernible from *Lanco* and *Salini* is that no problem of admissibility arises when the choice of forum in the contract is not exclusive but rather confirms the availability of a local forum existing by operation of the general law of the host State. The idea that an express provision of a treaty can be nullified by an appeal to the claimant's natural right to unimpeded access to ICSID arbitration might not be wholly complied with the principles of interpretation in Article 31 and 32 of the Vienna Convention on the Law of Treaties.

We have arrived at the point in the analysis of admissibility where a conflict between two fora for the settlement of disputes has been established: a judicial or arbitral forum previously chosen by the parties in their contract and the arbitral forum established by the investment treaty. The author proposes that the investment treaty tribunal should generally stay its jurisdiction in favor of the contractually chosen forum save in circumstances where the claimant has, or is likely to be, subject to a denial of justice in that forum.

---

<sup>203</sup> Ibid. 405/25.

<sup>204</sup> Ibid. 405-6/27.

If a relationship of coordination between the investment treaty regime, the municipal legal system of the host State and multilateral conventions on choice of forum agreement is to be achieved, then the general principles of *generalia specialibus non derogant*, *prior tempore potior jure* and *pacta sunt servanda* provide the doctrinal basis for sorting out conflicts between overlapping jurisdictions.

In *SPP v Egypt*,<sup>205</sup> an ICSID tribunal was required to interpret an Egyptian law recording Egypt's consent to three different methods for resolution of disputes, including: (i) any method of settlement previously agreed to by the parties themselves; (ii) dispute resolution pursuant to an applicable BIT; and (iii) arbitration under ICSID Convention.<sup>206</sup> The tribunal noted that these methods were listed from the most specific type of agreement on the resolution of disputes to the most general and from this deduction concluded:

‘A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and Egypt, while such a bilateral treaty would in turn prevail with respect to a multilateral treaty such as the Washington Convention. [The clause] thus reflects the maxim generalia specialibus non derogant.’<sup>207</sup>

It is important to emphasize that the tribunal in *SPP v Egypt* made no distinction between the status of each judicial forum contemplated by each method of dispute resolution. It is submitted that this approach is entirely correct.

In *Klöchner v Cameroon*,<sup>208</sup> Klöchner instituted ICSID proceedings on the basis of the supply agreement, whereas Cameroon relied upon the protocol of agreement by way of counterclaim.<sup>209</sup> The tribunal ruled that:

‘The Claimant is right in denying the jurisdiction of the Arbitral Tribunal to rule on disputes arising from this contract.’<sup>210</sup>

The tribunal thus upheld the validity of the parties' contractual choice of ICC arbitration for disputes arising out of the management contract, implicitly on the basis of the *generalia specialibus non derogant* principle. The controversial part of the ICSID

---

<sup>205</sup> *SPP v Egypt No. 1* (Preliminary Objections) 3 ICSID Rep 101.

<sup>206</sup> *Ibid.* 122/60.

<sup>207</sup> *SPP v Egypt No. 2* (Preliminary Objections) 3 ICSID Rep 131, 149-50/83.

<sup>208</sup> (Merits) 2 ICSID Rep 9; (Annulment) 2 ICSID Rep 95.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.* 17.

tribunal's decision in *Klöchner* was the partial circumvention of its finding on the status of the ICC arbitration clause in the management contract by pronouncing upon issues pertaining to the management on the basis of a general provision in the protocol of the agreement that recorded Klöchner's obligation to 'be responsible for the technical and commercial management of the plant'.<sup>211</sup> This aspect of the decision was the subject of a rigorous dissenting opinion<sup>212</sup> and was then sharply criticized by the *ad hoc* committee on annulment.<sup>213</sup>

## **B. Shareholder Claims**

Perhaps the single greatest misconception that has plagued the investment treaty jurisprudence to date concerns the problem of claims by shareholders. The root of this misconception is the incorrect characterization of the problem as one of jurisdiction rather than admissibility. There is no difficulty in confirming the tribunal's jurisdiction *ratione personae* over a shareholder with the requisite nationality. There is also no difficulty in confirming a tribunal's jurisdiction *ratione materiae* over claims by that shareholder in relation to its investment in shares in a company incorporated in the host State. But is that the end of the analysis? Would an investment treaty claim by each individual shareholder of a company (corporate investor) be admissible? The arbitration clause in the investment treaty might restrict the class of claimants that can resort to arbitration under that treaty, but it can hardly be claimed that this is the panacea for dealing with the problem of admissibility.<sup>214</sup>

In *Total v Argentina*,<sup>215</sup> for instance, the tribunal justified its decision to uphold the admissibility of shareholder claims as follows:

'The protection that BITs afford to such investor is accordingly not limited to the free enjoyment of the shares but extends to the respect of the treaty standards as to the substance of their investments'.<sup>216</sup>

---

<sup>211</sup> Ibid. 9, 13-14, 17-18, 68-70.

<sup>212</sup> Ibid. 89-93.

<sup>213</sup> (Annulment) 2 ICSID 95, 95-117.

<sup>214</sup> See also; *Sempra v Argentina* (Preliminary Objections) para. 77.

<sup>215</sup> Decision on Objections to Jurisdiction. ICSID Case No. ARB/04/01.

<sup>216</sup> Ibid. para. 74.

This statement appears to imply that the ‘substance’ of the investment of shareholders is the property of the company they invested in. The International Court posed the following question in *Barcelona Traction*:

‘It can be asked whether international law recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances?’<sup>217</sup>

That question must be confronted by every supranational regime concerned with the protection of property rights. The investment treaty tribunals have indeed answered the International Court’s question in the following terms:

‘The investment treaty regime recognizes for the shareholders in the company a separate and independent right or interest in respect of damage done to the company by a foreign government to any extent and in all circumstances.’

In this research, shareholder actions for ‘direct injury’ and ‘reflective loss’ are distinguished. An action for a ‘direct injury’ is premised upon the third party having breached an obligation owed directly to the shareholder rather than just to the company, whereas in an action for ‘reflective loss’ the shareholder is suing for the diminution of the value of its shares caused by acts of the third party directed to the company itself. The third party in investment treaty arbitration is of course the host State or one of its emanations. Reflective loss can be defined as:

‘The diminution of the value of the shares ... the loss of dividends ... and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds.’<sup>218</sup>

Great care must attend the deployment of judicial reasoning discovered outside the investment treaty context to resolve contentious issues within it. But even greater care must be taken before dismissing the valuable insights gained from the rich experience of other judicial fora by simplistic appeals to the *sui generis* nature of investment treaty arbitration. This applies with equal force to the relevant experience of international and municipal courts.

---

<sup>217</sup> *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* 1964 ICJ Rep 6, 44 (Preliminary Objections).

<sup>218</sup> *Johnson v Gore Wood Co.* [2001] 1 All ER 481, 532.

In *CMS v Argentina* (known as *Barcelona Traction* case), the International Court in its decision on Preliminary Objections stated that:

‘In short, the question of *jus standi* of a government to protect the interests of the shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical situation in respect of the shareholding interests, as recognized by international law.’<sup>219</sup>

This distinction informed the separate opinions of Judges Morelli, Fitzmaurice and Gros in the Second Phase of the Proceedings. According to Judge Morelli:

‘To say that there is no rule which authorizes diplomatic protection of shareholders on account of measures taken in respect of company is to exclude the existence of any obligation of Spain in this connection, *vis-à-vis* any other States. Belgium’s right is thereby denied, not because such a right might hypothetically belong to a State other than Belgium, but rather because no such right can be invoked by any State, since no rule exists from which it could derive.’<sup>220</sup>

Judge Fitzmaurice pronounced in his separate opinion with characteristics lucidity:

‘If it is not right that international law should distort the structure of the company by failing to give all due effect to the logic of its separate personality, distinct from that of the shareholders, it is no less wrong, and an equal distortion, if international law fails to give due effect to the limitations on this principle recognized by the very system which, *mutatis mutandis*, it is sought to apply on the international plane.’<sup>221</sup>

Perhaps the best illustration of the distinction between shareholders claims for a direct injury and claims for reflective loss is the judgment of the Chamber of the International Court of Justice in *ELSI* (*Elettronica Sicula SpA*)<sup>222</sup>. The essence of the claim was that corporate investors were deprived of their right to manage the liquidation of *ELSI* in an orderly fashion. Judge Oda’s observations pertaining to article III (2) was:

‘Raytheon and Machlett certainly could, in Italy, ‘organize, control and manage’ corporations in which they held 100 per cent of the shares – as in the case of *ELSI* – but this cannot be taken to mean that those United States corporations, as shareholders of *ELSI*, can lay claim to any rights other than those rights of shareholders guaranteed to them under Italian law as well as under the general principles of law concerning

---

<sup>219</sup> (*Belgium v Spain*) 1964 ICJ Rep 5, 45.

<sup>220</sup> (*Belgium v Spain*) 1970 ICJ Rep 4, 228 (Morelli J).

<sup>221</sup> Separate Opinion of J Fitzmaurice, *ibid.* 71. See also the ICJ’s judgment: *ibid.* 39-40, See also: Separate Opinion of J Morelli.

<sup>222</sup> (*USA v Italy*) 1989 ICJ Rep 15.

companies. The rights of Raytheon and Machlett as shareholders of ELSI remained the same and were not augmented by the FCN Treaty.’<sup>223</sup>

This statement is perfectly consistent with the approach taken by the Chamber of the International Court. The divergence with the Chamber’s approach commences with the next line of Judge Oda’s Separate Opinion:

‘Those rights which Raytheon and Machlett could have enjoyed under the FCN Treaty were not breached by the requisition order, because that order did not affect the ‘direct rights’ of those United States corporations, as shareholders of an Italian company, but was directed at the Italian company of which they remained shareholders.’<sup>224</sup>

Although the Chamber did not directly consider this particular point, for the reasons previously articulated it cannot be accepted insofar as the ‘direct rights’ of Raytheon and Maccllett were capable of being prejudiced by the requisition order. That would settle any objection to the admissibility of this claim. The Author concludes that:

‘The claim alleging an interference with the American investors’ right to manage and control its investment was admissible for the purposes of the FCN Treaty and that this conclusion would be no different in the investment treaty context. Rather than dismissing the claim on the merits, the Chamber should have properly investigated those ‘doubts’ and found that it was inadmissible and hence Judge Oda’s general point about the lack of *jus standi* of the United States was well taken in relation to this claim. In the investment treaty context, the same approach would be required with respect to a claim of this type based on an obligation to accord full protection and security.’

The Iran/US Claims Tribunal considered the admissibility of a claim for a direct injury in *Foremost-McKesson HBOC Inc. v Iran*,<sup>225</sup> It was alleged that the Iranian company had withheld dividends from the US shareholder over a period of several years while continuing to pay dividends to its Iranian shareholders. The tribunal found that the claim was not within its *ratione tempore* jurisdiction.

Where investment treaty tribunals have admitted shareholder claims for reflective loss founded upon a breach of the obligation of fair and equitable treatment or full protection or security or national treatment or most-favored-nation treatment or other minimum standard of treatment, an intractable problem has arisen as to where to draw the line. The problem was confronted in *Enron v Argentina*.

---

<sup>223</sup> Ibid. 87-8.

<sup>224</sup> Ibid. 88.

<sup>225</sup> (Case 220-37/231-1, 10 April 1986) 10 Iran-US CTR 228.



In *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*,<sup>226</sup> Argentina raised an objection to the admissibility of Enron's claims because Enron could not, as a shareholder of TGS, identify any rights attaching to that shareholding, which had been affected by measures attributable to Argentina.

At the hearing on jurisdiction held in the present case, the Tribunal put a question to the parties as to whether the Claimants had been invited by the Government of Argentina to participate in the investment connected to the privatization of TGS. It turned out that this had been precisely the case. It followed that all the claims advanced by Enron were admissible. The test for admissibility devised by the tribunal was thus founded upon the criterion of an 'invitation'.

The concern expressed by *Enron* tribunal about the prospect of an endless chain of claims of different shareholders in different companies with indirect control over the same investment was taken up in *Noble v Ecuador*.<sup>227</sup> The tribunal's answer to this problem does not inspire confidence:

'The tribunal does not disagree with the statement made by the Enron tribunal. There may well be a cut-off somewhere, and future tribunals may be called upon to define it. In the present case, the need for such a definition does not arise. Indeed, the cut-off point, whatever it may be, is not reached with two intermediate layers. The relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote.'<sup>228</sup>

The Author affirms that it is impossible to make a legal judgment on the remoteness of a claim unless one has a legal test for remoteness in mind. The 'need for such a definition' certainly does arise. A tribunal's failure to give proper analysis to the admissibility of a derivative claim by a shareholder generates intractable problems in respect of the qualifications of damages if the claim is upheld on the merits. In other words, the assertion of jurisdiction over an inadmissible claim by a shareholder leads to consequential errors in the assessment of damages. Two such consequential errors can be found in the jurisprudence to date.

---

<sup>226</sup> *Enron v Argentina* (Preliminary Objections) 11 ICSID Rep 273; (Merits).

<sup>227</sup> (Preliminary Objections).

<sup>228</sup> *Ibid.* para. 82.

The first is for the tribunal to assess the damages to an investment in shares flowing from a breach of an investment treaty obligation by employing the standard of compensation of expropriation even where the tribunal has ruled that there has been no expropriation. The second consequential error is to assess damages on the basis of a crude estimate of the loss to the shareholder caused by an injury to the company. The leading example of such an error is the award in *Nykomb v Latvia*.

In *Nykomb Synergies Technology Holding AB v Republic of Latvia*,<sup>229</sup> the tribunal decided to exercise its jurisdiction over a claim brought by the parent company in respect of a dispute concerning an entitlement to a double tariff rate in a contract between its local subsidiaries. The following finding by the tribunal should have resulted in a finding of inadmissibility in respect of Nykomb's derivative claim:

'In the present case, there is no possession taking of Windau or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise – apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc. The tribunal therefore concludes that the withholding of payment at the double tariff does not qualify as an expropriation or the equivalence of an expropriation under the treaty.'<sup>230</sup>

The tribunal must be commended as being among the first to acknowledge the axiomatic rule of valuation that a loss to a company is not reflected exactly as a loss to a shareholder. The problem of quantifying the 'reflective loss' has been analyzed extensively in many jurisdictions. It is an issue that does not evaporate in the international stratosphere of an investment treatment claim.

Some investment treaties contain express provisions that regulate the instance where a controlling shareholder is permitted to claim on behalf of and in the name of its company incorporated in the host State for the purpose of Article 25(2)(b) of the ICSID convention.<sup>231</sup> Article 25(2)(b) of the ICSID Convention provided in relevant part (see Appendix 2):

---

<sup>229</sup> (Merits) 11 ICSID Rep 158.

<sup>230</sup> Ibid. 194/section 4.3.1.

<sup>231</sup> Asian-African Legal Consultative Committee Model BIT, Art. 1©, UNCTAD Compendium (Vol. III, 1996) 117; Switzerland Model BIT, Art. 893) ('a company which has incorporated or constituted according to the laws in force on the territory of the Contracting Party and which, prior to the origin of the dispute, was under the control of nationals or companies of the other Contracting Party, is considered, in the sense of the Convention of Washington and according to

‘Any Juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention.’

Schreuer’s analysis of the *travaux préparatoires* of Article 25(2)(b) of the ICSID Convention suggest that:

‘A suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners was discarded. It was soon realized that this would not be feasible where shares are widely scattered and their owners are insufficiently organized.’<sup>232</sup>

### C. Legal and Beneficial Ownership of The Claim

As with other aspects of the investment treaty regime, it is important to commence the analysis of the problem with a clear statement of why the solution provided by the law on diplomatic protection is inapposite. In the diplomatic protection context, the question is not the transferability of the international claim *sensu stricto*, but rather the transferability of the right of interposition by diplomatic protection that attaches to the injury suffered by a foreign national.

There can be no ‘transfer of claim to diplomatic protection from one person to another’ because a claim to diplomatic protection does not belong to an individual but rather vests in the individual’s national state. What is transferred in this context is the right to a remedy in respect of the injury that exists within a municipal legal order in accordance with the applicable choice of law rule. The terminology employed by the Institute of International Law is therefore to be preferred:

*‘When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seized of it unless it possessed the national charter of the claimant State, both at the date of injury and at the date of its presentation.’*<sup>233</sup>

---

its Article 25(2)(b), as a company of the latter’), *ibid.* 181; UK Model BIT (1991), Art. A(2), *ibid.* 189; USA Model BIT (1994), art. 9(8), *ibid.* 202.

<sup>232</sup> C Schreuer, ‘*The ICSID Convention: A Commentary*’ (2001) 291 (references to documents Concerning the Origine and the formulation of the convention (1968) are omitted).

<sup>233</sup> Institute of International Law, Warsaw Session, *Annuaire de l’Institut de Droit International* (Vol.2, 1965) 210 (Art. 2: ‘The National Charter of an International Claim Presented by a State for Injury Suffered by an Individual’).

In contradiction to diplomatic protection, the right to prosecute investment treaty arbitration is conferred directly upon the claiming investor. Hence there is no need for rules governing the requisite connection between the individual and entity who has suffered the injury and the national State of that individual or entity which has standing to present a claim. The link of nationality between the claiming investor and its national State is of critical importance to the tribunal's jurisdiction *ratione personae* because it is the national identity of ownership or control over the investment that brings it within the framework of the investment treaty. But is less significant in relation to the admissibility of claims, because the interest of the investor's national State in the prosecution of the investment treaty arbitration is much less prominent than the interest of the Claimant State in diplomatic protection.

The policies underlying the rules of interposition for diplomatic protection and the relevant principles of admissibility in the investment treaty context are also fundamentally different. The primary function of the contentious nationality rule in diplomatic protection, for instance, is to prevent nationals from transferring their allegiance to more powerful States that might have the means to bring diplomatic pressure to bear upon the State causing the injury.

In contrast, the primary concern in fashioning principles of admissibility for investment treaty arbitration must be the avoidance of forum shopping by the claimant once the dispute has arisen.

The legal or beneficial ownership of an investment can be structured in such a way as to attract the protection of an investment treaty in force at the host State of the investment.<sup>234</sup> A putative investor is entitled to structure its investment so as to attract substantive protection of an applicable investment treaty and that entitlement is consistent with the object and purpose of an investment treaty, which is to encourage foreign investment by reducing the sovereign in the country in question.

The legal or beneficial ownership of an investment cannot be transferred in order to establish the jurisdiction of an investment treaty tribunal in respect of an alleged injury to

---

<sup>234</sup> *AdT v Bolivia* (Preliminary Objections) para. 330.

that investment attributable to measures of the host State save where the host State has given its express consent to such a transfer on notice of this consequence.<sup>235</sup> This principle rests upon the principle of *nemo dat quod non habet* or *nemo potiore potest transferre quam ipse habet*: an individual or entity with legal or beneficial ownership of investment at the time of the alleged injury to the investment cannot transfer better rights in respect of that investment than it had at that time. The right to prosecute investment treaty arbitration before an international tribunal established pursuant to a particular investment treaty is a valuable right that may attach to an investment and cannot be created by means of a transfer of legal or beneficial ownership to that investment. There has been extensive consideration of above principle in two cases.

In CME Czech Republic B.V. (The Netherlands) v Czech Republic,<sup>236</sup> the crucial event was the alleged coercion of the Media Council that culminated amendment to article 1.4.1 of the MOA, which purportedly altered CNTS's rights in relation to CET 21's television license. But that crucial event occurred before CME had acquired its investment.<sup>237</sup>

The Tribunal held that the investment was the shares acquired by the Dutch parent company. The Netherlands/Czech Republic BIT accorded protection to this investment and that protection followed any subsequent disposition of the shares to a daughter company. This reasoning is consistent with the principle above because the disposition of the investment did not purport to create a new right under an investment treaty.

In Aguas del Tunari, S.A. v Republic of Bolivia,<sup>238</sup> The tribunal was hindered by the lack of clarity in which Bolivia's preliminary objections were articulated<sup>239</sup> and was compelled to rely upon its power in ICSID Arbitration Rule 41(2) to examine its jurisdiction independently.<sup>240</sup> Nevertheless, the ground of inadmissibility was put in contention: in the

---

<sup>235</sup> *Mihaly v Sri Lanka* (Preliminary Objections) 6 ICSID Rep 310, 315/24; *Impregilo v Pakistan* (Preliminary Objections) 12 ICSID Rep 245, 273/135; *Société Générale v Domenica* (preliminary Objections) para. 110; *African Holding Co. v Congo* (Preliminary Objections).

<sup>236</sup> (Merits) 9 ICSID Rep 121.

<sup>237</sup> The Czech Republic did not raise an objection to the tribunal's jurisdiction on the basis of these facts and the tribunal deemed such an objection to be waived and declined to investigate its own jurisdiction *ex officio* (ibid. 380/188). Instead, the Czech Republic, for the first time at the hearing on the merits, pleaded this point as a substantive defence or a defence based on admissibility (ibid. 381/189, 420/197).

<sup>238</sup> (Preliminary Objections).

<sup>239</sup> (Preliminary Objections) para 84.

<sup>240</sup> Ibid. para. 84.

context of Bolivia's 'second objection'.<sup>241</sup> With respect to that contention, the tribunal stated:

'On the basis of the evidence available, IWH B.V. is not simply a corporate shell set up to obtain ICSID jurisdiction over the present dispute. Rather IWH B.V. is a joint venture 50% owned by Baywater and 50% owned by Edison S.p.A., an Italian corporation.'<sup>242</sup>

There is some concern that the 'evidence available' was insufficient for the tribunal's ruling and this may well have been an instance when disclosure of the relevant documents should have been ordered.<sup>243</sup>

Dispositions relating to the legal and beneficial ownership of the investment that occur after the claimant has validly failed a notice of arbitration have no effect upon the admissibility of its claims.<sup>244</sup> Once a claim is presented, the opportunity of forum shopping comes to an end. Any disposition relating to the legal or beneficial ownership of the investment after the claim is presented should not, therefore, have an impact upon the admissibility of the claim.

In *EnCana v Ecuador*,<sup>245</sup> The tribunal ruled that, insofar as Encana was pursuing a claim for its own loss, the disposal of its investment was immaterial.<sup>246</sup> The Author affirms that this conclusion must be endorsed. It is consistent with the principle which eschews any requirement of continuous control over the investment after the time of the alleged breach of the obligation forming the basis of the claim until it is presented. It is also consistent with above principle because there was no risk of forum shopping on the part of EnCana that would make the disposition of its investment relevant to the admissibility of its claims.

---

<sup>241</sup> The assertion in the 'second objection' was: 'the Claimant is not a Bolivian entity "controlled directly or indirectly" by nationals of the Netherlands as required by the Netherlands-Bolivia BIT'.

<sup>242</sup> Ibid. para. 321.

<sup>243</sup> The tribunal dismissed Bolivia's request for documentation in Procedural Order No. 1 and restated its reasons for doing so in: (preliminary Objections) paras. 324-7. It was stated that the tribunal's ruling on the Bolivia's second objection made the request 'without object' (ibid. para.327). Bolivia's second objection was not directly concerned with the possible ground of inadmissibility under consideration at the time of this research and the author is not informed as to whether Bolivia did in fact request documents relevant to this ground.

<sup>244</sup> *National v Argentina* (Preliminary Objection) paras. 114-21; *EnCana v Ecuador* (Merits) 12 ICSID 427, 461/131; (semble) *Batavian National Bank Claim* 26 ILR 346 (1985); *Wintershall v Argentina* (Preliminary Objections) paras. 55-60; *Rumeli Telekom v Kazakhstan* (merits) paras. 325-6.

<sup>245</sup> (Merits) 12 ICSID 427.

<sup>246</sup> Ibid. 461/131.

## D. Denial of Benefits

A ‘denial of benefits’ provision is not self-judging and must be positively established by the claimant and positively invoked by the respondent. The burden of the proof clearly falls upon the respondent host State and if that burden is discharged before the tribunal, then the claimant investor’s claims must be dismissed. A ‘denial of benefits’ provision obviously does not supply a defence to the merits of the claims; if the provision is properly invoked then merits of the claims will never be tested. It is thus a matter of admissibility.<sup>247</sup> These points are best illustrated in relation to Article 17 of the ECT entitled ‘Non-Application of Part III in Certain Circumstances’, which reads:

‘Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.’

Part III of the ECT contains the substantive obligations of investment protection, whereas the investor/state arbitration clause is to be found in Part V of the ECT. If there were an express reference to Part V of the ECT in Article 17, then a Contracting Party’s reliance upon the ‘denial of benefits’ provision would constitute a jurisdictional objection. The tribunal would still have the power to rule upon this jurisdictional objection by the virtue of the principle of *compétence de la compétence*. But it is the protection that is denied by the Article 17 of the ECT and hence it must be characterized as going to admissibility.

At the outset, the ultimate conclusion that if Article 17 does not go to jurisdiction then it must go to the merits is difficult to comprehend. As previously stated, the particular factors leading to a ‘denial of benefits’ have nothing to do with the merits of the claims. The tribunal concluded that where the Contracting Party invokes Article 17 in arbitration proceedings with the investor, it only has prospective effect. Insofar as the investor in any arbitration proceedings is seeking damages for the events of the past, this is tantamount to holding that the ‘denial of benefits’ clause is devoid of effect. According to the tribunal, in order for Article 17 to apply to events of the past, it would be incumbent upon the

---

<sup>247</sup> This was the characterization adopted by the tribunal in relation to the ‘denial of benefits’ provision in Article 1(2) of the USA/Ukraine BIT in: *Generation Ukraine v Ukraine* (Merits) 10 ICSID Rep 236, 272/15.7 (‘this is not, as the Respondent appears to have assumed jurisdictional hurdle for the Claimant to overcome in the presentation of its case: instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State.’).

Contracting Party to exercise its right under Article 17 before or after the investment was consummated.

The claimant investor and the respondent host state enter into a legal relationship for the purposes of the investment treaty for the first time when the investor accepts the host state's unilateral offer of arbitration by filing a notice of arbitration. It is artificial to interpret Article 17 in such a way so as to compel the host Contracting Party to take steps under the ECT before that legal relationship is consummated. Such an interpretation also ignores the reality of how such clauses operate in practice. Even if a Contracting Party made the formal 'general declaration' envisaged by the tribunal, it is still a matter of appreciation for a tribunal constituted pursuant to Article 26 of the ECT as to whether Article 17 applies to the circumstances of the particular investor.

### **3.4. CONCLUSION**

As it was mentioned in chapter 2, the eminence of the International Centre for the Settlement of Investment Disputes in the sphere of investment arbitration is undeniable. However, the mere existence of a dispute related to an investment does not render arbitration of such a dispute possible. There are certain prerequisites for an investment treaty tribunal to proceed to adjudicate the merits of claims arising out of an investment.

The ICSID arbitration requires that tribunals must have jurisdiction over the parties and the claims, and the claims must be admissible. Furthermore the host state must have consented to that arbitration of investment disputes.

The purpose of this chapter was to introduce and elaborate preliminary issues relating to arbitrability, justiciability and admissibility in investment arbitration with particular emphasis on critical cross analyzing of 'admissibility' an important terminology used in jurisprudence of ICSID.

Admissibility refers to the exercise of the adjudicative power of the tribunals in arbitral proceedings. These terms are being employed inconsistently and with a notable ambivalence to the rationale for having different terms in the first place. It was discussed that these terms might well have suffered a downgrading in recent times.



The rules of admissibility, if properly invoked, may require the dismissal of the claim or counterclaim before the determination of its merits. The grounds of inadmissibility at base represent certain legal defects in a claim that are dependent of, and yet often closely connected to, the substantive grounds upon which a claim or counter claim is to be adjudicated on the merits. Admissibility deals with the *sustainability* of the claim for adjudication on the merits.

The investment treaty jurisprudence discloses a great deal of confusion about the extent to which a determination made by the tribunal on its jurisdiction or the admissibility of claims in a preliminary decision must be conclusive in respect of such issues. The confusion arises because there are certain issues of the jurisdiction and admissibility which require the tribunal to make an assessment of the facts asserted by the claimant in support of its claims on the merits.

## 4. CHAPTER FOUR: PREREQUISITES FOR INVESTMENT

### ARBITRATION – *JURISDICTION*

#### 4.1. INTRODUCTION

This chapter addresses the other important preliminary issue in investment arbitration, namely ‘jurisdiction’, which has been subject to much argumentative dialogue among legal practitioners and scholars alike. Admissibility and jurisdiction although very closely defined in lexicon, refer to different set of prerequisite terms in investment arbitration. There are no classified set of rules and principles within the jurisprudence on investment arbitration and the realm of international investment law.

This research has a particular emphasis on the necessity of compilation of a set of rules that would be the reference for upholding jurisdiction of arbitral tribunals and tackling the waivers or arbitrariness. *Lex juridictio* is the proposed framework within which such principles and rules should be defined and classified. The Author strongly believes that solutions to the problems of admissibility and jurisdiction will ultimately contribute to the fairness and justice of the system of resolving disputes between foreign investors and host states. The Author also supports the hypothesis that principles of fairness and justice are a more legitimate source of guidance for resolving these questions than the policy objectives for concluding the investment treaty as revealed in its preambular clauses. There is an inexorable connection between the general policy of encouraging foreign investment and a decision to uphold jurisdiction in relation to a specific investment dispute

What if the basis for the decision to uphold jurisdiction were in one instance to be universal for all future cases, what would be the consequences for the state parties to the treaty? Would it open the floodgates to an unlimited number of claims in respect of the same underlying damage to a particular investment? Would it undermine the sanctity of commercial contracts? Would it have a deleterious effect on the capacity of municipal courts to provide effective remedies? This research contests that if such questions can be answered in the affirmative, then the tribunal has strayed off the path towards the fair and legitimate interpretation of the treaty.

#### 4.2. THE EXISTENCE OF THE ADJUDICATIVE POWER–(JURISDICTION)

To avoid negotiating the terminological quagmire as a preliminary step in explaining the interface and boundaries of jurisdiction from admissibility, three concepts will be introduced and distinguished without using the common terms of art. Instead, the relevant French terms are identified insofar as they are less corrupted by bad practice than their English equivalents.

The existence of an adjudicative power. Have the conditions for vesting the arbitral tribunal with adjudicative power been satisfied? (*L'attribution de la jurisdiction.*)

The scope of the adjudicative power. What are the categories of parties and disputes in relation to which the arbitral tribunal can adjudicate? (*L'étendue la jurisdiction.*)

The exercise of the adjudicative power. Can the arbitral tribunal exercise its adjudicative power in relation to the specific claims submitted to it? (*Les conditions de recevabilité.*)

The two meanings ascribed to *jurisdiction* in this taxonomy find some support in international decisions. For instance, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia gave the following elaboration of a distinction between '*L'attribution de la jurisdiction*' and '*L'étendue la jurisdiction*' by characterizing an objection in relation to the constitution of the tribunal as pertaining to the former:

'Jurisdiction is not merely an ambit or sphere (better described in this case as 'competence'); it is basically – as is visible from the Latin origin of the word itself, *juridictio* – a legal power ... [I]f the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is preliminary to and conditions all other aspects of jurisdiction.'<sup>248</sup>

---

<sup>248</sup> *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995) ICTY Appeals Chamber, paras 10-12. See also *Corfu Channel (UK v Albania)* 1948 ICJ Rep 15, 49 (Dissenting opinion of Judge Daxner) ('In my opinion, the word "jurisdiction" has two fundamental meanings in international law. the word is used: (1) to recognize the Court as an organ instituted for the purpose *jus dicere* and in order to acquire the ability to appear before it; (2) to determine the competence of the Court, i.e., to invest the court with the right to solve concrete cases').

In contracts the distinction between both meanings of jurisdiction, on the one hand, and *Les conditions de recevabilité*, on the other, is more entrenched in international decisions.<sup>249</sup>

An investment treaty tribunal is vested with adjudicatory power (jurisdiction) if a national of one contracting state has acquired an investment in another contracting state and the host state of the investment has consented to the arbitration of investment dispute.

### **A. Host State's Consent and The Investment**

The existence of the tribunal's adjudicative power is predicated upon: (i) the consent of the contracting state whose economy has benefited from (ii) the investment made by a national of the other contracting state. The first aspect of the *quid pro quo* is a question of treaty interpretation and at this stage the tribunal's inquiry is normally limited to ascertaining whether consent is recorded in the investment treaty and is valid as a matter of international law. There may, however, be conditions precedent to the contracting state's consent to the arbitration of investment disputes recorded in the investment treaty, such as the requirement for the claimant to waive the prosecution of local remedies.

Consent to arbitration of investment disputes is considered in Chapter 8. The second aspect of *quid pro quo* concerns whether or not the foreign national has transferred resources to the company of the host state in the manner required to constitute an investment pursuant to the terms of the investment treaty. The complex issues that arise in relation to the investment are considered in Chapter 5. Naturally there are other conditions relating to the *L'attribution de la jurisdiction*, such as the proper constitution of the tribunal. This research is only concerned with those conditions unique to investment treaty arbitration and ICSID arbitration in particular, and hence the focus is limited to the host state's consent and the foreign national's investments.

In this research, the existence of the tribunal's adjudicative power by virtue of these two elements – the host state's consent and the foreign national's investment – is referred to

---

<sup>249</sup> E.g. *Interhandel (US v Switzerland)* 1959 ICJ Rep 6, 20 *et seq.*; *Nottebohm (Liechtenstein v Guatemala)* 1954 ICJ Rep 4, 15, 25. This is not to say that it is always properly maintain. For instance, the European Court of Human Rights has tended to classify all preliminary objections as relating to 'admissibility' even when they clearly relate to the Court's jurisdiction.

under rubric of ‘jurisdiction’. This is the first meaning ascribed to ‘jurisdiction’ to convey the *L’attribution de la jurisdiction*. It is encapsulated in the statement of the Mexican-United States General Claims Commission in the *Elton* case: ‘*Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal or a law prescribing its jurisdiction.*’<sup>250</sup>

This research is concerned exclusively with the substantive conditions for the existence of the tribunal’s adjudicative power, which are unique to investment treaty arbitration. the procedural conditions for establishing the tribunal’s adjudicative power would include the rules governing the institution of arbitral proceedings (*‘la saisine’*) and the method for constituting the tribunal.

## B. The Scope of the Adjudicative Power

As stated above, the scope of the tribunal’s adjudicative power is circumscribed by the same acts that confirm the existence of that power. Those acts are the host state’s consent in the investment treaty to the arbitration of investment disputes and the foreign national’s acquisition of an investment in the host state. The various aspects of the scope of adjudicative power of investment arbitration tribunals are shown against the consent of the host state in the table below:

**Table 3: The various aspects of scope of jurisdiction**

| Aspect of the scope of adjudicative power | Consent of host state                                 | Investment  |
|---|---|---|
| Material ( <i>ratione materiae</i> )      | Which type of claims can be submitted to arbitration? | Which proprietary interests can be the object of the claim? |
| Personal ( <i>ratione personae</i> )      | Who can submit claims to arbitration?                 | Who made the investment?                                    |
| Consensual ( <i>ratione voluntatis</i> )  | What constitutes consent to arbitration?              | How was the consent given?                                  |
| Temporal ( <i>ratione temporis</i> )      | When did the obligations entered into force?          | When was the investment made?                               |

<sup>250</sup> Opinions of Commissioners, Under the Convention Concluded 8 September 1923, as extended by the Convention signed 16 August 1927, between the United States and Mexico. 26 September 1928 to 17 May 1929 (1929), as cited in: B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) 259.

The consent of the host state recorded in the investment treaty controls the scope of the arbitral tribunal's adjudicative power in several respects. First the consent defines the type of claims that can be submitted to arbitration and hence the material scope of the tribunal's adjudicative power. Some contracting states, for instance, consent to claims based upon an investment treaty obligation, an investment agreement or an investment authorization. Other contracting states only permit claims for compensation due by virtue of an expropriation. Second, the timing of the host state's consent in terms of when it acquired legal force determines the outer limits of the temporal scope of the tribunal's adjudicative power.

Third, the consent determines the class of persons or entities that can avail themselves of the arbitral mechanism in the investment treaty and hence the personal scope of the tribunal's adjudicative power. The class of persons or entities is usually defined by reference to their having the nationality of one of the contracting parties.

The act of making a qualified investment is also controlling for the scope of the arbitral tribunal's adjudicative power in several respects. First, the proprietary interests that comprise the investment are the object of any investment treaty claim submitted by the investor to arbitration against the host state. Hence the material scope of the tribunal's adjudicative power in this respect is limited to claims having as their object such proprietary interests. Second, the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope of the tribunal's adjudicative power over claims based upon an investment treaty obligation. Third the identity of the national who made the investment determines the personal scope of the tribunal's adjudicative power.

It is the coincidence of these aspects of the host state's consent and the foreign national's investment that determines the scope of the tribunal's adjudicative power. As stated earlier, in this research the scope of the arbitral tribunal's adjudicative power is also referred to as its '*jurisdiction*' in the sense of *l' étendue de la jurisdiction*. Each aspect of the scope of the arbitral tribunal's jurisdiction is designated by the Latin terms *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione voluntatis*. In view of the particular focus of this research on ICSID arbitration, the Author has made an emphasis on

the critical analysis of the Material, Personal and Consensual scopes of upholding adjudicative power of the investment arbitration tribunals. Each of these aspects of the arbitral tribunal's jurisdiction is considered separately in Chapters 6, 7 and 8 that follow.

### **C. The Law Applicable to Jurisdiction and Admissibility**

An investment treaty is an international instrument governed by international law; the arbitral tribunal is created by the investment treaty; therefore, issues relating the tribunal's jurisdiction or the admissibility of claims submitted to it are to be resolved by the treaty and international law. Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.

Direct access of a national investor of a state contracting party to raise and pursue a claim against the host state contracting party does generates complex answer to the question of the source of arbitral tribunal's authority. That authority must be derived from an agreement between the host contracting state party to the investment treaty and the national of another contracting state party. As the national is not a privy to the investment treaty itself, that international instrument cannot be the entire agreement evidencing both parties' consent to arbitration.

The consent on the part of the host contracting state to arbitrate is recorded in the investment treaty. The consent can be conceptualized as a unilateral offer to arbitrate. When a national serves a notice of arbitration upon the host contracting state party, then that unilateral offer must be deemed to be accepted by the national so that an agreement to arbitrate comes into existence.<sup>251</sup>

The existence of an agreement to arbitrate is critical to the application of the ancillary legal regime for the conduct of arbitration and the recognition and enforcement of arbitral awards. 'Consent in writing' is also a requirement for the application of the ICSID Convention,<sup>252</sup> which is commonly an option conferred upon the putative claimant

---

<sup>251</sup> J Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Rev – Foreign Investment LJ* 232, 247. *Palma v Bulgaria* (Preliminary Objections) para. 198.

<sup>252</sup> Art. 25(1), See appendix 1.

investor in investment treaties. Where such an option is not exercised, the application of municipal laws regulating international arbitration is also contingent upon the existence of an agreement in writing to arbitrate.<sup>253</sup> Finally arbitration rules such as the UNCITRAL Arbitration Rules,<sup>254</sup> the ICC Rules of Arbitration<sup>255</sup> and the LCIA Arbitration Rules<sup>256</sup> can only be incorporated by reference into the arbitration if there is an agreement to arbitrate containing such reference.

In *Occidental Exploration & Production Co. v Republic of Ecuador*,<sup>257</sup> the court accepted that, as a matter of private international law an agreement to arbitrate could in principle be subject to international law. From that premise, the Court considered the agreement to arbitrate between the parties to investment treaty arbitration:

‘Although it is a consensual agreement, it is connected with the international treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators’ jurisdiction. Further, the protection of the investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the state against which an investor is arbitrating.’<sup>258</sup>

This reasoning can be fully endorsed. The undertaking to arbitrate in the investment treaty itself contains those terms on jurisdiction; the validity of the agreement to arbitrate is contingent upon the investor claimant’s acceptance of them.

The application of international law to the agreement to arbitrate paves the way for the development of an autonomous body of principles regulating issues of jurisdiction and admissibility for the investment treaty regime. The express provisions of the investment treaty and, where applicable, the ICSID Convention, are obviously the starting point for resolving such issues, but these provisions do not supply a comprehensive set of answers to every problem relating to jurisdiction and admissibility within the investment treaty regime. The chapters that follow are largely concerned with the identification of the

---

<sup>253</sup> E.G. UNCITRAL Model Law on International Commercial Arbitration, Arts. 1, 7; Arbitration Act 1996 (England), s. 5; Nouveau Code de Procédure Civile (France) Arts. 1442, 1443; Federal Private International Law Act (Switzerland), Art. 178; Code of Civil Procedure (Netherlands), Arts. 1020, 1021.

<sup>254</sup> Art. 1(1).

<sup>255</sup> Art. 1(1).

<sup>256</sup> Preamble.

<sup>257</sup> [2005] EWCA Civ 1116, [2006] QB 432.

<sup>258</sup> Ibid. 459.



problems that commonly arise in relation to the jurisdiction on the arbitral tribunal and the admissibility of claims, and with the possible solutions to such problems.

It is important to distinguish between the issues relating to jurisdiction and admissibility from those relating to the procedure of the arbitration. Issues relating to jurisdiction and admissibility concern the existence, scope and exercise of the adjudicative power by the arbitral tribunal. The subject matter of the agreement to arbitrate is the existence, scope and exercise of adjudicative power by the arbitral tribunal. The Author supports the paradigm that the applicable sources of law to that agreement is the investment treaty and, where relevant, the ICSID Convention.

The procedural rules governing the arbitration do not regulate the existence, scope and exercise of the adjudicative power by the arbitral tribunal but rather issues such as the modalities for constituting the tribunal, the taking of evidence, the conduct of hearings, and so on. Such rules can be derived from an international treaty (such as ICSID Convention),<sup>259</sup> municipal laws on arbitration (such as the English Arbitration Act 1996) and arbitration rules (such as UNCITRAL Arbitration Rules). It is, therefore quite possible, and indeed normal, for international law to govern issues of jurisdiction and admissibility, and the municipal law of the seat of the arbitration in conjunction with the set of arbitration rules chosen by the parties to govern issues of procedure.

#### **D. Double Jurisdictional Aspect of ICSID Arbitration**

Indeed, in ICSID *treaty* arbitration there are two, rather than one, jurisdictional keyholes for any dispute.<sup>260</sup> This is being referred to as one of the crucial differences of international investment arbitration as opposed to international commercial arbitration. A typical arbitration clause of a commercial contract with foreign element conventionally provides for (1) ‘referral to arbitration by authorizing the creation of the tribunal’ and at the same time stipulates (2) ‘which disputes will be within the jurisdiction of that tribunal’.<sup>261</sup> For instance, the arbitral clause may provide for (1) arbitration in New York

---

<sup>259</sup> The ICSD Convention transcends both the subject matters under discussion. Articles 25, 26 and 27 might be relevant to questions of jurisdiction and admissibility, whereas Articles 36 to 49 regulate the procedure of the arbitration.

<sup>260</sup> T Weiler, ‘Investment Treaty Arbitration and International Law’ (Juris Publishing, New York: 2008), p.120.

<sup>261</sup> Ibid.

under the rules of London Court of International Arbitration and may limit the jurisdiction of the arbitral tribunal to (2) ‘any dispute arising out of this contract’.

By contrast, in ICSID treaty arbitration, such commercial contract is usually replaced by a BIT, wherein there is conventionally a referral to ICSID institution and a definition of jurisdiction.<sup>262</sup>

This is being referred to as a lower jurisdictional keyhole. And it is that referral to ICSID institution created by the 1965 Convention on the Settlement of International Investment Disputes that establishes the second jurisdictional keyhole as the ICSID Convention itself contains limitations on the types of disputes that fall under the aegis of ICSID. These limitations form upper jurisdictional keyhole which the above mentioned article 25(1) of ICSID Convention establishes.

The tribunal in *CSOB v Slovak Republic* held in this context:

‘A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.’<sup>263</sup>

Such ‘double requirement’ approach has been also aptly reflected in *Plama* case. In view of the accession to both Energy Charter Treaty and the ICSID Convention by Cyprus and Bulgaria at the time of institution of the proceedings, the company invoked the protection availed by the Energy Charter Treaty and its dispute resolution provision which explicitly refers to ICSID. Bulgaria attempted to deny ICSID jurisdiction over dispute alluding to uncertain ownership of Plama, which included persons who were not nationals of ECT Contracting States. The Tribunal rejected the Respondent’s motion and found that ‘Plama, as a company organized in accordance with the law applicable in Cyprus, was an investor of ‘another Contracting Party’ who had made an investment in the area of ‘the former Party’ by acquiring a substantial shareholding in a company operating in Bulgaria’. Hence, in *Plama* case the tribunal referred to lower jurisdictional keyhole and addressed the relevant provision of Bulgaria-Cyprus BIT to interpret if *Plama* was an investor in Bulgaria.

---

<sup>262</sup> But not necessarily, as an investment contract may also contain a similar arbitration clause.

<sup>263</sup> *CSOB v Slovak Republic*, CSID Case № ARB/97/4, Decision on Jurisdiction (1999) ICSID Review-Foreign Investment Law Journal, vol.14 (1999), para. 251

### 4.3. THE CONCEPT OF SCOPE OF JURISDICTION

#### A. Which Type of Claims Can Be Submitted to Arbitration?

Fundamentally, it is notoriously difficult to establish when the protection of foreign nationals/entities and of their property rights matures into the protection of foreign investment. The aforementioned *Salini* test is being criticized, yet not given the effective and viable alternative.

Krishnan argues that the *Salini* test dramatically narrows the field of transactions, which runs counter to the wording and *travaux préparatoires* of the ICSID Convention suggest.<sup>264</sup> It is argued that under *Salini* test, only direct investment is considered to be in compliance with ICSID's notion of investment and other forms, such as portfolio investments, are beyond the contours of the test. Indeed, portfolio investments do not necessarily entail control rights over enterprise, 'regularity of profit and return' or 'certain duration', as it was set forth in *Salini* case.<sup>265</sup> According to Krishnan, an adequate definition of investment is contained in 5<sup>th</sup> edition of the International Monetary Fund's Balance of Payments Manual, which categorizes investment into foreign direct investment, portfolio investment, and other investment, thereby demonstrating that all three forms should be referred to as investment:

'Direct investment is the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy ... The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise ... The components of direct investment capital transactions are equity capital, reinvested earnings, and other capital associated with various intercompany debt transactions.

Portfolio investment includes, in addition to equity securities and debt securities in the form of bonds and notes, money market instruments and financial derivatives such as options ... The major components of portfolio investment which are classified under assets and liabilities, are equity securities and debt securities ... Debt securities are subdivided into bonds and notes, money market instruments, and financial derivatives that include a variety of new financial instruments ... Equity securities cover all instruments and records acknowledging, after the claims of all creditors have been met, claims to the residual values of incorporated enterprises.

---

<sup>264</sup> D Krishnan, 'A notion of ICSID investment' (2009) Oil, Gas and Energy Law journal 6(1), p. 4.

<sup>265</sup> Ibid. p.13.

Other investment is a residual category [...] classified primarily on an instrument basis [...] The instrument classification comprises trade credits, loans, [...] currency and deposits [...] and other assets and liabilities.’

According to Krishnan, 184 states have signed International Monetary Fund’s Articles of Agreement thereby expressing their assent to be bound by IMF’s views and objectives.<sup>266</sup> It is claimed that in view of inextricable link between investments and macro-monetary conditions, ‘the reliance upon this elder-sibling Bretton Woods institution is apt for the ICSID Convention’.<sup>267</sup>

On the opposite side of the legal argument, Schreuer advocates that *Salini* criteria are quite flexible.<sup>268</sup> He strongly argues that all five elements are not onerous. According to Schreuer, arbitral practice evinces the fact that tribunals at times omit some elements or add other criteria to endorse the transaction as an investment. For instance, in *L.E.S.I. Dipenta* and *L.E.S.I. Astaldi* cases, the tribunal held unequivocally that ‘usefulness for the host state’s development’ was not a required element for an investment.<sup>269</sup> At the same time, the tribunal in *Phoenix v The Czech Republic* discerned six elements instead of those five mentioned in *Salini* test: “(i) a contribution in money or other assets, (ii) a certain duration, (iii) an element of risk, (iv) an operation made in order to develop an economic activity in the host State, (v) assets invested in accordance with the law of the host State, (vi) assets invested bona fide.”<sup>270</sup>

Schreuer contends that notwithstanding numerous attempts to codify the term ‘investment’, the history of ICSID Convention suggests that all such endeavors failed as it is extremely difficult to expound on such an elusive term as investment.<sup>271</sup> It is claimed that at the time of drafting of ICSID Convention the assumption was that in most cases there would be agreement in writing on consent to arbitrate thereby suggesting that if the parties surrendered their dispute to the competence of ICSID, such parties obviously had agreed that there had been investment.<sup>272</sup> Pursuant to this line of argument and in view of

---

<sup>266</sup> Ibid. pp.17-18.

<sup>267</sup> Ibid.

<sup>268</sup> T Weiler, ‘*Investment Treaty Arbitration and International Law*’ (Juris Publishing, New York: 2008), p. 126.

<sup>269</sup> Ibid.

<sup>270</sup> *Phoenix v The Czech Republic* <<http://ita.law.uvic.ca/documents/PhoenixAward.pdf>>, accessed 3 September 2010.

<sup>271</sup> T Weiler, ‘*Investment Treaty Arbitration and International Law*’ (Juris Publishing, New York: 2008).

<sup>272</sup> Ibid

the principle of party autonomy, any transaction may be included in the meaning of investment by the parties' consent.<sup>273</sup> At the same time, as Shahabuddeen aptly notes, there are 'outer limits' set forth in article 25 of ICSID Convention,<sup>274</sup> and transactions falling beyond these limits do not fall under the definition of investment as required by ICSID notwithstanding any agreement between the parties.<sup>275</sup> In other words, parties are indeed at liberty to settle on what constitutes investment, but only within those 'outer limits', and beyond those 'outer limits' their consent is of no use when establishing conformity with ICSID's requirement of investment.

Bekker also suggests that *Salini* test is the exercise of Kompetenz-Kompetenz of arbitrators, which practically implies that it is often more beneficial to give arbitrators the temporary<sup>276</sup> power to rule on their own competence and decide what dispute is arbitrable.<sup>277</sup> The term 'Kompetenz-Kompetenz' originated in West Germany within the context of the debate as to whether the parties by submitting the arbitration agreement give the arbitrator the power to make a binding decision regarding his own jurisdiction.<sup>278</sup> Hence, as Bekker advocates, 'adopting a definition, any definition of investment' for the purposes of establishing whether a dispute is arbitrable and if that particular tribunal has competence to proceed to the merits of the case, is the applicability of the Kompetenz-Kompetenz principle enshrined in article 41 of ICSID Convention by the arbitrators.

As to pre-investment expenditures, tribunal has expressly mentioned in *Mihaly v. Sri Lanka* that business development expenses, which amount to 2%-4% of the total planned

<sup>273</sup> See also Krishnan, *supra*, p. 6. There are, however, some 'outer limits'.

<sup>274</sup> As it was noted, article 25 of ICSID Convention delineates those limits: 'The dispute must be of legal nature. Disputes of non-legal nature although related to an investment are not protected under the auspices of the ICSID Convention, hence, are not subject to ICSID jurisdiction. The dispute needs to arise directly out of an investment. Disputes arising out of matters that do not tantamount to an investment is excluded, e.g., disputes arising out of immigration. The non-State party to the dispute needs to be a national of another Contracting State. However, since 1978 ICSID has had a set of additional facility rules that allow disputes in which either the State party to the dispute or the State whose national is party to the dispute is not a Contracting State or disputes that did arise directly out of an investment to be submitted to arbitration.

Consent to submit the dispute to ICSID needs to be granted by both parties in writing.

<sup>275</sup> M Shahabuddeen, 'Dissenting opinion of Judge Mohamed Shahabuddeen' <[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1031\\_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1031_En&caseId=C247)>, accessed 2 September 2010, p. 40.

<sup>276</sup> See Weiler, p. 131.

<sup>277</sup> J Barcelo, 'Who decides the arbitrators' jurisdiction? Separability and competence-competence in transnational perspective' (2003), 36 Vanderbilt Journal of Transnational law 1114, pp. 1116-1118.

<sup>278</sup> X Jason, 'A Brief Introduction to the 'Kompetenz-Kompetenz Principle in International Commercial arbitration' <<http://www.duanduan.com/lsit-e-2004-2-10-2.htm>>, accessed 12.01.2010, N Wyss, 'First Options of Chicago, Inc. v. Kaplan: a perilous approach to kompetenz-kompetenz' (1997) 72 Tul. L. Rev. 351, pp. 372-373.

investment, did not constitute ‘investment’ as it was required under applicable US-Sri Lanka BIT. It has been aptly articulated by Walde that a certain duration of performance as well as some act or an undertaking of the government ‘encouraging, inducing or accepting such expenditures at first stage of an investment project followed by subsequent stages of more intensive investment’, is required for an early expenditure to be construed as ‘investment’.<sup>279</sup>

## **B. Who Can Submit Claims to Arbitration?**

Caron contends that for a definition of ‘investor’ it is crucial to take into account the double-jurisdictional nature of ICSID arbitration. It is argued that it is not a correct approach to interpret the requirement of nationality contained in article 25 of ICSID Convention by citing awards which look at a lower keyhole, i.e. the BITs’ definition of ‘investor’. Similarly, approach to apply a range of texts from BITs to interpret the meaning implied in the aforementioned article 25 is also flawed. It is suggested that if encouragement of foreign investments is a goal of an emerging economy, then it is fundamental to define the rules of nationality with sufficient clarity so that investor understands what the rule is at the time of investment.<sup>280</sup>

Schreuer notes that the rules on nationality of investors are largely regarded as a highly formalistic area of law. Schreuer refers to *Tokios Tokeles v Ukraine* to support this viewpoint, as the outcome of this case, as he claims, was emphatically contingent on formal criteria. The respondent in that case requested the Tribunal to ‘pierce the corporate veil’ claiming that the real claimants are Ukrainian nationals pursuing an international arbitration against their own government, which runs counter to the object and purpose of the ICSID Convention. In this context, the tribunal held:

‘In our view, the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the Convention and supports our analysis under it. Although article 25 (2b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule

---

<sup>279</sup> Ibid.

<sup>280</sup> T Weiler, ‘*Investment Treaty Arbitration and International Law*’ (Juris Publishing, New York: 2008), p. 128.

is that the nationality of a corporation is determined on the basis of its siege social or place of incorporation.’<sup>281</sup>

In other words, the recourse to place of incorporation of a corporate entity or its siege social was referred to as the widely accepted position for the purposes of interpreting the nationality requirement. The same approach was applied in *Champion Trading Co. and Ameritrade Int’l. Inc. v Arab Rep of Egypt*.<sup>282</sup> In *Autopista v Venezuela*<sup>283</sup> it was held that no state, court or tribunal has the competence to set aside the corporate identity of the legal entity.

Bekker notes that the question of applicability of rules of international law is relevant for the purposes of defining the nationality of the legal entity.<sup>284</sup> International law has dealt with corporate nationality issues in the context of diplomatic protection which states afford to its juridical persons. The landmark case in this regard is considered to be *Barcelona Traction, Light and Power Company Limited*, wherein the ICJ ruled:

‘In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals.[....]. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of ‘the genuine connection’ has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another.’

Sinclair concludes that it is doubtful if the existence of ‘genuine connection’, or the so-called effective nationality, is ‘the correct rule of general international law in respect of claims against a third state’.<sup>285</sup> According to Sinclair, no recognition of dominant and effective nationality rule is found in investment treaty arbitration.<sup>286</sup> It is argued that otherwise the legal practice would come across the problematic notion of ‘the nationality of convenience’. At the same time, the opponent of Sinclair’s viewpoint makes reference to the United Nations Convention on the Law of the Sea (UNCLOS), its article 91 and the phenomenon of flags of convenience. Article 91 of the UNCLOS requires ‘a genuine link

---

<sup>281</sup> *Tokios Tokeles v Ukraine*, (Decision on Jurisdiction, 29 April 2004), ICSID Case No. ARB/02/18, 11 ICSID Rep 313.

<sup>282</sup> (Jurisdiction), 2004 in 19 ICSID Rev-FILJ 275 (2003).

<sup>283</sup> ICSID Case No. ARB/00/5 (2001) at paras. 67, 107 – 109.

<sup>284</sup> T Weiler, ‘Investment Treaty Arbitration and International Law’ (Juris Publishing, New York: 2008), p. 130.

<sup>285</sup> Ibid. p. 130.

<sup>286</sup> Ibid.

between the State and the flag ship', which serves as a corroboration for those supporting 'the genuine link' principle in determining the nationality of the entity.<sup>287</sup> Bekker criticizes Sinclair in that the latter refers particularly to the International Law Commission and the International Law Association as the sources of international law. Bekker claims that these are subsidiary means of determining international law principles as mentioned in article 38 of the Statute of the International Court of Justice (ICJ), the treaty clause which outlines the sources of international law to be applied by the ICJ. The UNCLOS, on the contrary, has been *ratified* by some 140 states, which is indicative of state practice and falls under the first three subcategories of sources in the above mentioned article 38.

The foregoing controversy indicates the debate over applicability of *incorporation*, *siege social* and *control* formulas to attribute nationality to an entity. While the ICSID jurisprudence largely favors either *incorporation* or *incorporation* and *siege social* principles to determine corporate nationality, and as one of the first ICSID cases clearly supports the same criteria,<sup>288</sup> it is noteworthy that international law and ICSID jurisprudence underwent important changes, and there exist divergent views on the issue of corporate nationality.<sup>289</sup>

The proponents of incorporation/*siege social* theory argue that the first part of article 25 of ICSID Convention sets forth the general rule of attribution ('any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration'), while the second part of it becomes an exception ('any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention').<sup>290</sup> Astorga claims that if a legal entity, national of host state, can be treated as a foreigner because of foreign control, it is construed that the common rule of defining the host state nationality is other than 'control' test. Hence, the company can be a national of the host state due to its incorporation therein, but can be treated as a foreigner for the purposes of article 25 of ICSID

---

<sup>287</sup> Ibid. p. 131.

<sup>288</sup> See above *SOABI v. Senegal*.

<sup>289</sup> See Astorga, p. 447.

<sup>290</sup> See Astorga, p. 446.



Convention as an exception. As Astorga puts it, control appears to be the *exception*, while other methods, such as incorporation or siege social and the mix thereof, constitute the general norm.

In this regard, Broches argued that article 25 implicitly assumed incorporation as the criterion of nationality, but this was not an exhaustive list of criteria to attribute corporate nationality. Broches pointed to the importance of the flexibility and advocated the approach which would take into account economic realities such as ownership and control, but at the same time warning that ICSID objectives must be complied with.

On the other hand, Walde argues that it is commonplace that law and legal thinking lags behind economic reality. According to Walde, the majority of publicly-traded companies nowadays cannot be linked to solely one country with different institutional shareholders residing globally and with ownership structures which changes within days. It becomes virtually impossible to detect the ownership, which means that there is a movement towards global claimant in a global economy. But, as Walde contends, this will not be fast movement as legal practice and thinking do not accept fast movement.

### **C. What constitutes ‘Consent to Arbitration’?**

Blyschak notes that although state’s consent to waive its sovereign immunity is the cornerstone of investor-State arbitration, many states are of opinion that ‘their consent has been taken for granted, illegitimately expanded and exploited’.<sup>291</sup>

Harten and Loughlin outline the difference between a sovereign consent to investment arbitration and that of private party to commercial arbitration. It is claimed that a private party’s consent to commercial arbitration is expressly given to the dispute in question or is specific to the private relationship within which the dispute has arisen. In contrast, a state’s consent to investment arbitration is by and large ‘an agreement to the compulsory arbitration of future disputes with investors *as a group*’.<sup>292</sup>

---

<sup>291</sup> P M Blyschak, ‘State consent, investor interests and the future of investment arbitration: reanalyzing the jurisdiction of investor-state tribunals in hard cases’ 9 *Asper Rev. Int’l Bus. & Trade L.* 99, pp.106-107.

<sup>292</sup> G Harten and M Loughlin, ‘*Investment Treaty Arbitration as a Species of Global Administrative Law*’ (2006) *EJIL* 17 (1), p. 142.

Advance consents to arbitration under the aegis of ICSID Convention can be found in about twenty investment laws and 900 bilateral investment treaties.<sup>293</sup> According to Pate, many of such investment laws globally are ambiguously worded. The findings of his research state that while few investments laws seem to have a common substantive reference to ICSID arbitration, most of investment laws generate legal argument as to interpretation of dispute resolution procedures.<sup>294</sup>

Shihata argues that in some instances, investment laws were drafted ‘on a condition for presentation of a loan to the Bank’s Board, or for the effectiveness of the loan agreement’.<sup>295</sup> It is claimed that while such approach may guarantee some development in legislative sphere, it may not necessarily imply that ‘sufficient deliberations have taken place to achieve appropriate legislative changes’.<sup>296</sup> Pate holds that when a state makes unilateral declarations and thereby allures investors to make an investment, this creates a legitimate expectation that a binding legal obligation of a state has arisen.<sup>297</sup>

In this context, Lauterpacht also asserts that this is also compliant with the doctrine of estoppel which, albeit having its roots in common law jurisprudence, has been recognized by a number of scholars as a principle applicable in international law practice.<sup>298</sup> This has been also opined by ICSID tribunal in *Amco v Indonesia*, where it held that ‘the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved; [i]n addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterized by the requirement of good faith’.<sup>299</sup>

Pate rightfully notes that such unilateral offers of the states to arbitrate has spurred criticism and mixed reactions.<sup>300</sup> Proponents of liberal investment regime believe that this

---

<sup>293</sup> M Solanes and A Jouravlev, ‘*Revisiting privatization, foreign investment, international arbitration, and water*’ <<http://www.eclac.org/publicaciones/xml/0/32120/lcl2827e.pdf>>, accessed 13 September 2010, p. 18.

<sup>294</sup> T Pate, ‘The past, present and future of the arbitral clause in foreign investment legislation: in pursuit of ‘the balance’ accessed 13 September 2010, p. 79.

<sup>295</sup> I Shihata, ‘The Legal Framework for Development: Role of the World Bank in LTA’ (1995) IBL 23, p. 360.

<sup>296</sup> Ibid.

<sup>297</sup> See Pate, p. 92.

<sup>298</sup> E Lauterpacht, ‘The Development of International Law by the International Court: Being a Revised Edition of The Development of International Law by the Permanent Court of International Justice’ (1934), 1982, 172.

<sup>299</sup> *Amco Asia Corp and Others v. Republic of Indonesia* (Amco v. Indonesia) Case No. ARB/81/1, Decision on Jurisdiction of September 25, 1983, 9 ICSID Rep. at 47.

<sup>300</sup> See Pate, p. 100.

is a good trend and is indicative of the good faith requirement. It is claimed that 'states should not be concerned provided that they intend to comply with their obligations vis-à-vis foreign investors'.<sup>301</sup> However, the problem may arise due to 'possibility that the dispute resolution provisions will be used veraciously against a blameless host state'.<sup>302</sup>

Pate believes that, in view of controversial Libyan oil arbitrations, there had been 'inherent biases' against emerging economies in the past.<sup>303</sup> In this context, Paulsson claims that while it may have been true in the beginning of twentieth century up until 1950s, this is no longer true today.<sup>304</sup> To support this viewpoint, Delaume argues that the majority of scholars and practitioners today are of the view that developing states are in a position to successfully enforce their rights by means of arbitral proceeding and execute arbitral awards that are rendered in their favor.<sup>305</sup>

Schreuer, however, warns that such approach may be acceptable provided states make unilateral offers to arbitrate and obtain reciprocal rights.<sup>306</sup> Paulsson is of the same view advocating that 'this new world of arbitration is one where the claimant need not have a contractual relationship with the defendant, and where the tables could not be turned, the defendant could not have initiated the arbitration'.<sup>307</sup>

Nolan and Sourgens also note that interplay between articles 25(1), 71 and 72 of ICSID Convention is lacking scholarly deliberation.<sup>308</sup> This is also the reflection of the ICSID history as to consent withdrawal - Bolivia only recently became the first state ever to denunciate its consent to arbitrate under ICSID Convention. On the other hand, Nolan and Sourgens note that the 'offer-and-acceptance'-based approach implies that a state only becomes subject to ICSID jurisdiction when its offer is accepted by an investor. In this regard, Orrego suggests that the ICSID Convention was drafted with a contractual type of consent in mind.

---

<sup>301</sup> K Vandevelde, 'Investment liberalization and economic development: the role of bilateral investment treaties' (1998) Columbia Journal of Transnational Law, vol. 36, p.502.

<sup>302</sup> Ibid.

<sup>303</sup> See Pate, p. 101.

<sup>304</sup> J Paulsson, 'Third World Participation in International Investment Arbitration' (1987) ICSID Review 3(2), p. 21.

<sup>305</sup> G Delaume, 'The Pyramids Stand- The Pharaohs can rest in peace' (1993) ICSID Review 8 (2), p. 263.

<sup>306</sup> C Schreuer, The ICSID Commentary (Cambridge, CUP: 2001), p. 198.

<sup>307</sup> J Paulsson, 'Arbitration without privity' (1995), ICSID Review – Foreign Investment Law Journal 10, p. 234.

<sup>308</sup> M Nolan and F Sourgens, 'The interplay between state consent to ICSID arbitration and denunciation of ICSID Convention' (2007) OGEL, September issue, p. 17.

The Author argues that a state's consent to ICSID is more than the offer; it is rather an obligation. The above mentioned aspects are centered primarily on the issue of interpretative practices. Schreuer suggests that relevant interpretative practices are considered to be a recurrent theme raised in arbitral proceedings before ICSID tribunals. Andreeva contends that in the context of BITs or MITs, wherein states are considered to offer investors to arbitrate if a dispute arises, consent should not be interpreted with reference to traditional rules, and instead, it should be governed by the rules applicable to unilateral acts. Above mentioned restrictive versus effective interpretation principles are invoked, however no legal consensus is reached at which of these principles carry weight and will do justice to consent clause.<sup>309</sup>

#### **4.4. CONCLUSION**

The existence of a legal dispute concerning an investment is a jurisdictional requirement in investment arbitration. If proceedings are to be conducted under the ICSID Convention, the test is that there is a 'legal dispute arising directly out of an investment' [Article 25(1)]. Each of these elements, the existence of the dispute, and the existence of an investment may raise jurisdictional questions.

Respondents have sometimes argued that the tribunal lacked jurisdiction because the dispute before it was not legal but rather of a political or economic nature. Tribunals have invariably rejected these arguments, since the claims had been presented in legal terms.

The existence, scope and exercise of the adjudicative power of ICSID arbitration tribunals is determined by conformity with the criteria expressly emphasized within article 25(1) and (2) of ICSID Convention with respect to investment, nationality and consent. Investors and host states have tried to reject jurisdiction of ICSID tribunals by way of questioning the Personal, Subject and consensual jurisdictional prerequisites of a claim.

These were briefly discussed in this chapter, but will be elaborated and analyzed in detail in Chapters 6 to 8.

---

<sup>309</sup> C Schreuer, 'ICSID Dispute Resolution: UNCTAD Handbook', p. 34.

Jurisprudence of ICSID presently falls short of clear and conclusive definitions for notions of investor, investment and consent. Consequently such inadequacies have led to controversial awards by ICSID tribunals. These deficiencies, incoherencies and doubtfulness within jurisprudence of ICSID and its arbitral awards have been the main motive for the present research.

The author has proposed the relevance of an autonomous body of principles and rules regulating issues of jurisdiction and admissibility for investment treaty arbitration. This proposition might be considered very bold, given past failures in this respect and because considerable obstacles would have to be overcome before any unification could be reached.

A more coordinated and collective approach towards such issues that seek to enhance multilateral consensus building could have several advantages, namely a gradual harmonization effect on the arbitration system, an increase in clarity and stability of investment relations, an improvement on the consistency of its awards.

It is manifested that the proposed clarity and coherency in tackling jurisdictional and admissibility issues will ultimately contribute to the fairness and justice of the system for resolving disputes between foreign investors and host states.

## 5. CHAPTER FIVE: PREREQUISITES FOR INVESTMENT

### ARBITRATION – *ARBITRABILITY*

#### 5.1. INTRODUCTION

It is defined that it is the agreement to arbitrate – often the arbitration clause embedded in a contract between the parties – which renders an arbitral proceeding possible. However, an unwilling party may undertake steps to eventually avoid the arbitration process *by claiming that the contract between them is either null or was void from the very beginning* (and thereby jeopardizing the validity of the arbitration clause) or *that there was even no agreement to arbitrate* and further involve the (sometimes non-neutral) judiciary to finally settle the dispute. This notorious maneuver is normally aimed to waive the admissibility of the claim/dispute best classified by the Author as waivers of ‘arbitrability’.

In the author’s opinion, the authority to decide the very jurisdiction of the arbitral tribunal *per se* even in the event of party challenging the validity/existence of the commercial contract and/or validity/existence of the arbitration clause (arbitrability) shall be extended to many if not most instances. To elaborate the foregoing, this chapter further provides the background for the solutions that were found to address the situation if a party to a commercial contract is willing to avoid arbitration by challenging the validity/existence of the underlying contract *or* by questioning the validity/existence of the agreement to arbitrate - the separability doctrine and the competence-competence principle respectively.

This chapter will address queries such as: What is the theoretical framework for these solutions? What is the rationale for applying them? How are they correlated with each other? To address these issues, current academic debate surrounding these concepts, and the main criticisms these solutions face are further discussed.

Additionally, it is the internal law of the host state, which is frequently viewed as being the *lex contractus* – law governing the contract –hence, comparative analysis of a number of domestic law regimes and their procedural rules as to the aforementioned principles of separability and competence-competence would be of interest.

## 5.2. THE AGREEMENT TO ARBITRATE

The literature on international commercial arbitration heavily debates the topic of distribution of powers between courts and arbitrators in case if a challenge is brought with regard to the contract that contains an agreement to arbitrate (that gives arbitrators an authority to arbitrate a dispute) and, yet, the arbitration agreement/clause itself.<sup>310</sup> Such a situation draws an interesting picture.

Firstly, if a party challenges the validity or even existence of the commercial contract, it consequently jeopardizes the validity or existence of the arbitration agreement, thereby nullifying the arbitrators' competence.<sup>311</sup>

Secondly, it is manifest that if a party to a contract claims that there was no arbitration agreement, i.e. the arbitration clause, *at all*, it would be logically inconsistent to silently leave them a power to hear a particular case.<sup>312</sup> It is asserted that arbitrators receive their authority from the parties' agreement and 'a challenge to this agreement's validity or existence would *logically* leave them powerless to hear a case until it was determined that the agreement was indeed effective, conferring on them authority to resolve the relevant disputes' [emphasis added].<sup>313</sup> The above mentioned illustration implies a need for interference of a third party whose competence is not questioned and such a role is often played by courts.<sup>314</sup>

---

<sup>310</sup> C Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000), 11 Am. Rev. Int'l Arb. 397, p. 397. See, for example, also: W Park, 'The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?' (1996) 12 ARB. INT'L 2, p. 137, W. Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators' (1997), 8 AM. REV. INT'L ARB. 133, A Rau, 'The Arbitrability Question Itself' (1999) 10 AM. REV. INT'L ARB. 287, J Rosen, 'Arbitration Under Private International Law: The Doctrines of Separability and Compétence de la Compétence' (1997), 17 FORDHAM INT'L L.J., p. 599, H Smit, 'The Arbitration Clause: Who Determines Its Validity and Its Personal and Subject Matter Reach?' (1995), 6 AM. REV. INT'L ARB. 395, C Svernlöv, 'What Isn't, Ain't: The Current Status of the Doctrine of Separability' (1991), 8 J. INT'L ARB. 4, p. 37.

<sup>311</sup> W Park, 'Determining arbitral jurisdiction: allocation of tasks between courts and arbitrators' (1997), 8 Am. Rev. Int'l Arb. 133, pp. 142-143; S Bennett, 'Developing American approach to arbitrability' (2003), Dispute Resolution Journal, February-April, p. 6.

<sup>312</sup> For example, A. Samuel, 'Jurisdictional problems in International commercial arbitration: a study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law' (1989) as cited in C. Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000), 11 Am. Rev. Int'l Arb. 397, p. 397.

<sup>313</sup> C. Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000), 11 Am. Rev. Int'l Arb. 397, p. 397.

<sup>314</sup> Ibid. At pp. 397-398.

Nevertheless, the judicial intervention to determine whether the agreement to arbitrate is effective in case of a challenge to the validity of a contract or an arbitration agreement itself in order to solely establish the jurisdictional authority of the arbitral tribunal seems, in practice, quite unreasonable.<sup>315</sup> In this regard, potential pitfalls and disadvantages of such a judicial intervention are going to be addressed in detail below.

In general, perhaps not absolutely logical, but a practical perspective states that it is often more beneficial to give arbitrators the temporary power to rule on their own competence.<sup>316</sup> For instance, Gross expresses it in terms of convenience and logic by claiming that such temporary power ‘addresses this problem and this need by placing convenience ahead of logic, albeit within certain limits.’<sup>317</sup> Additionally, as it was interestingly and quite correctly expressed by Lee, ‘it is actually a ‘chicken-or-egg-first’ issue’.<sup>318</sup>

In this context, the legal academia arrived at the conclusion that arbitrators at least need to be allowed the power to ascertain provisionally whether they have competence to hear a particular case or not. Two legal solutions were found: the principle of separability of arbitration clause and the doctrine of competence-competence. It should be noted, however, that these solutions are not alternatives to each other.

### **5.3. LEGAL RESOLUTIONS TO UPHOLD ARBITRABILITY**

As it has been pointed out earlier, an agreement to arbitrate is the cornerstone of any arbitral proceeding.<sup>319</sup> Hence, the legal logic states a valid arbitration is the consequence of a valid agreement to arbitrate. It is the arbitration agreement that is a source for arbitrators to define their competence and power in regard of a dispute in question.<sup>320</sup>

There are generally two basic types of arbitration agreements: the arbitration clause and the submission agreement.<sup>321</sup> The former, however, is more popular. In other words, such

---

<sup>315</sup> Ibid. At p. 398.

<sup>316</sup> J Barcelo, ‘Who decides the arbitrators’ jurisdiction? Separability and competence-competence in transnational perspective’ (2003), 36 Vanderbilt Journal of Transnational law 1114, pp. 1116-1118.

<sup>317</sup> P Gross, ‘In Competence of Competence: An English View’ (1992), 8 Arb. Int’l 206.

<sup>318</sup> See, T H Lee, ‘Encyclopedia of international commercial litigation.’

<sup>319</sup> A Redfern, *Law and practice of international commercial arbitration*, (4<sup>th</sup> edition, Sweet & Maxwell 2004) page 6.

<sup>320</sup> Ibid. page 155

<sup>321</sup> Ibid.



an arbitration agreement is included in the main contract as an arbitration clause and entitles the parties to submit future disputes to arbitration.<sup>322</sup>

### A. Doctrine of ‘Separability’ of Arbitration Clause

The doctrine of separability/severability/autonomy<sup>323</sup> of arbitration clause is alluded to as ‘the conceptual cornerstone’ of arbitration law and particularly that within the international context.<sup>324</sup> The doctrine of separability of arbitration clause stipulates that the latter is ‘separable’ from the contract containing it.<sup>325</sup> Broadly speaking, separability signifies that the invalidity of the parties' commercial contract does not necessarily invalidate the agreement of these parties in that contract to arbitrate disputes arising under that contract. Szurski claims that the essential practical advantage of the doctrine is that it constitutes *a serious obstacle*, for a party willing to delay or repudiate his arbitration agreement, to nullify the arbitration clause by questioning in court the existence or validity of the arbitration agreement *through* challenging the validity of the main contract.<sup>326</sup>

The doctrine of separability is approved by a number of institutional and international rules of arbitration.<sup>327</sup> For instance, the UNCITRAL Model Law lays down that:

‘... [t]he arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.’<sup>328</sup>

Similarly, the London Court of International Arbitration prescribes in its rules that:

‘[a]n arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement.’<sup>329</sup>

---

<sup>322</sup> Ibid.

<sup>323</sup> For the purposes of this paper, these terms are used interchangeably.

<sup>324</sup> J Barcelo, ‘Who decides the arbitrators’ jurisdiction? Separability and competence-competence in transnational perspective’ (2003), 36 Vanderbilt Journal of Transnational law 1114, pp. 1114-1115; Rau, A, ‘Everything you really need to know about “separability” in seventeen simple propositions’ (2003), 14 Am. Rev. Int’l Arb. 1, p. 1

<sup>325</sup> K Davis, ‘A Model for arbitration law: autonomy, cooperation and curtailment of state power’ (1999), 26 Fordham Urb. L.J. 167, p.196; A Rau, ‘The arbitrability question itself’ (1999), 10 Am. Rev. Int’l Arb. 287, p. 331; A Rau, ‘Everything you really need to know about “separability” in seventeen simple propositions’ (2003), 14 Am. Rev. Int’l Arb. 1, p. 2; Huber, S., Arbitration and Contract (August 19, 2003).

<sup>326</sup> Szurski, p. 76 as cited in A Redfern, A et al, Law and practice of international commercial arbitration, 4<sup>th</sup> edition, see supra, p. 193.

<sup>327</sup> J Barcelo, ‘Who decides the arbitrators’ jurisdiction? Separability and competence-competence in transnational perspective’ (2003), 36 Vanderbilt Journal of Transnational law 1114, pp. 1114-1115; T Oehmke, ‘Separability doctrine’, 1 Commercial Arbitration § 20:15 (Last updated December 2006); A Maniruzzaman, ‘The new law of international commercial arbitration in Bangladesh: a comparative perspective’ (2003), 14 Am. Rev. Int’l Arb. 139, pp.149-150.

<sup>328</sup> UNCITRAL Model law on International Commercial arbitration, art.16(1).

## B. Rationales for Separability Doctrine

The following arguments validate the underlying necessity of the doctrine of separability of arbitration clause. Monestier affirms that the rejection of the separability doctrine's application to contracts may lead to unfair permission for one party to evade his contractual obligations.<sup>330</sup> Furthermore, Petrus appropriately notes that the separability doctrine is necessary to execute parties' explicit or implicit intent on the issue that any and all conflicts between them be arbitrated, including disputes about the validity of the contract between them.<sup>331</sup> It is true to add that if the clause is considered to be invalidated contrary to the separability principle, there will be nothing left for a party (especially that which is in genuine need) to hope for.

Firstly, Redfern asserts that 'it would be entirely self-defeating if a breach of contract or a claim that the contract was voidable<sup>332</sup> was sufficient to terminate the arbitration clause as well; this is one of the situations in which the arbitration clause is most needed.'<sup>333</sup> Maniruzzaman claims that the inclusion of an arbitration clause at least provides the parties with the chance to 'ventilate their grievances through it about the principal agreement whatever they may be'.<sup>334</sup> Secondly, as Smit states, the treatment of arbitration clause as independent from the contract is justified on the ground that these are different kinds of agreements, i.e. the arbitration clause involves issues of procedural dispute resolution whereas the contract touches upon the substantive rights and obligations of the parties in their contractual relationship.

A good parallel is made by Judge Stephen M. Schwebel who equalizes a contract containing an arbitration clause to *two* agreements, consisting of a contractual 'twin' and an arbitral 'twin'; and the latter 'survives any birth defect or acquired disability of the principal agreement'.<sup>335</sup> Park relates the need for application of the separability principles

---

<sup>329</sup> LCIA Arbitration Rules, Art. 23.1.

<sup>330</sup> T Monestier, Nothing comes of nothing or does it? A critical re-examination of the doctrine of separability in American arbitration, (2001) 12 Am. Rev. Int'l Arb. 223, p. 236.

<sup>331</sup> C Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act', (2000) 11 Am. Rev. Int'l Arb. 397, p. 401

<sup>332</sup> For the definition, see *below*.

<sup>333</sup> A Redfern, et al, Law and practice of international commercial arbitration, see *supra*, p. 193

<sup>334</sup> A Maniruzzaman, 'The new law of international commercial arbitration in Bangladesh: a comparative perspective' (2003), 14 Am. Rev. Int'l Arb. 139, p.150.

<sup>335</sup> R Smit, 'Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?' (2002) 13 Am. Rev. Int'l Arb. 19, p. 19.

to the issue of integrity of the arbitral process.<sup>336</sup> It is implied that the separability doctrine is an indispensable conceptual principle that is used in order to preserve the autonomy and integrity of the arbitration.<sup>337</sup> Otherwise, without the principle of severable arbitration clause, a party would be able to avoid or delay arbitration merely by questioning, in court or in the arbitration, the contract in which the arbitration agreement is found.<sup>338</sup>

And the application of the separability is deemed to be fundamentally important within the international context, in particular in terms of foreign investment, due to the fact that a foreign investor wouldn't engage in business transactions with the host state if there is no basis for a neutral arbitration forum in case if the latter challenges the validity of their contract thereby escaping the arbitration of the dispute in question.<sup>339</sup> To clarify, it was claimed that 'the elimination of all uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting'.<sup>340</sup>

It is again true as it is obvious that otherwise it may lead to the business community's loss of confidence in arbitration as an efficient and effective dispute resolution mechanism. Additionally, Samuel advances the view that in the absence of the separability doctrine, arbitrators would be allowed to hear only claims where parties do not raise the objections in regard of the existence, validity of the main contract, which is definitely unrealistic since the party at fault would certainly do its best to avoid liability.<sup>341</sup>

This obviously restrains the direct effectiveness of arbitration agreements by limiting them to claims that do not question the validity, existence or presence of the agreement to arbitrate.

---

<sup>336</sup> W Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators', 8 Am. Rev. Int'l Arb. 133 (1997), p. 144.

<sup>337</sup> Ibid.

<sup>338</sup> R Smit, 'Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?' (2002) 13 Am. Rev. Int'l Arb. 19, p. 22.

<sup>339</sup> R Smit, 'Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?' (2002) 13 Am. Rev. Int'l Arb. 19, p. 22.

<sup>340</sup> Scherk v. Alberto-Culver, 417 U.S. 506, 518-519 (1974).

<sup>341</sup> A Samuel, 'Jurisdictional problems in International commercial arbitration: a study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German law' (1989), p. 178 as cited in C Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000), 11 Am. Rev. Int'l Arb. 397, p. 400.

### C. Doctrine of ‘Competence-Competence’

The term ‘kompetenz-kompetenz’ originated in West Germany within the context of the debate as to whether the parties by submitting the arbitration agreement give the arbitrator the power to make a binding decision regarding his own jurisdiction.<sup>342</sup>

In this regard, the doctrine of competence-competence or kompetenz-kompetenz<sup>343</sup> has asserted that a tribunal has jurisdiction to decide on challenges to its own jurisdiction.<sup>344</sup> To put it another way, in accordance with the competence-competence principle, arbitrators are entitled to decide challenges to the arbitration agreements which stipulates for their authority to resolve the dispute in question by themselves. This doctrine has received a widespread, but not full,<sup>345</sup> recognition in the national and institutional rules on international commercial arbitration.<sup>346</sup>

For example, the UNCITRAL Model Law stipulates that:

‘[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement...’<sup>347</sup>

### D. Rationales for Competence-Competence Principle

The need for the competence-competence doctrine is grounded in a number of arguments. Firstly, like separability, it serves as the instrument of bringing into reality the parties’ implied or explicit intent that any and all disputes arising out of their relationship be arbitrated.<sup>348</sup> As in above mentioned case with the severability principle, this is especially useful in international transactions.<sup>349</sup> It is appropriately stated by Smit that ‘the parties of different nationalities generally expect and intend that any and all disputes about their

---

<sup>342</sup> X Jason, ‘A Brief Introduction to the ‘Kompetenz-Kompetenz’ Principle in International Commercial arbitration’, <<http://www.duanduan.com/lsit-e-2004-2-10-2.htm>>, accessed 12 January 2011, N Wyss, ‘First Options of Chicago, Inc. v. Kaplan: a perilous approach to kompetenz-kompetenz’ (1997) 72 Tul. L. Rev. 351, pp. 372-373

<sup>343</sup> These terms are interchangeable.

<sup>344</sup> N Wyss, ‘First Options of Chicago, Inc. v. Kaplan: a perilous approach to kompetenz-kompetenz’ (1997), 72 Tul. L. Rev. 357, pp. 351-352.

<sup>345</sup> Ibid. At p. 360.

<sup>346</sup> Ibid. At p. 355.

<sup>347</sup> UNCITRAL Model law on International Commercial arbitration, Art. 16.

<sup>348</sup> C Petrus, ‘Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain’s 1988 Arbitration Act’ (2000), 11 Am. Rev. Int’l Arb. 397, p. 401.

<sup>349</sup> See R Smit, see *supra*, p. 26.

contractual relationship, including disputes about their agreement to arbitrate, will be resolved in a neutral, non-national arbitral forum.’<sup>350</sup>

Furthermore, Wyss argues that the complexity and specific nature of some arbitration proceedings often drive parties to seek arbitral, rather than judicial, dispute resolution in the first place. In this regard, Sandrock claims that in the context of international arbitration;

‘[t]hese reasons include: greater knowledge of arbitrators about sophisticated international commercial matters; confidentiality of the proceedings; better command of foreign languages by arbitrators, which dispenses with the need for furnishing translations and employing interpreters; other economies of expense; the relative speed of arbitration proceedings.’<sup>351</sup>

Additionally, as with separability, the doctrine significantly contributes to the maintenance of the arbitral tribunal's autonomy and capacity to operate without undue external interference. Otherwise, a party to an arbitration agreement would be able to frustrate or delay the arbitration merely by challenging the parties' arbitration agreement and insisting upon judicial determination of that challenge.

### **E. Corollary of Separability and Competence-Competence**

Born contends that the separability and competence-competence doctrines are ‘corollaries’ of each other as ‘the separability doctrine implies the arbitrator's power to consider his own jurisdiction’.<sup>352</sup> Actually, most rules on international commercial arbitration and foreign arbitration statutes approach these two principles in one article.

As was mentioned earlier, they are not alternatives to each other. Instead, these doctrines are considered to be of complementary use. For example, if a contract appeared to be invalid due to, for instance, its illegal object and the challenge to the validity of arbitration agreement was made; a following scenario would be derived. Firstly, arbitrators in any way shall first decide the issue of their competence in order to proceed to the merits stage

---

<sup>350</sup> See R Smit, see supra, p. 26.

<sup>351</sup> O Sandrock, ‘Arbitration between U.S. and West German Companies: An Example of Effective. Dispute Resolution in International Business Transactions’ (1987) 9 U. Pa. J. Int'l Bus. L. 27, p. 49.

<sup>352</sup> R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int'l Arb. 19, p. 31.

of a dispute resolution. This appears to be in the jurisdictional phase of the arbitral proceeding and is considered to be in compliance with the doctrine of *prima facie*.

And in order to decide whether they are competent to arbitrate the issue given that the challenge to the validity of the arbitration agreement is made arbitrators resort to the principle of competence-competence. In this regard, it is reasonable to mention that the separability and competence-competence intersect here only in the sense that arbitrators who rule on their own jurisdiction will envisage the arbitration clause alone, not to the entirety of the contract, because in accordance with the separability doctrine the clause is considered to be autonomous from the underlying contract.

It is appropriately asserted that separability principle would permit arbitrators to find the main contract invalid (due to its illegal object) without thereby destroying their authority to render an award pursuant to the arbitration clause.<sup>353</sup> The separability doctrine would not, however, make the arbitration agreement itself valid if a person who signed the agreement had no power to do so.<sup>354</sup> In turn, competence-competence principle allows arbitrators to examine the power of the person who signed the contract. But, as Park claims:

‘under competence-competence principle standing alone, without the sister doctrine of separability, the arbitrators could not declare the main contract void for illegality without thereby undermining their jurisdiction to do so’.<sup>355</sup>

Significantly, it should be kept in mind that they are still different conceptions and should not be confused. In fact, sometimes there is misinterpretation of the doctrine of separability and that of competence-competence.<sup>356</sup> Separability says nothing about the validity of the arbitration clause itself.<sup>357</sup> The fact that an arbitration clause might be valid even if there are imperfections in other contract terms and conditions does not lead to express affirmation that the clause itself will be valid.

---

<sup>353</sup> W Park, ‘Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators’ (1997), 8 AM. REV. INTL ARB. 133, p. 143.

<sup>354</sup> Ibid.

<sup>355</sup> W Park, ‘Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators’ (1997), 8 AM. REV. INTL ARB. 133, p. 143

<sup>356</sup> J Barcelo, ‘Who decides the arbitrators’ jurisdiction? Separability and competence-competence in transnational perspective’ (2003), 36 Vanderbilt Journal of Transnational law 1114, p. 1116.

<sup>357</sup> R Bishop, ‘A practical guide for drafting international arbitration clauses’, <<http://www.kslaw.com/library/pdf/bishop9.pdf>>, accessed 15 February 2010.

So, in fact, these principles are considerably distinct, being, however, very closely intertwined. In other words, it is defined that the separability doctrine, on one hand, ensures the power of arbitral body to decide challenges to the contract containing the arbitration clause, not the arbitration clause itself, which, in case of absence of the competence-competence principle in the procedural rules of the arbitral proceeding, are reserved for the courts. The competence-competence doctrine, on the other hand, vests the jurisdictional power on the arbitral tribunal to decide challenges to the arbitration clause itself.<sup>358</sup> Smit, for example, provided a very comprehensive explanation when stating that ‘while separability addresses the issue of ‘who decides’ challenges to the contract, competence-competence addresses the second-tier issue of ‘who decides who decides’ challenges to the contract’.<sup>359</sup>

## **F. Criticism, Problems and Arguments**

Arbitration clause is normally very short. Such arbitration agreements for the dispute resolution which may possibly appear in the future usually are not elaborative. The reason is that parties do not know what kind of disputes may arise and how they can best be settled.<sup>360</sup> The other motive may be the case that although parties to a contract may agree to such an arbitration agreement, they may be of strong opinion that there will be even no need to resort to it.

Most international arbitrations take place in accordance with an arbitration clause inserted into a contract between the relevant parties. These clauses are often called as ‘midnight clauses’<sup>361</sup> since they are the last clauses to be drafted in contract negotiations that sometimes effectuate late at night or early in the morning. As a result, insufficient attention is given to the details of the dispute settlement and often an inoperative and substandard agreement is accepted.<sup>362</sup>

---

<sup>358</sup> R Bishop, ‘A practical guide for drafting international arbitration clauses’ <<http://www.kslaw.com/library/pdf/bishop9.pdf>>, accessed 18 March 01.2010.

<sup>359</sup> R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int'l Arb. 19, p. 31-32.

<sup>360</sup> A Redfern, et al, Law and Practice of international commercial arbitration, see supra, pp. 156-157.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

However, the severable nature of the arbitration clause also spurred much debates and criticism. Smit contends that many parties to a contract ‘would be surprised to hear that they have signed not one but two separate agreements’, as the doctrine of severability of arbitration clause postulates.<sup>363</sup>

The United States, as was previously mentioned, continuously resist the acceptance of the competence-competence principle. For example, in *Sphere Drake Ins. Ltd v All American Ins. Co.*<sup>364</sup> case, Judge Easterbrook considered that ‘courts have jurisdiction to determine their jurisdiction not only out of necessity but also because their authority depends on statutes rather than parties' permission’ and, actually, the statutory authority is not subject to validity/existence challenges unlike the authority derived from the parties’ consent is. It is claimed that ‘arbitrators lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties do control the existence and limits of an arbitrator's power’.<sup>365</sup>

The criticism of competence-competence doctrine has a practical backbone as well, and a practical perspective seems to be more interesting. It is argued that arbitrators may not rule with entire objectivity on the question of their jurisdiction where they have a financial interest in upholding their competence over the case and consequently obtain the arbitrator fees.<sup>366</sup> Walt appropriately notes that arbitrators are more than courts biased with respect to the existence of the arbitration issue as the compensation for private judges motivates them to find jurisdiction in any particular dispute.<sup>367</sup> In *Outtley v. Sheepshead Nursing Home, Trafalgar Shipping Co. v. Int'l Milling Co* the same opinion was articulated. To clarify, ‘once they have bitten the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite’.<sup>368</sup>

Despite the widespread criticism that the aforementioned principles face, as of today there are a vast number of jurisdictions in Europe and America and, as was previously

---

<sup>363</sup> See, Smit, see supra, p. 31-32.

<sup>364</sup> *Sphere Drake Ins. Co. v. All American Insurance*, 256 F. 3d.

<sup>365</sup> R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int'l Arb. 19, p. 26.

<sup>366</sup> Ibid.

<sup>367</sup> A Walt, ‘Decision by Division: The Contractarian Structure of Commercial Arbitration’ (1999), 51 Rutgers L. Rev 369, p. 408-410.

<sup>368</sup> *Trafalgar Shipping Co. v. Int'l Milling Co.*, 401 F.2d 568, 573 (2d Cir. 1968); *Outtley v. Sheepshead Nursing Home*, 688 F. 2d 883, 898 (2d Cir. 1982).



mentioned, international conventions and rules which regulate institutional procedure of international arbitration, that uphold to a great degree these principles.<sup>369</sup>

However, it continues to be ambiguous and, moreover, unsettled in some jurisdictions what is the extent, the moment and the manner in which courts may or must intervene in the arbitration proceedings to adjudicate issues of arbitral body's competence or incompetence over the dispute prior to the moment when arbitrators grant final award on the merits.

As to the competence-competence, there exist situations when *early* court intervention saves time and expense. Firstly, there situations include a circumstance when the parties' agreement to arbitrate is *obviously* lacking. It is suggested that a resort to the judiciary in order to obtain a court's declaration that the arbitrators lack authority should be allowed, when the contract between these parties does not reasonably contain *any* arbitration agreement/clause.<sup>370</sup> It is reasonable to affirm that the intervention in this case does save spending of time and funds.

However, it is not clear whether such an early court's declaration or intervention would be of help in case if, despite a challenge to the validity of the arbitration agreement, it appears *prima facie* that parties *have agreed to arbitrate*, or when parties have expressly agreed to give arbitrators power to decide on their competence. Another example when a court's early intervention would be unreasonable is when only the arbitral body's personal reach (who is bound by the agreement) and the subject matter reach are subject to a challenge, but not the validity of the agreement to arbitrate itself.

Furthermore, the U.S. practice with respect to the separability doctrine is also worth elaborating. The court usually easily applies the separability doctrine to challenges that a contract containing an arbitration clause is 'voidable'. A definition of 'voidable' applies to contracts, which exist but are subject to annulment. On the other hand, there is another

---

<sup>369</sup> For example, in Germany: Zivilprozessordnung art. 1037; in England: *Christopher Brown Ltd. v. Genossenschaft Österreichischer Waldbesitzer Holzwirtschaftsbetriebe* Registrierte Genossenschaft mit beschränkter Haftung, [1954] 1 Q.B. 8; ICC Rules of Arbitration: Art. 6 (4); UNCITRAL Model Law: Art. 16.

<sup>370</sup> C Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000) 11 Am. Rev. Int'l Arb. 397, p. 399.

type of a contract that raised a huge debate among the academic world: a distinction is drawn between a contract which is voidable and the one which is ‘*void ab initio*’.

Hence, in the US the separability principle is applied solely in cases where the underlying contract satisfies *all the necessary elements* of contract formation, but is subject to rescission on the basis, for example, of fraud or duress. Where it is claimed that the contract containing the arbitration provision never came into existence due to *some deficiency in contract formation*, the U.S. courts have generally refused to refer to the doctrine, applying the rationale that a valid arbitration provision cannot be severed from a ‘contract’ that never came into legal existence.

The basic reason why courts reject to apply the separability doctrine to claims that the contract containing the arbitration clause never came into existence or is otherwise void was perhaps best expressed in *Pollux Marine Agencies v. Louis Dreyfus Corp.* by asserting that ‘something can be severed only from something else that exists. How can the Court sever an arbitration clause from a non-existent charter party?’<sup>371</sup> In other words, U.S. law has subscribed to the paraphrased Shakespearean wording, ‘nothing comes of nothing’.<sup>372</sup>

#### **5.4. APPROACH OF VARIOUS LEGISLATIONS AND INSTITUTIONS**

Given the above mentioned criticism and debates, following questions are identified.

When is it correct for the judiciary to intervene or, otherwise, decline the proceedings? What are the instances when the separability and competence-competence are and are not to be applied? Given that the US has more than any other jurisdiction elaborated the nature of these two doctrines in their case law, what is the correct approach to the void/voidable distinction of the contract?

All these questions are going to be answered after the comparative analysis of the approach of four foreign jurisdictions especially that of the United States as being very controversial and at the same time being the most interesting one, as well as that of the UNCITRAL are examined.

---

<sup>371</sup> *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F. Supp. 211, 219 (S.D.N.Y. 1978).

<sup>372</sup> R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int’l Arb. 19.

The support for the principles of severability and competence-competence is largely resembled in the domestic laws on arbitration. Yet, the number of states that have not still accepted these doctrines is continuously decreasing.<sup>373</sup> This paper does not aim to provide a detailed analysis of all domestic laws that touch upon the severability and competence-competence as being beyond the scope of it, so the most significant and notable systems will be overviewed.

### **A. The UNCITRAL Model Law**

The United Nations Commission on International Trade Law adopted the Model Law on International Commercial Arbitration on June 21, 1985. This Model Law aims to lay down the most contemporary solutions in international commercial arbitration in order to direct national legislators.<sup>374</sup>

The UNCITRAL Model law embodies both the separability and competence-competence principles in its Chapter IV that accordingly elaborates the issues of jurisdiction of an arbitral tribunal. So, article 16 states that:

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the terms of the contract. A decision by the arbitral tribunal that the contract is null and void *shall not entail ipso jure the invalidity of the arbitration clause*'. [emphasis added]

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

---

<sup>373</sup> A Redfern, et al, Law and Practice of international commercial arbitration, see supra, p. 195

<sup>374</sup> C Petrus, 'Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000) 11 Am. Rev. Int'l Arb. 397, p. 403.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days that it has received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

According to article 16, the powers between courts and arbitrators are deemed to be distributed. It clearly provides that the arbitral tribunal is granted with the priority to adjudicate on its competence. Such a priority is even extended when the validity or existence of the arbitration clause is questioned.

However, there is an important conclusion that is deducted from article 16. Namely, paragraph 1 comprises a very vague definition of the separability doctrine. There is no indication whether the arbitration clause will survive even if the initial contract is found to be *void ab initio* or becomes null as a consequence of an event.

It should be kept in mind that the whole UNCITRAL Model law is meant to be adopted with the aim to limit the court intervention. In this sense, Article 5 of the Model law stipulates that ‘[i]n matters governed by this law no court shall interfere except where so provided in this law.’

## **B. French Perspective**

A very extreme approach is provided in France. In 1963, the French Cour de Cassation in *Gosset* case held that the arbitration clause is severable from the main contract and is legally autonomous.<sup>375</sup> In detail, the initial contract between the parties was found to be a nullity, but an arbitral award was granted recognition and enforcement due to completely separate nature of the arbitration clause that held to be unaffected by the invalidity of the initial contract.<sup>376</sup> This statement is mirrored in article 1466 of the French Code of Civil Procedure lays down the power of arbitrators to rule upon their own jurisdiction:

---

<sup>375</sup> Ibid. p. 194.

<sup>376</sup> Ibid.

‘If one of the parties contests, before the arbitral tribunal, the principle or scope of the tribunal's jurisdictional authority, the tribunal has the power to rule upon the validity or the limits of its own appointment.’<sup>377</sup>

Also, it is claimed that France has adopted ‘the most radical expression’ of the competence-competence principle.<sup>378</sup> Moreover, according to article 1458 of the French Code of Civil Procedure, court intervention is not allowed until an arbitral award is finally rendered. The only exception is the case when the arbitration agreement is ‘manifestly null and void’ and provided that the arbitral tribunal has not been formed. Otherwise, under Section 1 of Article 1458, the court is automatically required to decline jurisdiction over any dispute referred to it. The statement that the arbitration agreement shall be ‘manifestly null and void’ does not have accurate explanation and, thus, subject to different interpretation that, actually, gives power to the court to ascertain this meaning. Furthermore, in contrast, claims that the arbitration agreement is the consequence of fraud vest the arbitral tribunal first to decide the issue.<sup>379</sup>

### C. The German View

It was stated above that the competence-competence or kompetenz-kompetenz doctrine originated in Germany.<sup>380</sup> Unlike in most other legal systems, the Federal German Court upheld that the parties' agreement empowers the arbitrators to rule conclusively and bindingly on the validity of the arbitration clause, i.e. ‘the last word on the issue of jurisdiction *may* be left for the arbitrators’.<sup>381</sup>

However, historically, section 1037 of the German Code allows arbitrators to continue arbitration even when ‘it is maintained that the arbitral process is inadmissible’ on the ground of an invalid arbitration agreement, an arbitrators' acting *ultra vires*, i.e. on the subject matter not determined by the agreement, or an inappropriately appointed arbitral

---

<sup>377</sup> See Petrus, see supra, pp. 406-407.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> X Jason, ‘A Brief Introduction to the ‘Kompetenz-Kompetenz’ Principle in International Commercial arbitration’ <<http://www.duanduan.com/lslt-e-2004-2-10-2.htm>>, accessed 12 March 2012; N Wyss, ‘First Options of *Chicago Inc. v. Kaplan*: a perilous approach to kompetenz-kompetenz’ (1997), 72 Tul. L. Rev. 351, pp. 372-373

<sup>381</sup> C Petrus, ‘Spanish perspectives on the doctrines of kompetenz-kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act’ (2000), 11 Am. Rev. Int'l Arb. 397, p. 405.

body.<sup>382</sup> It was once commented that such a ruling is although provisional.<sup>383</sup> This ‘provisional ruling’ is subject to court control under Section 1041(1) of the German Code, provided that the complaining party raised the objection during arbitration, thereby preserving the right to object.

The scholars' commentary on these provisions of the Code identifies the absence of the doctrine of the competence-competence. Hence, German courts have ruled that arbitrators have the ‘final word’ on their own jurisdiction when such power is conferred upon them by the parties to the contract. In other words, *it is not an inherent power* of an arbitrator since it must be explicitly stated in the agreement to arbitrate that parties vest them to have the final word.

#### **D. The English Viewpoint**

As to the separability doctrine, the English law admitted it in Smith v. H & S International Holding Inc.<sup>384</sup> Traditionally, England, however, maintained a moderate version of the competence-competence principle. It was asserted that arbitrators are entitled to inquire into the merits of a challenge to the validity/existence of the arbitration clause not for the purpose of reaching any binding conclusion, but for the purpose of ‘satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not’.<sup>385</sup> So, this determination was not mandatory and could be overruled by a competent court. The parties could resort to a court determination of the issue of arbitrators' jurisdiction at any time, whether before, during or after the arbitral proceedings. A court, in its turn, was even allowed to impose civil and criminal sanctions on anyone not complying with its orders.<sup>386</sup>

Recent developments contributed to the maintenance of the continental dominant version of the competence-competence doctrine by adopting the Arbitration Act 1996, applicable in England, Wales and Northern Ireland.

---

<sup>382</sup> German Code, Section 1037, in S. Phillip, *Is the Supreme Court bucking the trend? First Options v. Kaplan* in light of European reform initiatives in arbitration law, (1996) 14 B.U. Int'l L.J. 119, p. 134.

<sup>383</sup> O Glossner, in ‘International Handbook on Commercial Arbitration’ (Albert J. Van Den Berg & Pieter Sanders eds., Supp. 17 1994) as cited in S Phillip, ‘Is the Supreme Court bucking the trend? *First Options v. Kaplan* in light of European reform initiatives in arbitration law’ (1996), 14 B.U. Int'l L.J. 119.

<sup>384</sup> *Paul Smith Ltd. v. H & S International Holding Co. Inc.*, [1991] 2 Lloyd's L.Rep., 127.

<sup>385</sup> *Christopher Brown v. Genossenschaft Oesterreichischer* [1954] 1 QB 8.

<sup>386</sup> See, for example, *Allied Marine Ltd. v Vale Do Rio Doce S.A.* [1985] 1 W.L.R. 925.

Section 30 of the Arbitration Act 1996 provides that:

‘(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction,...’

It should be noted that being based on article 16 of the Model Law, Section 30 of the Arbitration Act is different in that parties may agree that the arbitral tribunal is not entitled to rule on its substantive jurisdiction, by inserting the phrase ‘[u]nless otherwise agreed by the parties’.

### **E. The U.S. Legal Setting**

In the United States the separability has been recognized. So, when a court is introduced to a challenge concerning the validity of the main contract, which does not affect the validity of the arbitration clause itself, it will refer the issue to arbitral proceedings in accordance with the Federal Arbitration Act 1925, Section 4, which states:

‘The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.’<sup>387</sup>

In other words, according to the Federal Arbitration Act if a party's claim does not doubt the existence of the agreement to arbitrate an arbitral proceeding will definitely take place. Otherwise, the discussion goes further. As was previously stated under the main criticism of the doctrines, the U.S. courts have distinguished those contracts that are voidable and those that are *void ab initio*. The latter is being largely debated and American courts have generally rejected to apply the separability doctrine to this type of contract, i.e. which is *void ab initio*.

In accordance with Section 4 of the Federal Arbitration Act, the issue of arbitral tribunal's jurisdiction over a case is to be decided as a preliminary issue by the courts rather than by the arbitral tribunal itself. It stipulates that:

‘If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.’<sup>388</sup>

---

<sup>387</sup> The Federal Arbitration Act, Title 9, US Code, Section 1-16, Section 4.

<sup>388</sup> The Federal Arbitration Act, Title 9, US Code, Section 1-16, Section 4.

The issue of whether arbitrators have competence over the dispute is treated in the United States under the common title ‘arbitrability’.<sup>389</sup> The rule of arbitrability, i.e. that it is solely decided by the judiciary, was developed in a sequence of cases known as the Steelworkers' Trilogy.<sup>390</sup>

## **F. An Optimal Approach**

By elaborating the above mentioned jurisdictions and their peculiar approach to the issue of application of the separability and competence-competence, the following wording of sample arbitration clause is suggested by the Author. For this purpose, it is considered to use the UNCITRAL Model law's article 16 as a model clause.

Firstly, French position that is famous due to its radical application of the separability and competence-competence principles seems to be frequently inefficient.

Secondly, the German perspective as to proposing the contractual approach to the competence-competence may be introduced as additional protective measure in case if parties want to ensure the applicability of competence-competence and the following provision is suggested to be added into article 16 of the UNCITRAL Model law:

‘The parties may expressly agree in the arbitration agreement to give power to the arbitrators to rule conclusively and bindingly on the issue of their competence.’

Thirdly, the practice of the United States as to the void/voidable distinction as well as to four types of challenges to which U.S. courts have refused to apply the separability doctrine do raise a number of arguments that may be of interest. Furthermore, the void/voidable distinction is very ambiguous and it raises big impediments in their proper interpretation and further appropriate applicability of whether to confer the jurisdiction or not. For example, one dictum noted that the void/voidable distinction or fraud in the factum/fraud in the inducement distinctions will rather confuse than clarify the issue of the dispute and contribute to its resolution.<sup>391</sup>

---

<sup>389</sup> S Bennett, ‘Developing American approach to arbitrability’, *Dispute Resolution Journal*, February-April, 2003, p. 1.

<sup>390</sup> G Minda, ‘Arbitration in the post-cold-war era – Justice Kennedy’s view of postexpiration arbitrability in *Litton Financial Printing Division v. NLRB*’ (1992), 22 *Stetson L. Rev.* 83, p. 87, *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

<sup>391</sup> See *Burden v. Check into case of Kentucky, LLC*, 267 F. 3d at 489. It was stated that ‘the void/voidable or fraud in the factum/fraud in the inducement distinctions may more confound than clarify the dispositive issue and its resolution’.



Interestingly, the claim that ‘there was no meeting of minds’ is perhaps the most interesting scenario of application of the separability doctrine. However, it should be kept in mind that the alleged failure of the parties' pre-contractual negotiations to mature into a final and binding contract should not always necessarily imply a failure to reach agreement to arbitrate any dispute that may arise between them.

Then, the challenge as to the forgery or fraud in factum of the contract shall not in any way raise the issue of application of the separability principle. It is, in fact, manifest that a person, whose signature has been forged, has never agreed to anything, including arbitration. This situation is similar to that raising the issue of obvious non-existence of the agreement to arbitrate.<sup>392</sup>

Furthermore, the challenge arising out of agency relationships does not necessarily entail the rejection of separability. It is appropriately stated that so long as the agent had authority to enter into the arbitration agreement, the agreement should be severed from the remainder of the contract regardless of whether the agent was authorized to enter into the contract.<sup>393</sup>

Additionally, the U.S. court's rejection to apply the separability doctrine should be also reconsidered, i.e. the challenge as to the illegality/lack of consideration. It is reasonably suggested that there is no reason why an arbitration clause in a contract that lacks consideration should not be severed from their underlying contract and enforced.

The above mentioned arguments and conclusions give a more detailed overview of the separability doctrine with particular cases when its application is advisable and when is not. So, it is suggested that the above mentioned conclusions as to the void/voidable distinction should be codified using article 16 of the UNCITRAL Model law as a basis (as was previously proposed).

Fourthly, the English version of article 16 of UNCITRAL Model law seems very appropriate. The parties shall be given a right to agree that the arbitral tribunal does not

---

<sup>392</sup> See *Chastain v Robinson-Humphrey Co.* 957 F.2d 851 (11th Cir. 1992) in R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int'l Arb. 19, p. 37.

<sup>393</sup> See, in R Smit, ‘Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?’ (2002) 13 Am. Rev. Int'l Arb. 19, p. 37.

have a power to rule on its competence. In other words, it is again suggested to add the wording ‘unless otherwise agreed by the parties’ as it was made in the Arbitration Act 1996.

## 5.5. CONCLUSION

The analytical content of foregoing chapter attempted to elaborate on other waivers of arbitrability of disputes with a foreign element namely; invalidity of the underlying contractual agreement and that of the agreement to arbitrate.

However, the main conclusion stemming from the current analysis is that unconventional and sophisticated claims need to be elaborated *within the context of surrounding circumstances*, hence, extending the reasoning beyond its *prima facie* interpretation, be it the issue of interpretation of unilateral consent to arbitrate in the host state legislation or the qualification of pre-investment expenditure under article 25 of ICSID Convention.

The Author proposes the arbitral authority to rule on competence over a dispute even in the event of a challenge to the validity/existence of the underlying contract (the application of the separability principles) between the parties and/or validity/existence of the arbitration agreement itself (the doctrine of competence-competence) is proposed to be extended in most instances.

However, in case if the validity or existence of the arbitration agreement itself is at issue, the authority to decide the arbitrators’ competence is advisable not to be granted to the arbitral tribunal, if there is obvious non-existence of the agreement to arbitrate.

It is also proposed, the German notion that proposes the *ad hoc* basis of the application of competence-competence may be also taken into consideration as the additional protective instrument in case if parties want to ensure the applicability of competence-competence principle. Furthermore, the English view in regard to the parties’ right to agree that the arbitral tribunal does not have a power to rule on its competence is also advised to be added. And as to the separability, the above mentioned conclusions as to the void/voidable distinction are also proposed to be added.

This research endorses that over the various criticisms that have been lodged against the existing system of investor-state dispute resolution, one of the more recurrent has been the charge of inconsistency. In even the most harmonious body of case law, there are bound to be notes of dissonance. That the significance of such phenomena will be amplified in as politically sensitive a field as international investment law is to be expected. Yet in criticizing tribunals' allegedly divergent approaches to admissibility and jurisdiction, one must take care neither to exaggerate the extent of the inconsistencies we discover nor to disregard the various additional factors that contribute to acceptance or dismissal of claims on arbitrability grounds.

To do so would render injunction to the efforts of treaty negotiators, party advocates, and adjudicators in constructing an effective, unified and harmonized set of laws governing jurisdiction and admissibility to resolve a wide-ranging and extraordinarily complex series of problems.

## **6. CHAPTER SIX: JURISDICTION RATIONE PERSONAE – NATIONALITY IN INVESTMENT ARBITRATION**

### **6.1. INTRODUCTION**

In many countries, foreign investments are required to be channelled through locally incorporated companies. This requirement has important implications for foreign investors. If the investment is carried out through a locally incorporated company, a national of the host State, the investor would not normally be eligible to be a party to proceedings before the Centre. The drafters of the Convention recognized this problem and adopted Article 25(2)(b). This provision allows locally incorporated but foreign controlled companies to have access to ICSID provided certain procedural requirements are met.

The claimant, whether an individual or legal entity, must have the nationality of one of the contracting state parties in accordance with the test for nationality prescribed in the investment treaty itself. If the claimant has the option of pursuing ICSID arbitration and elects that option, then the requirement of the Article 25 of the ICSID Convention must also be satisfied. The difficulty that has emerged in practice is the relationship between the test for nationality prescribed in the investment treaty and the rules on nationality that from part of the law of the contracting state party.

This chapter attempts to clarify; whether the fact of the claimant's possession of the nationality of the contracting state pursuant to its municipal law conclusive for the purposes of the nationality requirement in the treaty and thus the tribunal's jurisdiction *ratione personae* over the claimant? What weight should be given to a certificate of nationality issued by one of the contracting state parties? In applying the test for nationality in the BITs, is a tribunal bound by a determination of the competent national authority to the effect that the claimant is a national or enterprise of that state, or is the tribunal entitled to conduct its own investigation of the claimant's nationality in accordance with the applicable national law? In applying the same test, is a tribunal bound by the provisions of national immigration acts in relation to nationality of a natural person,

or the relevant national laws on legal entities in relation to the nationality of an enterprise? In other words, if the tribunal concludes on the basis of the law of the relevant contracting state party that the claimant is a national of that state, can it nevertheless decline its jurisdiction *ratione personae* over that claimant?

Having a long-standing history in international law context, the concept of ‘corporate nationality’ is deemed to be inextricably linked to that of natural persons. The notion witnessed its development particularly in the field of diplomatic protection. Several sources of international law have dealt with the concept, but before going into the merits of the field, semantics of these sources needs to be explored.

## **6.2. SEMANTICS OF SOURCES OF INTERNATIONAL LAW**

Methods of identifying sources of national law – which is conventionally made by references to constitution, legislation and judicial case law - explicate its highly hierarchical structure. Public international law is lacking authority to legislate, and, as Malanzcuk contends, same subjects of international law adopt international law norms and principles themselves.<sup>394</sup>

Remarkably, the fundamental source of international law in view of the foregoing was customary law which emanates from state practice. Conclusion of an increasing number of international treaties, whose subject matters span from the law of the sea to diplomatic and consular relations, is oftentimes construed as the replacement of customary law. Malanzcuk argues that, provided there is an international consensus on rules of customary law, such norms tend to be codified by treaty.<sup>395</sup>

The list of sources of public international law is deemed to be embodied in article 38 (1) of the Statute of the International Court of Justice, which reads:

‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) International custom, as evidence of a general practice accepted as law
- c) The general principles of law recognized by civilized nations

---

<sup>394</sup> P Malanzcuk, ‘Akehurst’s Modern Introduction to International Law’ (London, UK: Routledge, 2003), page 35.

<sup>395</sup> Ibid. page 37.

- d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.’

Some writers have argued that the list is not exhaustive; the others criticized it for being too extensive.<sup>396</sup> Although there have been some heated debates as to exclusive nature of the clause, yet no alternative text which had been ever suggested won universal approval.<sup>397</sup> It is argued that ‘treaties are the maids-of all-work’ in international law. Sometimes compared to contracts in national legal systems, one should, however, draw a distinction. Primarily, within a local legal system, contracts are merely legal transactions, not sources of law.

Interestingly, some publicists juxtapose ‘law-making treaties’ (*traités-lois*) vis-à-vis ‘contract treaties’, whereby the purpose of the former is ‘to conclude an agreement on universal substantive legal principles’, whereas the latter is, for instance, drawn for a state to lend a certain sum of money to another state. Whilst the law-making treaties are referred to as sources of law, the contract treaties are not.<sup>398</sup> It follows that a distinction between a law-making treaty and a contract treaty is primarily one of content.

As to customary law, it was held by the ICJ that international custom is formed by two elements – the objective one of ‘general practice’ and the subjective one, the so-called *opinio juris* of states. Hence, it is important to establish not only what states do, but also why they do so.<sup>399</sup>

It is generally accepted that main evidence of customary law is to be found in the actual practice of states conventionally reflected in statements of government spokesmen to the Parliament, press, at international conferences. The foregoing, however, may be the practice of a limited number of certain states. Further corroboration of an existing norm can be also reflected in writings of leading legal scholars, and in judgments of

---

<sup>396</sup> Ibid. page 37.

<sup>397</sup> Ibid.

<sup>398</sup> See, for instance; E Raftopoulos, ‘The inadequacy of the contractual analogy in the law of treaties’ (Hellenic institute of international and foreign law 1990).

<sup>399</sup> Ibid. page. 44.

international tribunals, as it is inferred by article 38(1d) of the Statute of the ICJ. Similarly, treaties, particularly multilateral ones, may encompass evidence of customary law.<sup>400</sup>

*Opinio juris*, or the psychological element *opinio juris sive necessitatis*, is referred to as a conviction felt by states that a certain form of conduct is required by international law. Malanczuk aptly notes that the current trend to establish *opinio juris* is ‘not to look for direct evidence of a state’s psychological convictions, but to infer *opinio juris* indirectly from the actual behavior of states’. Hence, it is not the official statements, which are indicative of *opinio juris* – rather acts or oftentimes omissions may form the required states’ conviction.

The third source of international law enumerated in article 38(1) of the ICJ Statute makes reference to ‘general principles of law recognized by civilized nations’. It is argued that this source was taken from the Statute of the forerunner of the ICJ, the Permanent Court of International Justice, and it was meant to be utilized when treaties or customary law provide no solution.

Interpretations as to whether it is general principles of national law or those of international law abound. Some argue that the genuine meaning of the phrase is to include both systems – national and international – to fill in the gaps left by treaty law and custom. Cheng claims that, indeed, international tribunals had applied general principles of law in both senses for many years, even before the PCIJ was established in 1920.<sup>401</sup> Such principles include, but are not limited to, good faith, estoppel, proportionality, right to fair hearing, denial of justice, exhaustion of local remedies, in *dubio pro reo*.

In addition to aforementioned primary sources of international law, there exist other sources – judicial decisions and teachings of leading scholars stipulated in article 38 (1d) of the ICJ Statute – which largely fall under the rubric of subsidiary means for the determination of rules of law. Schwarzenberger also contends that judicial decisions should carry more weight as opposed to viewpoints expressed by leading scholars.<sup>402</sup> The

---

<sup>400</sup> See M Villiger, Customary International Law And Treaties: A Study Of Their Interactions And ... The Agony Of Algeria / Stone, M. - London: Hurst, 1997.

<sup>401</sup> B Cheng, ‘General principles of law as applied by international courts and tribunals’, (Cambridge University Press 2006).

<sup>402</sup> See; G Schwarzenberger, International law (3<sup>rd</sup> Edition, 1957).

rationale behind such proposition is the variety of perspectives the members of the court usually look from to adjudicate on a real dispute, which stems from their widely differing legal training and experience. As Schwarzenberger argues, this is compared to private comments on issues or the discussion of hypothetical cases.

Most important, however, is instruction for the ICJ to apply judicial decisions subject to provisions of article 59, which explicitly exclude the doctrine of precedence and that of *stare decisis* from international law practice. This fundamental premise was comprehensively canvassed by Judge Azevedo in *Asylum* case:

‘It should be remembered... that the decision in a particular case has deep repercussions, particularly in international law, because views, which have been confirmed by that decision acquire quasi-legislative value, in spite of the legal principle to the effect that the decision has no binding force except between the parties and in respect of that particular case.’

It was noted that the jurisprudence of municipal courts does not quite fall squarely into the context of article 38(1) of the ICJ Statute. Whilst there are certainly exceptions such as, for instance, the standing of English judiciary, certain countries’ judicial and legal systems may not be as mature and independent as it is necessary, for those decisions to be applicable to international law cases. As Chancellor Kent puts it:

‘In the investigation of the rules of the modern law of nations, particularly with regard to the extensive field of maritime capture, reference is generally and freely made to the decisions of the English courts... They contain more intrinsic argument, more full and precise details, more accurate illustrations, and are of more authority than the loose dicta of elementary writers.’<sup>403</sup>

### **6.3. NATIONALITY IN THE DIPLOMATIC PROTECTION CONTEXT**

Tracing back the roots of the doctrine, diplomatic protection was designed to address the issue of state responsibility for injury to aliens. From the standpoint of international law, it has been generally accepted that wrongful acts or omissions of the state which caused damage to aliens are attributable to that state, and the latter holds responsibility under international law to treat aliens and their property adequately.<sup>404</sup>

---

<sup>403</sup> See; J Kent, Commentaries on American law (O Halsted New York, 2002).

<sup>404</sup> See; I Brownlie, Principles of Public International Law (Cambridge, UK: CUP, 2003).



According to International Law Commission, the following constituents form state's exercise of diplomatic protection:

‘Action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State’<sup>405</sup>

The Report, wherein the aforementioned elements were described, also held that in exceptional circumstances, diplomatic protection may be bestowed to non-nationals. The leading case which was adjudicated by the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, addressed the orthodox interpretation of the right to diplomatic protection in the following paragraph:

‘By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law’.

There are, however, the fundamental prerequisites for an object to be entitled to such diplomatic protection. One of key requirements for an exercise of diplomatic protection – the effective bond of nationality between the aggrieved party and the state which makes the claim – sparked off a lot of criticism among commentators, particularly with respect to corporate nationality. However, the first case, which dealt with the notion of ‘the effective bond’, or a so-called ‘genuine connection’ with the state in question, was *Nottebohm* case, wherein the ICJ laid down essential criteria of the same:

‘According to practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’.<sup>406</sup>

As to nationality of juridical entities, *Barcelona Traction* case, which was mentioned earlier in earlier chapters, is regarded as most important and emblematic. In *Barcelona Traction, Light and Power Company, Limited*, the dispute arose between Belgium and Spain due to a bankruptcy proceeding in Spain of Barcelona Traction, which was a company established in Canada. Belgium shareholders formed the overwhelming majority of it. In its suit against Spanish authorities they alleged that actions attributable to Spain

---

<sup>405</sup> Report of the ILC (2000) available at < <http://www.un.org/law/ilc/reports>>, accessed 15 November 2011.

<sup>406</sup> *Nottebohm* case, ICJ Reports 1955, 4.

were contrary to international law. The Court, however, took a stance which disqualified Belgium to exercise diplomatic protection of Belgian shareholders of the Canadian company with respect to allegedly illegal behavior of Spanish government.

The Court upheld the doctrine of incorporation and/or *siege social* as widely accepted formulas to determine nationality of juridical persons. It should be, however, noted that the Court stipulated two scenarios when the corporate veil may be lifted to entitle shareholders to diplomatic protection exercised by their home state. The first scenario refers to case of a company which has ceased to exist, whilst the second situation allows for the state of shareholders to exercise diplomatic protection if a state of incorporation of the company is incapable of taking action on behalf of such corporate entity.<sup>407</sup>

The standing of the Court as to protection of shareholders under international law was the subject of heated debates among scholars as it barely left shareholders without adequate protection under international law.<sup>408</sup> However, the logic behind a ‘corporate veil’ of the company is grasped through the very principle of distinct legal personality and rights vs. liabilities argument. Indeed, whereas shareholders shield themselves from liabilities due to existence of such ‘corporate veil’, it might have been erroneous to dissociate them and lift the ‘corporate veil’ if they need to enforce the company rights.<sup>409</sup>

Notwithstanding the conclusions of the ICJ in *Barcelona Traction*, nineteen years later it seemed to alter its position with respect to corporate nationality.

As it was mentioned earlier, the Court in *Barcelona Traction* identified that the case wherein the state of the shareholders is the claimant exercising diplomatic protection over its nationals against the state of incorporation of the company of these nationals would be most probably dismissed. In *Elettronica Sicala S.P.A. (ELSI)* case the U.S. government brought a case against Italy for the violation of the Treaty of Friendship, Commerce and Navigation signed by two countries. The United States alleged that, firstly, the Italian government seized an Italian subsidiary of a United States corporation in violation of

---

<sup>407</sup> ICJ Reports 1970, p. 40, para 64 .

<sup>408</sup> See; Astorga, p. 428.

<sup>409</sup> See Astorga, p. 429.

Italian law. Secondly, it was claimed that the subsidiary subsequently went bankrupt and that the Italian government purchased the subsidiary for its own use.

The U.S. government failed to persuade the International Court of Justice that Italy's actions represented an illegal intervention in management and control, an illegal impairment of investment rights, an unfair expropriation of property, or an unlawful failure to provide protection and security of property.<sup>410</sup> Even though it was argued that ELSI case has neither undermined the legal rules that apply to foreign investment, nor shown that the International Court of Justice is an inappropriate forum for the resolution of investment disputes,<sup>411</sup> central to this inquiry is the fact that the ICJ deemed there was a genuine connection between the company and the state of nationality of the shareholders. In other words, the ICJ granted the U.S the right to exercise diplomatic protection 'as long as the company whose rights were at stake was incorporated in the defendant state, a frequent situation when talking about foreign investment.'<sup>412</sup>

Hence, the practice of 'lifting the corporate veil' under international law has been eventually brought into existence.

The question of relevance of the nationality of claims rules for diplomatic protection in general international law to the investment treaty regimes has proved to be controversial, as it has been for other special international regimes for the adjudication of private claims in the past. It should first be noted that, in the diplomatic protection context, the nationality of claims rules are rules of admissibility and not jurisdiction. The reason for this distinction is obvious: States are the only litigants with *jus standi* in diplomatic protection claims and the primary jurisdictional concern is whether they have actually consented to the adjudication of the disputes by the International Court of Justice or another international tribunal.

If the jurisdiction is upheld then the tribunal can proceed to determine whether the diplomatic protection claim is admissible by reference to the rules concerning the requisite connection between the claimant state and the individual or entity who has suffered loss

---

<sup>410</sup> S Murphy, 'The ELSI case: an investment dispute at the international court of Justice' (1991) *Yale Journal of International Law* 16, pp. 392-393.

<sup>411</sup> *Ibid.*

<sup>412</sup> See Astorga, p. 430.

by the acts of the respondent state. For investment treaty arbitration, the bond of nationality assumes a jurisdictional significance because one of the litigants is an individual or legal entity whose *jus standi* to advance a claim depends upon positively establishing that bond. In other words, the respondent contracting state's offer to arbitrate only extends to a limited class of claimants defined by reference to their possession of the nationality of another contracting state.

Suppose that an investor, in a single dispute, asserts claims based on a contractual breach of its investment with the host state and a violation of an investment treaty obligation. The host state files an objection to the *ratione personae* jurisdiction of ICSID tribunal constituted pursuant to the investment treaty and/or objects to the admissibility of the claims on the basis of the tenuous link between the investor and the contracting state whose nationality is invoked.

Should the tribunal defer to general international law on the invocation of state responsibility, and in particular the rule on the nationality of claims in Article 44(a) of the ILC's Articles,<sup>413</sup> to supplement Article 25 of the ICSID Convention? To posit the conundrum differently, is the connecting factor to the general international law on the admissibility of claims to submission on a claim governed by international law, or is it the status of Article 25 of the ICSID Convention as a rule of international treaty law?

If the general international law on the admissibility of claims were to supplement Article 25 of the Convention by reason of the investor's reliance on a cause of action grounded in international law, this would produce an asymmetry between the ICSID tribunal's *ratione personae* jurisdiction in relation to the investor. This cannot have been the intention of the drafters of the autonomous test of nationality in Article 25. The second possibility, that the status of Article 25 as a provision of an international treaty attracts the supplementary application of other international rules on the nationality of claims, is no more appealing. The experience of the Iran/Us Claims Tribunal is informative in this respect.

---

<sup>413</sup> Crawford, *ILC's Articles*, 264.

In the *Dual Nationality* case,<sup>414</sup> Iran had contended that arbitration before the Iran/US Claims Tribunal were an instance of diplomatic protection so that solution to the admissibility of claims by dual nationals ‘must be found in public international law and not disputes between one State and nationals of the other, which could be resolved by the application of private international law’.<sup>415</sup> The Tribunal rejected this contention because the object and purpose of the Algiers Accord was not to ‘extend diplomatic protection in the normal sense’.<sup>416</sup> The rules of general international law on diplomatic protection did not, therefore, prevent the Tribunal from exercising jurisdiction *ratione personae* over US claimants that simultaneously held Iranian citizenship.<sup>417</sup>

#### 6.4. THE CONCEPT OF ‘NATIONALITY’ IN ARBITRATION

It is commonly accepted that the term nationality originates from the word ‘national’, and its definition falls under the jurisdiction of the state in question. The 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws codifies fundamental principle of public international law with respect to competence of each state to decide on matters related to nationality. The Hague Convention on Nationality addresses the concept of nationality in article 1, which reads:

‘It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.’<sup>418</sup>

In other words, the concept of nationality is predominantly subject to national laws. Each state is entirely free to prescribe rules as to who was to be considered as it’s national. It was held:

‘It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of nationality. [...] But it is no less accepted that when, in international arbitral or judicial

---

<sup>414</sup> Iran v USA (Case DEC 32-A18-FT, 6 April 1984) 5 Iran-US CTR 251 (Dual Nationality).

<sup>415</sup> Memorial of Islamic Republic of Iran in Case A/18 (21 October 1983) 25-6.

<sup>416</sup> 5 Iran-US CTR 251,261.

<sup>417</sup> *Sedco v NIOC and Iran* (CaseITL 55-129-3, 28 October 1985) 9 Iran-US CTR 245, 256.

<sup>418</sup> Convention on certain questions relating to the conflict of nationality laws, available at <<http://www.law.dal.ca/kindredinflaw/conflictfnationality>> accessed 21 March 2012.

proceedings, the nationality of a person is challenged, the international tribunal is competent to pass [judgment] upon that challenge.’<sup>419</sup>

Schreuer argues that ‘national and treaty-based definitions should be deferred to, so long as they are reasonable:

‘Definitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction will be controlling for the determination of whether the nationality requirements of Art. 25(2b) have been met.’<sup>420</sup>

### **A. Nationality under Contemporary BIT Provisions**

As early as in 1959 before proliferation of BITs all around the globe, the Treaty of Commerce, Establishment and Navigation between the United Kingdom and Iran dealt with the issue of corporate nationality in the following manner:

*‘The term ‘companies’:*

- *Means all legal persons except physical persons;*
- *‘in relation to a High Contracting Party’ means all companies which derive their status as such from the law in force in any territory of that High Contracting Party to which the present Treaty applies;*
- *‘in relation to a country’ means all companies which derive their status as such from the law in force in that country’<sup>421</sup>*

However, with economic integration processes and impact of these on corporate activities and operations, the definition of an ‘enterprise’ has been gradually expanded. Some retained the principle of incorporation as the main criterion to define the nationality of a legal enterprise, while the others added other criterion or used a combination of them.

For example, Chile-United States Free Trade Agreement characterized enterprises as ‘any entity constituted or organized under applicable law, whether or not for profit , and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association’, whereas ‘enterprise of a Party’ was defined as ‘an enterprise constituted or organized under the law of a Party’. This exemplifies the method of incorporation as the test for attribution of nationality. On

---

<sup>419</sup> UNCTAD, ‘Investor-state dispute settlement and its impact on investment rulemaking’ <<http://www.unctad.org/Templates/Download.asp>> accessed 21.12.2009, p. 11.

<sup>420</sup> *Aguas del Tunari S.A. v Republic of Bolivia*, ARB/02/3, Decision on Jurisdiction, 21 October 2005, at 281.

<sup>421</sup> I Brownlie, *Principles of Public International Law*, (7<sup>th</sup> Edition, Oxford University Press 2008), p. 408.

the other hand, some other countries add ‘siege social’ or seat criterion to the above mentioned place of incorporation method.

Article 1 of the BIT between Hong Kong and France reads:

‘3.b.(ii) Any legal person constituted on French territory in accordance with French legislation and having its head office on French territory, or any legal person controlled directly or indirectly by French nationals or by legal persons having their head office on French territory and constituted in accordance with French legislation.’

Interestingly, Switzerland is one of the countries whose approach to nationality is inclusive of control or substantial interest formula. For instance, Article 1.1 of Switzerland-Albania BIT makes reference to it as:

‘[...] (a)The legal entities, including the companies, the incorporated companies, the individual corporations or other organizations, that are constituted or organized in accordance with the legislation of that Contracting Party and which have their seat, at the same time as their real economic activities, in the territory of the same Contracting Party; (b)The legal entities established in accordance with the legislation of any country that are controlled, directly or indirectly, by nationals of that Contracting party or by legal entities having their seat, together with their real economic activities, in the territory of that Contracting party’

Interestingly, similar provisions are found in BITs, which Switzerland concluded with Latvia, Lithuania and Vietnam.<sup>422</sup>

Article 1 of the China Model BIT (1997) defines ‘investor’ as:

‘[...] (a) Natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party; (b) Legal entities including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party.’

Article 1 of the Germany Model BIT (2005) defines ‘investor’ as;

‘[...] - any natural person who is a German ... or a national of a Member State of the European Union or the European Economic Area ..., is established in the Federal Republic of Germany;  
- any juridical person ... which is founded pursuant to the law of the Federal republic of Germany ... and is organized pursuant to the law of the Federal Republic of Germany,...; which in the context of entrepreneurial activity is the owner, possessor or shareholder of an investment in the territory of the other Contracting State, irrespective of whether or not the activity is directed at profit;...’

---

<sup>422</sup> See Astorga, page. 436.

Article 1(b) of the Netherlands Model BIT (1997) defines ‘nationals’ as:

‘[...] i- natural persons having the nationality of that Contracting Party;  
ii- legal persons constituted under the law of that Contracting Party;  
iii- legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).’

Article 1(1) of the Turkish Model BIT (2000) defines ‘investor’ as:

‘[...] (a) natural persons deriving their status as nationals of either Party according to its applicable law,  
(b) Corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party.’

Article 1(c) of the United Kingdom Model BIT (2005, with 2006 amendments) defines ‘nationals’ as:

‘[...] i. in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;  
ii. in respect of [country];...’

Section (A) of the United States of America Model BIT (2004) defines ‘national’ as:

‘...a) for the United States a natural person who is a national of the United States as defined in Title III of the immigration and Nationality Act; and  
b) for [Country], [ ]...’

## **B. Nationality under Contemporary MIT Provisions**

The Energy Charter Treaty provides in its article 1 that an investor is:

‘[...] (a) With respect to a Contracting Party:  
(i) A natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;  
(ii) A company or other organization organized in accordance with the law applicable in that Contracting Party;  
(b) With respect to a ‘third state’, a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraphs (a) for a Contracting Party.’

Article 17 of the Energy Charter Treaty adds another requirement:

‘(1) Each Contracting Party reserves the right to deny the advantages of this Part to a legal entity if citizens or nationals of a third state own or control such entity and if that



entity has no substantial business activities in the Area of the Contracting Party in which it is organized.’

The North American Free Trade Agreement addresses the concept in investor in its article 1139:

‘Party or a state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment’.

[...] ‘Enterprise’ is construed to be: ‘An entity constituted or organized under the laws of a Party, a branch located in the territory of a Party and carrying on business activities there.’

It should be further noted that ‘an enterprise of a Party need not be controlled by one or more citizens of that Party, provided it is constituted, organized or located under the laws, or in territory of such Party’. In view of inclusion of an ‘enterprise of a Party’ to the definition of ‘investor’, Rubin and Alexander contend that it effectively means that ‘most of the investor protections provided in Chapter 11 will extend to non-NAFTA controlled or owned enterprises that are based in another NAFTA country’. <sup>423</sup>

### **C. Nationality under ICSID Convention provisions**

The case of *Soufraki v The United Arab Emirates*<sup>424</sup> was the first arbitral proceeding of the International Centre for the Settlement of Investment Disputes, in which an individual investor has not been granted protection extended by virtue of article 25 (2) of the ICSID Convention according to the fact that he did not qualify for the nationality requirements enunciated by the Convention.<sup>425</sup>

The claimant filed a request for arbitration in ICSID, invoking provisions on protection afforded by the UAE to Italian citizens under the 1997 UAE-Italy bilateral investment treaty. He thereby claimed that he is an Italian citizen and provided his Italian passport as a proof thereof. The UAE rejected his claims, and it appears that the principal objection raised by the UAE was that ‘in 1991 Mr. Soufraki had acquired Canadian nationality without taking the steps necessary under Italian law to preserve his Italian nationality, with the result that he lost his Italian nationality in 1991 and was not therefore a national of

---

<sup>423</sup> S J Rubin and D C Alexander, *NAFTA and investment*, (Kluwer Law International 1995), p. 19.

<sup>424</sup> ICSID Case No ARB/02/7, IIC 131 (2004).

<sup>425</sup> A Sinclair, ‘Nationality requirements for investors in ICSID arbitration – the award in *Soufraki v. the United Arab Emirates*’ <<http://ita.law.uvic.ca/documents/CommentonSoufraki.pdf>> , accessed 29 December 2011.

Italy at the relevant times necessary for ICSID to have jurisdiction under Article 25 of the ICSID Convention.<sup>426</sup> It is interesting to note that the tribunal held:

‘Had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be’.<sup>427</sup>

At the same time, there had been instances when ICSID ruled to have jurisdiction *ratione personae* over disputes where a claimant was a legal person of the host country controlled by foreign nationals. For instance, in *Liberian Eastern Timber Corporation v Liberia* and *Kloeckner Industrie-Anlagen GmbH and others v Cameroon*, it was held that a mere existence of ICSID clause in a contract with a local company will be construed as an agreement to treat this local company as foreign because of foreign control. The Tribunal stated:

[...]What is needed, for the final provision of Article 25(2) (b) to be applicable is (1) that the juridical person, party to the dispute, be legally a national of the Contracting State which is the other party and (2) that this juridical person being under foreign control, to the knowledge of the Contracting State, the parties agree to treat it as a foreign juridical person.<sup>428</sup>

In case of absence of a formal or implicit agreement to treat the enterprise as foreign, ICSID opined that effective foreign control may be not only direct, but also indirect. In *Societe Ouest Africaine des Betons Industriels (SOABI) v Senegal*, all of the shares of the local company SOABI belonged to a legal entity incorporated in Panama, the then ICSID Non-Contracting State, which deprived ICSID of jurisdiction *ratione personae*. But the tribunal found nevertheless that the legal entity incorporated in Panama was controlled by nationals of Belgium, which was an ICSID Contracting State. In other words, ICSID has confirmed jurisdiction *ratione personae* over this case by effectively establishing that SOABI was under the indirect control of nationals of a Contracting State:<sup>429</sup>

---

<sup>426</sup> Ibid.

<sup>427</sup> ICSID Case No. ARB/02/7, IIC 131 (2004)

<sup>428</sup> UNCTAD, ‘Investor-State dispute settlement and impact on investment rulemaking’ <<http://www.unctad.org/Templates/Download.asp?docid=9438&lang=1&intItemID=2068>>, accessed 20 April 2010, p.13.

<sup>429</sup> Ibid.

‘[...]‘a juridical person’ which had the nationality of the Contracting State party to the dispute’, the phrase used in article 25 (2b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, had its head office, or has been incorporated in that State.’

In *Tokios Tokeles*, the tribunal opined:

‘[...] The ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive.’

The dissenting arbitrator held:

‘...when it comes to ascertaining the international character of an investment, the origin of the capital is relevant, and even decisive. True, the Convention does not provide a precise and clear-cut definition of the concept of international investment ..., and it is therefore for each ICSID tribunal to determine whether the specific facts of the case warrant the conclusion that it is before an international investment.’

In *Vacuum Salt Products Ltd. v Ghana*, in its objections to jurisdiction, the government of Ghana argued that Vacuum Salt was its national, was not controlled by foreigners. The tribunal unequivocally opined that whether foreign control did exist had still to be confirmed:

‘... the parties’ agreement to treat Claimant as a foreign national ‘because of foreign control’ does not ipso jure confer jurisdiction. The reference in Article 25(2b) to ‘foreign control’ necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.’

The tribunal investigated the ownership structure of Vacuum Salt and found that foreign national held merely 20 percent of shares of the entity as opposed to remaining 80 percent, which were effectively possessed by Ghanaian nationals. The Tribunal also examined other substantive issues related to ownership structure, such as the foreign investor’s management role. The findings ruled out the possibility of treating Vacuum Salt as a foreign entity even though it was organized in Ghana.

## **6.5. THE CONCEPT OF ‘CONTROL’ IN ARBITRATION<sup>430</sup>**

The concept ‘control’ is used in a great number of investment treaties to designate the requisite nexus between the claimant and the investment. For instance, the US Model BIT

---

<sup>430</sup> See UNCTAD, The Course on Dispute Settlement in International Trade, Investment and Intellectual Property, 2.4. Requirements *ratione personae*, at <[unctad.org/disputesettlement/course.htm](http://unctad.org/disputesettlement/course.htm)>, accessed 21 August 2012.

(2004) defines ‘investment’ as ‘every asset that an investor owns or controls, directly or indirectly’, whereas NAFTA stipulates that an ‘investment of an investor of a party’ is ‘an investment owned or controlled directly or indirectly by an investor of such party’. No definition of control is to be found in either treaty. The Netherlands Model BIT (1997) does not identify the requisite nexus in the definition of an investment but rather supplies definitions of ‘investment and ‘nationals’ and then extends investment protection to “investment of nationals’.

Whether or not the term ‘control’ is actually used in the text of the investment treaty, it is clear that it must be implied. In each and every case, the claimant must have had control over the investment that has been affected by measures of the host state in order to fall within the scope of the tribunal’s jurisdiction *ratione personae*.

The question is then how to define the ‘control’ for the purpose of satisfying the requisite nexus between the claimant and the investment. In giving effect to the ordinary meaning of the word ‘control’, reference must be had to general principles of property law and company law. The majority of investment treaties say nothing about the indices of control,<sup>431</sup> and international law in general does not purport to regulate the relationship between an individual or legal entity and its assets.

An investment is a bundle of rights to tangible or intangible property. The strongest form of control that an individual or legal entity can acquire over tangible or intangible property is the right of ownership. Full ownership of property entails that the owner has *prima facie* unlimited privileges of use over that property and *pima facie* unlimited powers to control and transmission, subject to the outer limitations upon these privileges and powers prescribed by the relevant municipal law of property.<sup>432</sup>

Schreuer contends:

‘On the basis of the Convention’s preparatory works as well as the published cases, it can be said that the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone.’

---

<sup>431</sup> Argentina has concluded several BITs with a protocol setting out objective criteria for control.

<sup>432</sup> J Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), 29-30.

The ICSID Convention does not define the term “foreign control”, but the drafting history indicates that control must be exercised by nationals of other Contracting States.<sup>433</sup> This interpretation excludes control by nationals of non-Contracting States or by nationals of the host State. This interpretation is in line with the objective of the Convention to promote the settlement of disputes between host States and nationals of other Contracting States.

An agreement on an investor’s nationality under Article 25(2)(b) ‘because of foreign control’ implies that such control is an objective requirement that has to be determined by Tribunal. In other words, an agreement on the nationality of an investor creates no more than a presumption that there is ‘foreign control’. Whereas an agreement on foreign nationality can be inferred from the existence of a consent agreement, no such an inference can be made in respect of foreign control. ICSID tribunals have invariably examined the actual existence of foreign control over the local company.<sup>434</sup> In situations where the element of control is lacking, the Tribunal will find that it has no jurisdiction.

The consideration of elements other than shareholding demonstrates a differentiated approach to the concept of ‘foreign control’. In addition to shareholding, indirect control, voting powers or ‘managerial control’ were taken into account by ICSID Tribunals.<sup>435</sup> The complexity inherent in the concept of foreign control is most evident in connection with indirect control. Indirect control refers to instances where a foreign corporation, controlling the local company in the host State, is itself controlled by nationals of other States. In that situation, the question arises whether a Tribunal should concern itself only with those who directly control the local company or whether it should look beyond the first layer and search for the chain of control that may be exercised by multiple investors. ICSID practice on this point is not uniform.

---

<sup>433</sup> See Energy Charter Treaty 1994, Article 26(7), 34 ILM 360, 400 (1995). But contrast Article 1117 of NAFTA, 32 ILM 605, 643 (1993). For a broader discussion see Schreuer, Commentary, Article 25, para. 535.

<sup>434</sup> Schreuer, Commentary, Art. 25, para. 551.

<sup>435</sup> *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 396; *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15/16; *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 182/3; *LETCO v. Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, 351; *Vacuum Salt v. Ghana*, Award, 16 February 1994, 4 ICSID Reports 342-351; *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review— Foreign Investment Law Journal 366-370 (1998).

In *Amco v. Indonesia*, the Tribunal discussed the possibility of examining control beyond the first level. The Indonesian Government argued that PT Amco, the local company, was not controlled by Amco Asia, a company owned by a national of the United States of America, since Amco Asia was, in turn, controlled by a Hong Kong company owned by a Dutch citizen. The Tribunal refused to search for indirect control beyond the first level of control and found that it was restricted to the immediate control exercised by the parent company of the local company.<sup>436</sup>

The Tribunal in *SOABI v. Senegal* took a different approach. SOABI, a company incorporated in Senegal, was controlled by a Panamanian company, Flexa, which in turn was controlled by Belgian nationals. In this case, it was critical for SOABI to convince the Tribunal to go beyond the first level of control since Panama was not a Contracting State, whereas Belgium was (and is) a Contracting State. The Senegalese Government disputed jurisdiction arguing that Panama was not a Contracting State, hence, the nationality requirements of Article 25 were not met.

The Tribunal stated that the Convention was not only concerned with direct control over a locally incorporated company. The Tribunal referred to the purpose of Article 25(2)(b) of the Convention in facilitating foreign investments through locally incorporated companies while still retaining their standing before ICSID. In that spirit, the Tribunal went beyond the direct control exercised by the Panamanian company and found that SOABI was, in fact, controlled by Belgian nationals.<sup>437</sup> There is no definitive legal position on the issue of indirect control as ICSID Tribunals have taken differing approaches. Scholarly opinion is also divided. One view is that the correct approach would be to allow a Tribunal to search for control by a national of a Contracting State until jurisdiction can be established.<sup>438</sup> Under another view, a Tribunal should look at the true controllers thereby excluding access to the Centre to juridical persons controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State.<sup>439</sup>

---

<sup>436</sup> *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 396. It should be noted that this finding was an obiter dictum: even if the Tribunal had decided to probe beyond the first level of control, it would have been able to assert jurisdiction because all the relevant nationalities were those of Contracting States.

<sup>437</sup> *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 182/3.

<sup>438</sup> Amerasinghe, C. F., Interpretation of Article 25(2)(b) of the ICSID Convention, in: *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Lillich, R. B./Brower, Ch. N. eds.) 223, 240 (1994).

<sup>439</sup> Schreuer, Commentary, Article 25, para. 563.

## 6.6. CONCLUSION

In this chapter the Author identified the difficulty that has emerged in practice is the relationship between the test for nationality prescribed in the investment treaty and the rules on nationality that form part of the law of the contracting state party. The Author explains that the challenges facing the concept of nationality in investment treaty arbitration originate from the ambiguities prevailing on choice of applicable law.

The Author contends that the question of jurisdiction *ratione personae* is a question of international law and the test of nationality applied by the investment treaty tribunals serve the very limited purpose of regulating who has access to the tribunal. It was elaborated that relevant provisions of investment treaties contain a *renvoi* to the law of the relevant contracting state party on nationality.

The Author then argues whether a conclusion as to the existence or absence of the relevant nationality based upon the law is dispositive? In other words, are there factors extraneous to determination of the existence or absence of the relevant nationality in accordance with the law of the contracting state party that can be taken into account by the tribunal?

This research affirms that if such factors exist, then it is clear that their source must be international law. It is submitted that there are such extraneous factors based upon principles derived from the international law of investment treaty arbitration.

One such principle must be integrity and sustainability of the investment treaty regime and it is possible to envisage extreme circumstances whereby a tribunal would be justified in declining its jurisdiction *ratione personae* despite having concluded that the claimant has the requisite nationality in accordance with the law of the relevant contracting state party.

In formulating these principles to apply in extremis, it is important for tribunals to be mindful of the object and purpose of investment treaties. The architecture of most investment treaties reveals a *quid pro quo*: to encourage the investment of capital in the contracting state party, minimum standards of treatment and are enforceable at the suit of the investor once the investment is made. But at the same time there is little justification in grafting the 'genuine link' requirements propounded by the international Court of Justice.

## 7. CHAPTER SEVEN: JURISDICTION RATIONE MATERIAE – INVESTMENT IN INVESTMENT ARBITRATION

### 7.1. INTRODUCTION

The 1965 ICSID Convention availed *locus standi* to sue the State for breach of its obligations under investment contract containing an ICSID clause or under the treaty on which ICSID jurisdiction is founded. This does not however mean that any obligation arising out of contractual or treaty liabilities of the parties can be reviewed in ICSID. Instead, the parties' ability to set the ICSID mechanism in motion presupposes that the other conditions laid down in the Convention have been met. According to article 25 of the ICSID Convention, ICSID's jurisdiction *ratione materiae* extends to 'any legal dispute arising directly *out of investment*'.

'A dispute arising out of an investment' is an element of definition which is fundamental to the jurisdiction of the International Center for the Settlement of Investment Disputes. Regardless of the importance of this notion, no definition of investment, nor even general description of what is meant by this concept, is to be found anywhere in the Convention. As Delaume puts it, this omission may have been rather intentional.<sup>440</sup>

What is an 'investment' under ICSID Convention? Possible answers to this query may be found in the analysis of this notion by arbitral tribunals, where primarily *ratione materiae* jurisdiction of ICSID has been challenged. Again and again one hears the contention that ICSID Convention is over-protective of the interests of the host state, in that states were given considerable latitude to regulate such matters as the definition of investment and the interpretation of investment treaties to which they had adhered.<sup>441</sup> Others declare that, in order to balance the interests of states and investors more evenly, a set of objective criteria should be applied.<sup>442</sup>

---

<sup>440</sup> G Delaume, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1966) 1 International Lawyer 70.

<sup>441</sup> M Hunter and A Barbuk, *Reflection on the Definition of an 'Investment'* (2005) Liber Amicorum in honour of Robert Briner, p. 381.

<sup>442</sup> Ibid.



The history of the ICSID Convention reveals contradiction between two competing camps – the supporters of highly curtailed ICSID jurisdiction, or of those supporting developing countries, and of capital-exporting countries advocating ‘wide-open jurisdiction over any foreign enterprise’.<sup>443</sup> Notwithstanding this tension underlying the scope of ICSID jurisdiction, a recent shift in ICSID jurisprudence towards restrictive view of investment is indicative of trendsetting, which runs counter to historical arrangement, whereby ICSID tribunals were deferring to states’ *ex ante* decisions as to what constitutes an investment or which categories of economic enterprises to protect.

In this chapter, the Author will try to address following questions and propose unified rules and principles based on which they might be clarified for future reference. Questions such as: What is the difference between a dispute arising directly out of an investment and a dispute arising from a direct foreign investment? Do the parties have an unlimited discretion in agreeing that a particular transaction is an investment? Is it conceivable that a particular transaction is covered by the definition of “investment” in a BIT but is still outside ICSID’s subject-matter jurisdiction? Who makes a decision regarding ICSID’s jurisdiction *ratione materiae*? Will an ICSID tribunal only examine its competence *ratione materiae* if prompted by a jurisdictional objection? Can operations preparatory to investments be regarded as investments under the ICSID Convention?

## **7.2. THE CONCEPT OF ‘INVESTMENT’ IN ARBITRATION**

### **A. Investment under Legal and Economic Realization**

A central thesis of this chapter is that an investment, in order to qualify for investment treaty protection, must incorporate certain legal and economic characteristics. The economic characteristics derive from common economic conception of foreign direct investment.<sup>444</sup> They are considered as the transfer of resources into the economy of the host state and the assumption of risk in expectation of a commercial return. The legal characteristics derive from the non-exhaustive example of an ‘asset’ that constitutes

---

<sup>443</sup> J Mortenson, ‘The Meaning of “Investment”’: ICSID’s Travaux and the Domain of International Investment Law’ (2010) 51 HJIL 259.

<sup>444</sup> See e.g.: A Adhar, Economic Development Institute of the World bank, Terms Used in Investment Decisionmaking: A Glossary (1996) 46; J Downes and J Goodman, Dictionary of Finance and Investment Terms (6<sup>th</sup> edn., 2003) 350.

‘investment’ in investment treaties, which generalizes the requirement as the acquisition of property rights in the host state.

It is essential that an investment have both the requisite legal and economic characteristics. If, by way of illustration, the legal characteristics of an investment were to be considered in isolation from the common sense economic meaning of that term, then, pursuant to some investment treaty definitions of an investment, a train ticket would qualify as a ‘claim to money or to any performance under contract, having a financial value’ and thus as an investment.

In its attempt at a comprehensive review of investment treaty precedents on the definition of an investment, the tribunal in *Malaysian Salvors v Malaysia* distinguished between a ‘typical characteristics approach’ and a ‘jurisdictional approach’.<sup>445</sup> For the purposes of this dichotomy, the former was said to reflect the characteristics of an investment articulated in *Salini v Morocco*,<sup>446</sup> whereas the latter reveals a strict adherence to the terms of the definition supplied by the investment treaty.

### **A. Investment under Contemporary BIT Provisions**

Article 1 of the China Model BIT (1997) defines ‘investment’ as:

‘1. [...] every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, include:

a. movable and immovable property ...; b. shares, debentures, stock and ...; c. claims to money ...; d. intellectual property rights, ...; e. business concession conferred by law ....

Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.’

Article 1 of the Germany Model BIT (2005) defines ‘investment’ as;

‘1. [...] every kind of asset which is directly or indirectly invested ... in the territory of the other Contracting State. The investments include in particular:

(a) movable and immovable property ...;

(b) shares of companies ...;

(c) claims to money ...;

(d) intellectual property rights...;

(e) trade-names, trade and business secrets, technical processes, know-how, and good-will;

---

<sup>445</sup> *Malaysian Salvors v Malaysia* (preliminary Objections) para. 70.

<sup>446</sup> (Preliminary Objection) 6 ICSID Rep 400, 413/52.

(f) business concessions under public law,....

In the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other Contracting State;...’

Article 1(a) of the Netherlands Model BIT (1997) defines ‘investment’ as:

‘[...] every kind of asset and more particularly, though not exclusively:

- (i) movable and immovable property ...;
- (ii) rights derived from shares, bonds and ...;
- (iii) claims to money, to other assets or to any performance having an economic value;
- (iv) rights in the field of intellectual property, technical processes, good will ...;
- (v) rights granted under public law or under contract, ....’

Article 1(a) of *the* United Kingdom Model BIT (2005, with 2006 amendments) defines ‘investment’ as:

‘[...] every kind of asset, owned or controlled directly or indirectly, ..., includes:

- (i) movable and immovable property ...;
- (ii) shares in and stock and debentures ...;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, goodwill, technical processes and know-how;
- (v) business concessions conferred by law or under contract, ....

A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement;...’

Section (A) of the United States of America Model BIT (2004) defines ‘Investment’ as:

‘... every asset that an investor owns or controls, directly or indirectly, ..., including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

## **B. Investment under ICSID Convention**

The concept of investment is central to the ICSID Convention's subject-matter jurisdiction. Therefore, it may seem surprising that the Convention does not offer any definition or even description of this basic term.

The Documents Concerning the Origin and the Formulation of the Convention<sup>447</sup> record the background of this omission. The chairman of the sessions in which the Convention was prepared, Aron Broches, was reluctant to include a definition of 'investment' since the parties' agreement to submit disputes to ICSID would in any event always be required. Nevertheless, a series of proposals led to the following definition of investment in Article 30 of the Convention's First Draft:

'[A]ny contribution of money or other assets of economic value for an indefinite period, or, if the period be defined, for not less than five years.'<sup>448</sup>

This definition was not satisfactory to all participants. Some found it too imprecise, while others wished to introduce qualifications addressing elements such as profit and risk or the host State's development interests. Yet others found that the definition could be unnecessarily restrictive. A more detailed definition was drafted, but a proposal that omitted any definition of the term eventually prevailed.

One of the main reasons for resisting a definition of investment in the Convention was the fear that it could give rise to lengthy jurisdictional discussions even if the parties' consent to submit a dispute to ICSID was well established. The concerns did not necessarily involve the notion of investment itself, but rather what kind of investment would be a suitable subject-matter for the ICSID system. Proposals were made for minimum amounts, or for the exclusion of investment that pre-dated the Convention. Mr. Broches felt that this aspect of the Centre's jurisdiction was appropriately left to be controlled by the requirement of consent. He subsequently remarked 'that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to

---

<sup>447</sup> See History of the Convention and the description in Schreuer, Commentary, Article 25, paras. 80-86.

<sup>448</sup> History, Vol. I, p. 116.

jurisdiction.’<sup>449</sup> The relevant passage of the World Bank Executive Directors’ Report accompanying the Convention (see Appendix 3) reads as follows:

‘27. No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of dispute which they would or would not consider submitting to the Centre (Article 25(4)).’<sup>450</sup>

In fact, a number of attempts were made in the preparation of the Convention to include a definition of ‘investment’ but they all failed.

Therefore, the approach adopted in the Convention gives potential parties to ICSID arbitration wide discretion to describe a particular transaction, or a category of transactions, as investment. Ultimately, however, the requirement of an investment is an objective one.<sup>451</sup> The parties’ discretion results from the fact that the notion of investment is broad and that its contours are not entirely clear. But the parties do not have unlimited freedom in determining what constitutes an investment.<sup>452</sup> Any such determination, while important, is not conclusive for a tribunal deciding on its competence. Under Article 41 of the Convention, a tribunal may examine on its own motion whether the requirements of jurisdiction are met.

While it is not possible to give a precise definition of “investment” it is possible to identify certain typical features.<sup>453</sup>

- The project should have a certain duration.
- There should be a certain regularity of profit and return.
- There is typically an element of risk for both sides.
- The commitment involved would have to be substantial.
- The operation should be significant for the host State’s development.

---

<sup>449</sup> A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 *Columbia Journal of Transnational Law* 263 at 268 (1966).

<sup>450</sup> 1 ICSID Reports 23, 28.

<sup>451</sup> *Ibid.* at para. 90.

<sup>452</sup> *Ibid.* at para. 89.

<sup>453</sup> *Ibid.* at para. 122.

These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.

## **B. ‘Restrictive’ Test of Investment**

It is noteworthy that roots of the restrictive jurisdictional test professed by *Fedax* and *Salini* tribunals can be traced back to findings of Christoph Schreuer articulated in his seminal treatise on ICSID convention. Preceding *Fedax* and *Salini*, Schreuer posited five elements typical to most of investment transactions which would fall under ICSID jurisdiction.

Firstly, projects should have certain *duration* as there is an expectation of a longer term relationship. Secondly, a certain regularity of profit should be also relevant, although, as Schreuer puts it, a one-time lump sum agreement, albeit possible, would be untypical. According to Schreuer, assumption of risk may be alluded to as a function of duration and expectation of profit and, thus, regarded as third element of an ‘investment’. Fourthly, the commitment is supposed to be substantial. Thus ‘a contract with an individual consultant would not be substantial. The fifth element – ‘operation’s significance for the host State’s development’ – was referred to as an unconventional characteristic of an ‘investment’ in general, but the World Bank’s Executive Directors Report on ICSID Convention and the Preamble of the Convention reflect that ‘development is part of the Convention’s object and purpose’.<sup>454</sup>

## **A. Fedax Case**

In *Fedax v Venezuela*, Claimant was a company established and domiciled in Curacao (Dutch Antilles), which filed the request for arbitration with regards to a dispute arising out of promissory notes issued by the Republic of Venezuela and assigned by way of endorsement to *Fedax*. Republic of Venezuela raised objections to ICSID’s jurisdiction on the ground that there had been no investment for the purposes of the Convention. The Respondent argued that *Fedax* acquired promissory notes issued by the Republic of Venezuela in connection with the contract made with the Venezuelan corporation *Industrias Metalurgicas Van Dam C.A* by way of endorsement only. Venezuela further

---

<sup>454</sup> C Schreuer, ‘Commentary on the ICSID Convention’ (1996) 11 ICSID Review - FILJ 358.p. 140.

contended that promissory notes did not qualify as an investment because such transaction was not tantamount to a “direct” foreign investment which usually involves ‘a long term transfer of financial resources - capital flow - from one country to another in order to acquire interests in a corporation’, and which normally entails certain risks to potential investor.’<sup>455</sup>

In view of jurisdictional objections, the Tribunal first referred to article 25 (1) of ICSID Convention. In reply to the query of textual interpretation of Respondent’s arguments as to ‘direct foreign investment’, the Tribunal noted that text of article 25(1) of ICSID Convention confers jurisdiction of ICSID over ‘any legal dispute arising *directly* out of an investment’ [emphasis added]. The emphasis is of paramount importance as it is apparent that the term ‘directly’ has bearing on the dispute in question, and not on the *investment* itself. Hence, despite Respondents contention that the disputed transaction was not a ‘direct foreign investment’, the Tribunal held that jurisdiction can be established in respect of investments that are not of ‘direct’ nature.

Furthermore, in order to examine arguments of the Republic of Venezuela as to definition of ‘investment’, the Tribunal made references to the Report of Executive Directors of the World Bank on the ICSID Convention (see Appendix 3), which mentioned the following:

‘During the negotiations several definitions of ‘investment’ were considered and rejected. It was felt in the end that a definition could be dispensed with ‘given the essential requirement of consent by the parties’. This indicates that the requirement that the dispute must have arisen out of an ‘investment’ may be merged into the requirements of consent to jurisdiction. Presumably, the parties’ agreement that a dispute is an ‘investment dispute’ will be given great weight in any determination of the Centre’s jurisdiction, although it would not be controlling.’

In addition to it, it was noted by few distinguished commentators of the ICSID Convention that during the history of its negotiations, jurisdiction over loans, suppliers, credits, outstanding payments, ownership of shares and construction contracts, among other aspects, was left to the discretion of the parties.<sup>456</sup> The Tribunal further noted that six promissory notes in question were issued by the Republic of Venezuela in order to

---

<sup>455</sup> Brief by the Republic of Venezuela on objections to jurisdiction, 17 January 1997, at 8 as cited in E Helgeson and E Lauterpacht *ICSID Reports* (2002) 189

<sup>456</sup> Convention History, Vol. II, at 261, 474, 451, 542, 661, 500 as cited in E Helgeson and E Lauterpacht, p. 191.

acknowledge its debt for the provision of services under a contract signed in 1988 with Industrias Metalurgicas Van Dam C.A.; Venezuela had simply received a loan for the amount of the notes for the time period specified therein and with the respective obligation to pay interest. In light of these deliberations, the Tribunal affirmed that promissory notes are by default an instrument of credit and a rather typical financial instrument which records that a loan has been made.

In reply to Respondent's query regarding the nature of the underlying service transaction with Industrias Metalurgicas Van Dam CA, the Tribunal opined that the issue whether such transaction would have been qualified as an investment had Fedax NV, a Dutch company, entered into exactly the same transaction with the Republic of Venezuela as had Industrias Metalurgicas Van Dam CA falls outside the Respondent's contentions. In Tribunal's view, the central issue to the jurisdictional debate was not the nature of the underlying service transaction, but the very act of subsequent endorsement of promissory notes to foreign holders and Tribunal's treatment thereof.

It followed that the definition of 'investment' for this particular case was controlled by consent of the respective parties, and interpretations set forth in Article 1 (a) of the Netherlands-Venezuela BIT govern the jurisdiction of ICSID:

'The term Investments' shall comprise every kind of asset and more particularly though not exclusively .....

(ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures;

(iii) titles to money, to other assets or to any performance having an economic value...'

The foregoing definition evidences that the Contracting Parties to this BIT conferred a very broad meaning upon the concept of 'investment'. Furthermore, the promissory notes were issued by the Republic of Venezuela under the terms of the Law on Public Credit, which specifically governs public credit operations aimed at raising funds and resources "to undertake productive works, attend to the needs of national interest and cover transitory needs of the treasury".<sup>457</sup> That is to say that the transaction in question, i.e. issuance of promissory note and the endorsement thereof by Fedax, was no ordinary

---

<sup>457</sup> Ley Organica de Credito Publico, 12 August 1983, *Gaceta Oficial de la Republica de Venezuela*, 14 de Septiembre de 1983, as amended, *Gaceta Legal*, No. 594, 30 de Septiembre de 1983 as cited in E Helgeson and E Lauterpacht, p. 198.



commercial enterprise, which involved ‘a fundamental public interest’.<sup>458</sup> The status of the promissory notes under the Law of Public Credit serves as important evidence that the type of investment in question ‘is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter’.<sup>459</sup>

Tribunal further made reference to Schreuer’s descriptive reflections. It therefore argued that:

‘the duration of the investment in this case meets the requirement of the Law [on Public Credit] as to contracts needing to extend beyond the fiscal year in which they are made’. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. And most importantly, there is clearly a significant relationship between the transaction and the development of Venezuela, as specifically required under the Law [on Public Credit] for issuing the pertinent financial instrument.’

In view of the foregoing, the Tribunal reached the conclusion that the transaction in question was in conformity with the basic characteristics of an ‘investment’ earlier articulated by Schreuer.

## **B. Salini Case**

In the *Salini v. Kingdom of Morocco* the dispute arose around the contract for construction of part of a highway connecting Rabat and Fes in Morocco signed between two Italian companies, *Salini Costruttori S.p.A. and Italstrade S.p.A* (hereinafter, Salini), and the state-controlled ADM, a limited liability company that built, maintained and operated highways and various road works in accordance with the Concession Agreement concluded with the Moroccan Ministry of Infrastructure and Professional and Executive Training. However, due to disagreement over performed works, on May 1, 2000 *Salini* filed a Request for Arbitration against the Kingdom of Morocco.

In reply to *Salini* claims, Morocco raised an objection to jurisdiction in a letter sent to ICSID on July 17, 2000. It maintained that the Request was not admissible because (1) it was premature, that the Tribunal had (2) no jurisdiction *ratione personae* and *ratione*

---

<sup>458</sup> Ibid.

<sup>459</sup> See E Helgeson and E Lauterpacht, p. 199.

*materiae* and that (3) *Salini* ‘had waived the possibility of pursuing its claims under the BIT by signing the agreement which provided for jurisdiction under Moroccan administrative law in domestic courts’.<sup>460</sup> For their part, *Salini* argued that consent given by the Kingdom of Morocco to ICSID jurisdiction via BIT should prevail over contractual acceptance of another forum. In other words, Claimant contended that submission of the matter to the courts of Rabat would not imply a waiver of ICSID jurisdiction, particularly since the referral to administrative courts was required due to public nature of the contract.

In reply to Respondent’s contentions, *Salini* argued that the contract at issue was an investment within the meaning of Articles 1(c) and 1(e) of the BIT, which referred to ‘rights to any contractual benefit having an economic value’ and ‘any right of an economic nature conferred by law or by contract.’ The Kingdom of Morocco further alleged that these provisions ‘dilute the notion of investment into a broader notion of economic rights’ and that ‘articles 1(c) and 1(e) should, therefore, be read in conjunction with paragraph 1 of Article 1, which refers to the laws and regulations of the host State of the investment’,<sup>461</sup> and as per Moroccan Decree 2-98-482 of December, the transaction should be characterized as a mere contract for services.

The Tribunal, however, while noting the Respondent’s contention as to reference to laws and regulations of the host state, argued that ICSID’s jurisdiction was contingent on existence of investment within the meaning of the BIT as well as that of the ICSID Convention. The Tribunal thereby affirmed double-jurisdictional nature of the dispute and further disagreed with Morocco’s respective argument stating that paragraph 1 of Article 1 ‘refers to the validity of the investment and not to its definition’.<sup>462</sup>

It followed that the investment in question should have been ‘the object of contracts approved by the competent authorities’. In Tribunal’s view, this condition was satisfied as, *inter alia*, ‘different stages leading to the signature of the construction contract involved various interventions by the authorities’.<sup>463</sup>

---

<sup>460</sup> E Gaillard and Y Banifatemi, ‘Introductory note to ICSID: *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (Proceeding on jurisdiction)’ (2003) 42 ILM 606.

<sup>461</sup> *Salini v Kingdom of Morocco* (2003) 42 ILM 609.

<sup>462</sup> *Salini v Kingdom of Morocco* [2003] 42 ILM 609, at 46.

<sup>463</sup> *Ibid*, page 48.

Referring to the second jurisdictional requirement set forth in the ICSID Convention, the Tribunal noted the unprecedented nature of the debate over the notion of investment in ICSID jurisprudence. The Tribunal asserted that definition of investment in consent instrument, i.e. the BIT, should be also subject to an objective test, hence, not merely subjective, i.e. pursuant to the parties' will.

Following the lead professed by Schreuer, it further made references to Fedax tribunal's opinion as to jurisdictional criteria implied by article 25 (1) of the ICSID Convention – contributions, a certain duration of performance of the contract, participation in the risks of the transaction, the contribution to the economic development of the host State – and 'converted these descriptive reflections into a prescriptive set of requirements'.<sup>464</sup>

The Tribunal examined claimant's submissions as to its contributions, which included know-how, the necessary equipment and qualified personnel, production tool on the building site, loans to finance required purchases and a bank guarantee. Therefore, *Salini's* contributions were undeniable and so was the duration of the commitment, which was fixed at 32 months and later extended to 36 months. With regards to existence of risk, the Tribunal argued that this stemmed from the nature of the contract, which allowed for, *inter alia*, premature end of contract, and risk of potential increase in the cost of labor, any accident or damage to property, etc.<sup>465</sup>

As to the requirement of contribution to host state's development, the Tribunal also opined that in most countries similar infrastructure projects fall under the tasks to be executed by State or other public authorities. In addition to that, Claimant was able 'to provide the host State of the investment with know-how in relation to the work to be accomplished'.

Having considered carefully all abovementioned factors within the context of the facts, the Tribunal concluded that the contract between ADM and the Italian companies constituted an investment pursuant to Article 1 and 8 of the BIT.

---

<sup>464</sup> J Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 HJIL, p. 272.

<sup>465</sup> *Salini v Kingdom of Morocco* [2003] 42 ILM 609, p.55.

### C. Interpretation of the Restrictive Test (Objective and Subjective)

Critics of the restrictive test, introduced by ICSID tribunals, claim that such test is contradictory to the expectations of the founding fathers of the ICSID Convention. Schreuer argued that those five features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of an investment protected under the ICSID Convention.

Mortenson, for instance, examines the restrictive approach in detail and reaches the conclusion that at least three criteria were actually voted against while the Convention was drafted initially. In particular, those features are substantiality, contribution to the development of a state, duration. Remarkably, “merely” commercial factors referred to as another important screening factor was also added into the foregoing list.

The necessity of policy flexibility has been the main rationale for those advocating deference to state’s own legal interpretations of an investment enterprise and opposing the restrictive *Salini’s* threshold. In Mortenson’s view, such approach allows different Convention signatories to pursue various investment proliferation policies at any given moment in time.<sup>466</sup> Additionally, it makes it possible for regime participants to adapt to different political, ideological and economic realities. Advocates of deference to state ex ante decisions as to protected investments and respective commitments suggest that tribunal need to make references to state’s choices with regards to qualifying a particular enterprise as an ‘investment’.<sup>467</sup> It is argued that flexibility enables host states to, *inter alia*, police the boundaries of protected investments and limit or decline ICSID jurisdiction.<sup>468</sup> It follows that central to this viewpoint is the recommendation for tribunals to ‘root any narrowing construction in the BIT, contract or other consent document that opened the ICSID doors in the first place’.<sup>469</sup>

At the same time, according to Loncle, analysis of the ICSID jurisprudence on the definition of investment, notwithstanding the criticisms spurred over so-called ‘*Salini*

---

<sup>466</sup> J Mortenson, ‘The Meaning of “Investment”’: ICSID’s Travaux and the Domain of International Investment Law’ (2010) 51 HJIL, p. 302.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid, p. 303

<sup>469</sup> Ibid. p. 317

test', leads to the conclusion that only a few economic operations have not been so far qualified as investment. As evidenced by the tribunal in *Mihaly v. Sri Lanka*, expenses relating to studies carried out by the investor at pre-investment stage do not amount to an investment. Bank guarantees would also fall outside the scope of the definition, as the tribunal in *Joy Mining v Egypt* opined.

In Loncle's view, almost all other economic operations can be qualified as an "investment".<sup>470</sup> It is further argued that the existence of the agreement between the parties to qualify an economic operation as an investment would not suffice, and the arbitrators would not be bound by such agreement. Loncle refers to double-jurisdictional nature of treaty-based ICSID jurisprudence and contends that arbitrators 'have the obligation to carry out such double test to the extent the tribunal is empowered by the Convention, on one hand, and by the parties' agreement, on the other'.<sup>471</sup>

### **7.3. THE CATEGORIES OF INVESTMENT (CASE LAW)**

#### **A. Intangible Securities, Bonds and Shares**

##### *Joy Mining Machinery Limited v. The Arab Republic of Egypt*<sup>472</sup>

This dispute between Joy Mining Machinery Limited and the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt arose out of a Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project, particularly due to parties' disagreements over technical aspects related to the commissioning and performance tests of the equipment. Although Joy Mining was paid the full purchase price of the equipment in accordance with the Contract, the guarantees have not been released by Egyptian Government.

Following denial to release bank guarantees, Joy Mining submitted the dispute to ICSID arbitration under the UK-Arab Republic of Egypt BIT, claiming that the Contract was an investment under the Treaty and that the Respondent's denial to release these guarantees is

---

<sup>470</sup> J-M Loncle, 'The Investment Notion under ICSID Decisions' (2006) 3 International Business law Journal 321.

<sup>471</sup> Ibid. p. 330.

<sup>472</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11).

the violation of the Treaty. Meanwhile, Egyptian Government objected to the jurisdiction of the Tribunal submitting that certain conditions of Articles 25 and 26 of the ICSID Convention and the BIT were not fulfilled, particular the jurisdictional requirement for a dispute to arise directly from *investment*.

Respondent further contended that contractual conditions were ordinary commercial terms. In fact, the Respondent asserted that providing bank guarantees was merely a contractual obligation, and these could not be legally released as long as there was a claim for failure to perform under the Contract and no settlement was reached in this regard by means of dispute resolution mechanisms available under the Contract.

In reply to Respondents contentions, Joy Mining, the Claimant, accepted the fact that letters of guarantee are normally required in commercial transactions, but argued that it was not normal at all to require the guarantee of over 97% of the Contract price, as it was required in this case. It further maintained that a bank guarantee was an investment under the BIT. Article 1 of the UK-Egypt BIT includes in the definition of investment, among other elements, every kind of asset, mortgage, lien or pledge, and claims to money or to any other performance under contract having a financial value.

The Tribunal first examined the meaning and extent of Joy Mining's claims in light of the BIT. It established that inclusion of a contingent liability such as bank guarantee under the heading of protected investment within the meaning of Article 1 of the BIT, it should go far beyond the concept of investment, even if broadly defined. The Tribunal concluded that parties to a dispute should also satisfy the objective requirement of article 25 of the ICSID Convention. Otherwise, as it was argued by the Tribunal, Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision. Summarizing the elements that an activity must have in order to qualify as an investment, the Tribunal made references to observations made in *Fedax* and *Salini*, i.e. that the project in question should have certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development.

The Tribunal noted that the scope of the Contract was to replace and procure Longwall mining equipment, this being an element of normal sales contracts. The duration of the commitment was not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage. Neither was therefore the regularity of profit and return. Risk, however, might have been in place indeed, but it was not different from the risk involved in any commercial contract, including the possibility of contract termination. Therefore, the conclusion it reached was that it lacked jurisdiction to hear the dispute as the claim fell outside the scope of both the BIT and the Convention.

*CMS Gas Transmission Company v Argentine Republic* –

In *CMS v. Argentine Republic*, the disagreement developed over investments made by CMS in Argentina. In late 1989, in an attempt to end the economic crisis of late 1980s Argentina adopted an economic recovery plan which, among others, encompassed privatization program of utilities. In addition to privatization efforts, previously monopolized gas sector led by Gas del Estado, a national state-owned monopoly, became subject to unbundling and was therefore divided into several transportation and distribution companies to be privatized.

Unbundling and privatization led to formation of TGN, an investment of CMS and one of the companies incorporated as a result of the foregoing attempts. According to legislation of the Argentine Republic and the license granted to TGN, tariffs were to be calculated in U.S. dollars, but conversion to local currency was to be effected at the time of billing to the clients.

The Claimant also argued that under the regime tariffs were also to adjust every six months in accordance with the United States Producer Price Index (PPI). It was, however, noted that Argentina was of different opinion as to the nature and legal effects of the framework for TGN's operations, hence did not follow them. As a result, CMS filed a request for arbitration in July 2001 which was related mainly to the decisions taken in respect of application of the PPI to tariffs in the gas sector. Further, in July 2003, the Tribunal rendered its decision as to ICSID jurisdiction and affirmed its competence to proceed to merits of the dispute. However, in an Award of 12 May 2005, the Tribunal denied CMS's claims of expropriation of its investment under Article IV of the Argentina-

US BIT and Respondent's allegedly discriminatory and arbitrary treatment of same contrary to protection granted by Article II(2)(b) of the BIT.

On the other hand it held that failure of the Argentine Republic to grant fair and equitable treatment was in breach of Article II(2)(a) of the Treaty and that there was violation of binding commitments entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty. Argentine Republic wasn't satisfied with the Award and thus asked ad hoc Committee to annul this Award. In its annulment application, one of the main submissions of Argentina was that the Tribunal manifestly acted ultra vires as requirements of article 25 of ICSID Convention was not fulfilled.

After reviewing the submission, the Committee confirmed that Article 25 of the ICSID Convention did not incorporate any definition of investment and contended that terms of the BIT or of other consent instruments would be of relevance. In the present case, this definition is provided for by Article I of the Argentina-US BIT which states:

'Investment means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation a company or shares of stocks or other interests in a company or interests in the assets thereof.'

As to shareholder equity, it was opined that 'the BIT contains nothing which indicates that the investor in capital stock has to have a majority of the stock or control over the administration of the company'.<sup>473</sup> In other words, minority shareholding falls under the heading of an investment as also evident in earlier ICSID jurisprudence. Such equity participation was also referred to in article I(1) of the BIT. As CMS made capital investment in TGN covered by the BIT, and for this reason, the Committee concluded that there was no exercise of excess powers in this respect by the Tribunal which rendered the award in May 2005.

## **B. Pre-Investment Expenditure and Pure Contractual Claims**

Prospective investors may expend significant sums in the negotiation phase leading up to the conclusion of an investment agreement or a concession contract. If a dispute arises

---

<sup>473</sup> *CMS v Argentine Republic*, (Decision on annulment, 25 September 2007) ICSID Case No. ARB/01/8.



before the agreement materializes and negotiations are interrupted, will the project expenditures qualify as an investment for the purpose of ICSID jurisdiction?

The problem is highlighted by the fact that some treaties grant potential investors a right to establishment under certain circumstances.<sup>474</sup> This raises the question whether these entry rights are covered by the concept of investment under the ICSID Convention.

**Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka**<sup>475</sup>—

On 29 July 1999, the ICSID received request for arbitration from Mihaly International Corporation, a company established under the laws of the United States of America, against the Democratic Socialist Republic of Sri Lanka. The case concerned construction and operation of power generation facility on a build-operate-transfer (BOT) basis. The Parties signed Letter of Intent, Letter of Agreement, and Letter of Extension, however, no investment agreement has ever been signed by and between Mihaly and Sri Lanka. Ultimately when the offer made by Mihaly was rejected by the host state and Mihaly was unable to proceed with the project, it brought claim against Sri Lanka for expenses incurred during the negotiation and preparation phase of the investment project.

In reply to Claimant's submissions, Sri Lanka raised two main objections to the jurisdiction of the Center. Notwithstanding the fact that these objections referred to the jurisdiction *ratione personae* and *ratione materiae*, fundamental and most controversial contentions of both Parties were concentrated upon the existence of an investment for the purposes of Article 25 of the Convention.

The Claimant argued that 'the development phase activities were as essential for the successful commercial operation of the BOT project as was the physical construction of a plant, and that it was standard practice accepted by host governments, lenders and other equity investment to include the sponsors' development expenditures in the investment cost'. In response to Claimant's arguments, the Respondent did not rule out the possibility of including sponsors' development expenditures in the cost of investment for accounting purposes '*provided there was finally an agreement or consent of the host government to*

---

<sup>474</sup> See Dolzer/Stevens, *Bilateral Investment Treaties*, 50-57. See also Arts. 1102 and 1103 of the NAFTA..

<sup>475</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2 (March 15, 2002)

*receive or admit the investment in question*’ [emphasis added]. Mihaly cited three documents – Letter of Intent, Letter of Agreement and Letter of Extension – as evidence of Sri Lanka ‘agreement or authorization or awareness, if not acquiescence and approval’ for Mihaly to make an investment under the proposed project.

The tribunal affirmed that most commercial activities nowadays involve spending of huge sums on pre-investment preparations. In Tribunal’s view, hardly would the relevant qualification be governed by the amount spent, rather ‘it is always a matter for the parties to determine at what point in their negotiations they wish to engage the provisions of the Convention by entering into an investment’.<sup>476</sup> It went on to note that parties could have agreed to treat formation of a South Asia Electricity Company as ‘the starting point of the admitted investment’.<sup>477</sup> Nonetheless, according to core facts, it was obvious that the Respondent clearly indicated in various documents, in fact referred to by the Claimant, that ‘it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made’.<sup>478</sup>

The Tribunal concluded in regard of the Letter of Intent, of Agreement, and of Extension issued by and on behalf of the Government of Sri Lanka that no commitment or obligation was undertaken by either of the parties. It was noted that evidence of qualification of such expenditure as an investment for the purposes of ICSID Convention was to be found in ‘conventional law or in customary law’.<sup>479</sup> Mihaly was also not able to prove that development expenses could have been defined as investment within the similar context and in the absence of undertaking from the host State, as no evidence of relevant treaty interpretation or practice of states on that matter had been furnished by Claimant to the Tribunal. Therefore, the Tribunal concluded that it was unable to accept this type of expenditure as an investment protected under ICSID Convention.

### **C. Contractual Claims of BIT’s Umbrella Clause**

*Société Générale de Surveillance SA v Islamic Republic of Pakistan* –

---

<sup>476</sup> *Mihaly v Sri Lanka* (2002) 41ILM 867, p. 51.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid.* p. 60.

In *SGS v. Pakistan*, the basis for bringing the contractual dispute to ICSID was the pre-shipment inspection (hereinafter referred to as “PSI”) agreement, under which SGS undertook to inspect through SGS offices and affiliates goods, which were to be exported to Pakistan, and at ports of Pakistan jointly with Respondent’s customs authorities, and several articles of the Switzerland-Pakistan BIT, including, *inter alia*, articles 3(1), 4(1), 9(2) and 11.<sup>480</sup> Article 9(2) of the BIT provided for ICSID arbitration, while article 11 was referred to as a typical ‘umbrella clause’, or so-called ‘observance of undertakings’ clause, which aims at bringing contractual claims within the ambit of the BIT:

‘Either Contracting Party *shall* constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.’

The contractual validity term of five years was subject to automatic renewal provided neither party objected to such renewal in writing.<sup>481</sup> The PSI Agreement came into effect in January 1995; however, in December 1996 the Respondent informed SGS that the PSI Agreement was terminated with effect from March 1997.<sup>482</sup>

SGS filed the suit against Pakistan claiming that the PSI agreement had not been validly terminated by the Respondent and therefore such unlawful and ineffective termination of the PSI Agreement, violations of the PSI Agreement as well as of the BIT therefore gave rise to Pakistan’s liabilities under the PSI agreement and the BIT.<sup>483</sup>

In its objections to jurisdiction, Pakistan’s fundamental argument for dismissing ICSID’s jurisdiction was the PSI Agreement’s dispute resolution clause which stipulated that any dispute, controversy or claim arising out of, or relating to the Agreement, should be referred to arbitration under the Arbitration Act of the Pakistan.

Among other claims, Pakistan alleged that ICSID’s jurisdiction should be dismissed on the basis of article 2 of Switzerland-Pakistan BIT as SGS’s activities under the PSI Agreement did not constitute an investment within the territory of Pakistan since SGS’s

---

<sup>480</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, at 11.

<sup>481</sup> *Ibid.* at 14.

<sup>482</sup> *Ibid.* at 16.

<sup>483</sup> *Ibid.* at 36.

obligations were performed outside Pakistan through SGS controlled or affiliated entities.<sup>484</sup> The Respondent further contended that while SGS may have injected funds into offices and personnel in various ports around the world to render services under the PSI Agreement, this did not involve an investment in the territory of Pakistan.

In reply to Respondent's arguments, SGS observed that according to article 1 of the BIT the term 'investment' was to include 'every kind of asset including, inter alia, claims to money or to any performance having an economic value and concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law'.<sup>485</sup> SGS also submitted that ICSID jurisprudence holds that 'an investment need not be physically or directly made in the territory to satisfy requirements'<sup>486</sup> of provisions such as Article 2 of the BIT. According to SGS, regardless of where activities arising out of the PSI Agreement were performed, SGS's investment was, in any event, made within the territory of Pakistan as significant value of funds was injected into Pakistan's territory. SGS was also of opinion that the Respondent had in fact recognized that SGS was making an investment as it required SGS to obtain an authorization from its Board of Investment for the opening and operation of the offices.

After considering claims of both parties, the Tribunal held that non-exhaustive definition of 'investment' provided in Swiss-Pakistani BIT's article 1 was sufficiently broad to encompass the PSI Agreement as the Agreement's performance, by granting SGS the right to carry out pre-shipment inspection services, gave rise to 'claims to money'. The Tribunal further noted that 'Pakistan effectively granted SGS a public law concession, since SGS was conferred certain powers that ordinarily would have been exercised by the Pakistani Customs service', and 'such rights as SGS exercised pursuant to the PSI Agreement were rights given by law and by contract'.<sup>487</sup>

However, the debate over whether the Tribunal had jurisdiction 'to determine SGS's claims which are grounded on alleged violations by Pakistan of certain provisions of the

---

<sup>484</sup> Ibid. at 75.

<sup>485</sup> Ibid. at 123.

<sup>486</sup> Ibid. at 124.

<sup>487</sup> Ibid. at 135.

BIT’ or its claims ‘grounded on alleged breaches of certain provisions of the PSI Agreement’, or on both types of claims, was alluded to by Tribunal as being of the central importance. It therefore opined:

‘[...]BIT claims and contract claims appear reasonably distinct in principle. ... in case where ... a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract’. ..., the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state... cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty. [...]

We conclude that the Tribunal has .... We do not consider that, that jurisdiction would to any degree be shared by the PSI Agreement arbitrator.’

That is to say, the Tribunal declined jurisdiction over those claims arising solely out of the PSI Agreement and conferred it over BIT’s claims, particularly in respect of Pakistan’s obligation ‘to promote and protect investment in Pakistan’ (article 3(1) and 4 (1) of the BIT), ‘ensure fair and equitable treatment of investment’ (article 4(2) of the BIT), ‘to refrain from taking measures of expropriation or measures having the same nature and effect without providing effective and adequate compensation’ (article 6(1) of the BIT).

#### **D. Rights to Future Income and Claims to Money**

##### *Société Générale de Surveillance SA v. Republic of the Philippines* –

SGS was part of a large Swiss group providing certification services based on pre-shipment inspections carried out on behalf of the governmental authorities of the Philippines in the countries of export. Its services to Philippines covered pre-shipment inspection of not only quality, quantity and export market price, but also ‘sought to verify compliance with import regulations, the declared value of goods and their classification for customs purposes’.<sup>488</sup> In addition to it, SGS was to assist in modernization of customs and tax infrastructure in the Philippines. Two successive contracts were signed between SGS and the Philippines in 1986 and 1991 (hereinafter referred to as “Agreement”) and endorsed accordingly by the President of the Philippines. Agreement was further extended up until March 2000<sup>489</sup>, at which point SGS’s services under the agreement were

---

<sup>488</sup> *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, at 12.

<sup>489</sup> *Ibid.* para 13-14.

discontinued.<sup>490</sup> Services rendered by SGS were partially paid for. Request for arbitration, however, was premised on alleged failure of the Philippines to settle the balance, which, in Claimant's view, deprived SGS of the returns on its investments.

In its objection to the jurisdiction of the Tribunal, the Philippines argued that:

'[...]there was no investment in the Philippines as required by the BIT', and 'the dispute was purely contractual in character', and 'the issues in dispute are to be governed by a subsisting dispute resolution provision in the main Agreement requiring submission of all contractual disputes to the courts of the Philippines.'<sup>491</sup>

As to the definition of 'investment' under Article I(2) of the Swiss-Philippines BIT, SGS argued that: '(a) the Agreement clearly gave SGS 'claims to money or to performance having an economic value', in that it gave SGS claims against the Philippines for unpaid fees; (b) the dispute concerned 'rights given by contract', in that it concerned SGS's right to demand that the Philippines perform their obligations under the Agreement by making timely payment of fees due; and (c) pursuant to the requirements of the Agreement, SGS has invested substantial resources, including money and know-how'.<sup>492</sup>

The Philippines, in turn, contended that in order to establish ICSID jurisdiction, it was fundamental to establish the existence of an investment under both the BIT and Article 25 of the ICSID Convention. It further noted that under the ICSID Convention, 'technical assistance or consultancy contracts, suppliers' credits and peripheral training programs cannot be relied on by SGS as satisfying the investment requirement'.<sup>493</sup> According to Respondent's contentions, activities of SGS would not fall under the heading of investment even if references were made to typical characteristics rely upon by SGS. Further, it was argued that the definition of investment referred to in BIT was closely intertwined with the place of substantial performance of the overall obligation. In reply to this argument, SGS commented as follows:

- [...], it is clear that the BIT does not cover only investments physically located within the territory of the host State;

---

<sup>490</sup> Ibid. para 14.

<sup>491</sup> Ibid. para 17.

<sup>492</sup> Ibid. para 48.

<sup>493</sup> Ibid. para 59.

- For there to be a qualifying investment it is sufficient that the investor show that the effect of or the value added by the investments or the investment activities flow into the territory of the host State.<sup>494</sup>

The Tribunal manifested that ‘injection of funds into the territory [of a Contracting state other than the State of nationality of investor] for carrying out [activities pertaining to the investment]’ was crucial.<sup>495</sup> The Tribunal noted in this regard that a Swiss company within the SGS Group funded Manila Liaison Office, which employed ‘a significant number of people, and requisitions for inspections were channeled through [this] Office which arranged the inspection, received the results [...] and dealt with any resulting queries’.<sup>496</sup> The fact that the bulk of the cost of rendering the PSI inspection incurred outside the Philippines was not decisive.<sup>497</sup>

Remarkably, as the Tribunal noted, investments made outside the territory of the Respondent State, such as, for instance, construction of the embassy in a third state, would not involve ‘investments in the territory of State whose embassy it was’, no matter how beneficial it could be, and would not be extended similar BIT protection.<sup>498</sup> The Tribunal further made references to earlier ICSID jurisprudence on PSI services’ qualification as ‘investment’ under similar BIT provisions, such as *SGS v Pakistan*, and held that SGS made an investment ‘in the territory of’ the Philippines. However, as to exclusive dispute resolution clause in the Agreement itself which referred to courts of the Philippines, the Tribunal further concluded:

‘[...], in the Tribunal’s view its jurisdiction is defined by reference to the BIT and the ICSID Convention. [...] SGS should not be able to approbate and reprobate in respect of the same contract: if it claims ..., it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine’s courts are available to hear SGS’s contract claim. Until the question of the scope or extent of the Respondent’s obligation to pay is clarified ... a decision by this Tribunal on SGS’s claim to payment would be premature.’<sup>499</sup>

---

<sup>494</sup> Ibid. at 82.

<sup>495</sup> Ibid. at 136.

<sup>496</sup> Ibid. at 101.

<sup>497</sup> Ibid. at 106.

<sup>498</sup> Ibid. at 99.

<sup>499</sup> Ibid, at 155.

## E. Indirect and Concession Agreements Investments

### LETCO v. Liberia –

On June 16, 1983 Liberian Eastern Timber Corporation (hereinafter referred to as “Letco”), a company created and existing under the laws of the Republic of Liberia, filed a request for ICSID arbitration against the Government of the Republic of Liberia. The Request for Arbitration sought recovery of damages based on alleged violation of a concession agreement signed between both parties on 12 May 1970 under the title “Forest Products Utilization Contract” (hereinafter referred to as “Agreement”).

The Agreement entered into between the Government of Liberia and Letco necessitated ‘an extensive outlay of capital’ by Letco which was to be invested into harvesting and processing of forest products in Liberia. The Agreement required Letco to provide ‘all capital at such times and in such amounts as may be required for the economic and profitable development of this concession’.<sup>500</sup> However, due to differences which arose between the Forestry Development Authority of Liberia (hereinafter, the FDA) and Letco as well as Letco’s alleged violations of the Agreement, including, *inter alia*, FDA’s accusations of ‘Letco’s abandoning quantities of logs in the concession area’, the FDA sent a letter to Letco on November 18, 1980, indicating that its ‘concession area would be reduced by 279,000 acres “with immediate effect”’.<sup>501</sup>

According to Letco, it had paid out over \$5 million in machinery and equipment alone from 1970 to 1982, and the fact of payment of extensive amounts to fulfill its obligations under the Agreement was confirmed in Liberia’s own documents. Hence as to existence of ‘investment’, the Tribunal opined that ‘given the terms of the Agreement, the amounts paid out to develop the concession, and other undertakings, there was no doubt that the dispute had arisen directly from an ‘investment’ as required under article 25 (1) of the ICSID Convention.

---

<sup>500</sup> *LETCO v Liberia* (1987) 26 (3) ILM 651

<sup>501</sup> R Rayfuse, *ICSID reports: reports of cases decided under the Convention on the Settlement of Investment disputes between States and Nationals of Other States* (1994) 360



Tza Yap Shum v. Republic of Peru –

In *Tza Yap Shum v. Republic of Peru*, Request for ICSID arbitration dated 14 September 2006 was received from Mr. Tza Yap Shum, a national of the People's Republic of China and from TSG Perú S. A. C., a company incorporated under the Peruvian law, against the Republic of Peru.<sup>502</sup> In its request for arbitration, Claimant contended that alleged violations of the Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments affected the investment made by Mr. Tza Yap Shum in TSG Peru S. A. C., the Peruvian company involved in producing fish-based food products and exporting them to Asian markets.

According to claimant's allegations, his rights granted under Peru-China BIT had been violated as actions of the Peruvian Tax Administration committed in 2004 had largely affected its business operations and, in fact, extinguished TSG's economic viability, including, *inter alia*, unlawful and arbitrary tax lien on the company's bank accounts thereby precluding the company from operating without disruption.<sup>503</sup>

Peru replied with an objection to ICSID's jurisdiction claiming that three fundamental requirements for ICSID's jurisdiction – namely, *ratione materiae*, *ratione personae* and *ratione voluntatis* – were not met.

Following contentions of each party as to fulfillment of the requirement *ratione materiae*, the Tribunal first made references to allegations of the Respondent that the Claimant had not made an investment in Peru, and that the BIT did not protect indirect investments of Chinese investors in Peru. It followed that, according to Claimant's documents, at the outset Mr. Shum acted as the promoter of an investment project in the Peruvian fishmeal industry, which led to incorporation of TSG in Peru to perform business activity, and of Linkvest in the Virgin Islands to channel his control and financial flows to TSG.<sup>504</sup>

Analyzing definitions of 'investment' and 'investor' in the Peru-China BIT, the Tribunal concluded that the definition of 'investment' in the BIT was too broad and that it did not

---

<sup>502</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, at 1.

<sup>503</sup> *Ibid.* at 35.

<sup>504</sup> *Ibid.* at 90.

contain any specific references as to direct vis-à-vis indirect investment. The Tribunal further alluded to object and purpose of the BIT concluded between China and Peru, which aimed at promoting and protecting investments, and particularly to intentions of the Republic of Peru to promote and protect investments of Chinese nationals in Peruvian territory.<sup>505</sup> Article 1(1) of the Peru-China BIT established that the term “investment” meant every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, including, though not exclusively:

‘[...] a) movable, immovable property ..., b) shares, stock and any other kind of participation in companies; c) claims to money or to any other performance having an economic value, d) concessions conferred by law or under contract, ...’<sup>506</sup>

Based on the above, the Tribunal maintained that intentions of the BIT’s Contracting parties to promote and protect investment were decisive in defining the term ‘investment’ extensively. Additionally, Tribunal considered that ‘no evidence had been produced that indirect investments are not “in accordance with the laws and regulations” of the Republic of Peru’.<sup>507</sup> Consequently, the Tribunal found ‘no indication in the BIT leading them to exclude indirect investments of Chinese nationals in Peruvian territory from the scope of application of the Treaty, particularly when it [was] proven that they [exerted] the property and control over such investments’<sup>508</sup> thereby conferring its jurisdiction to proceed to merits of the dispute.

#### 7.4. CONCLUSION

As established by this research, there is no definition of an ‘investment’ in the ICSID convention. The Author asserts that term ‘investment’, however, is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope, for otherwise violence would be done to that ordinary meaning, in contradiction to Article 31 of the Vienna Convention on the Law of Treaties. In simple word, the right to performance embodied in a train ticket cannot qualify as an investment.

---

<sup>505</sup> Ibid. at 101.

<sup>506</sup> Ibid. at 105.

<sup>507</sup> Ibid. at 107.

<sup>508</sup> Ibid. at 221.

The Author affirms that precisely the same considerations apply to the use of the term of art ‘investment’ in the first article of investment treaties. The standard formulation in investment treaties is to define an investment as ‘any asset’ and then provide a non-exhaustive list of assets that might qualify as an investment.

The proprietary nature of the assets or rights over assets listed in investment treaties serves to distinguish, for example, the rights to performance arising out of a concession contract and rights to performance embodied in a train ticket. Furthermore, the open-textured nature of the standard formulation in investment treaties preserve the ordinary meaning of the term ‘investment’ and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.

The Author contends that it would be difficult to conceive of a hypothetical conflict between the conceptions of an investment in Article 25 of the ICSID Convention and the investment treaty because the use of the term ‘investment’ in both instruments imports the same basic economic attributes of an investment derived from the ordinary meaning of that term.

But suppose an investment treaty defined an investment as an asset, and listed a train ticket as an example of such an asset. In this case there would be a conflict between the definition of an investment in an investment treaty and Article 25 of the ICSID Convention because the state contracting parties in the former instance have transcended the frontier of the ordinary meaning of the term ‘investment’.

A bilateral act of this kind cannot produce effects in relation to a multilateral treaty (the ICSID Convention) and hence, if ICSID arbitration proceedings were to be commenced, the tribunal would be compelled to decline jurisdiction.

## 8. CHAPTER EIGHT: JURISDICTION RATIONE VOLUNTATIS

### - CONSENT IN INVESTMENT ARBITRATION

#### 8.1. INTRODUCTION

Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal. In the taxonomy outlined in Chapter 4, consent was listed as an issue of jurisdiction (*ratione voluntatis*), among other issues relating to the proper scope of that adjudicative power. The Author asserts that the range of in-depth scholarly research available on jurisdiction *ratione voluntatis* - as to whether or not the respondent host state has consented to the arbitration of investment disputes is relatively narrow.

In the vast majority of cases, exceptionally, questions might arise concerning the geographical scope of the respondent state's consent, such as for overseas territories in respect of which the respondent state exercises sovereign powers.<sup>509</sup> Also, if the investment treaty envisages a form of provisional applications, such as the Energy Charter Treaty, this may entail a delicate inquiry as to whether the consent of the respondent host state to investment arbitration is valid for the adjudication of the particular investment dispute.<sup>510</sup>

The difficulty facing tribunals is one of characterization: namely, whether the particular issue alleged to constitute an impediment to the tribunal's power to adjudicate the investment dispute is one relating to the consent to the investment arbitration (jurisdiction),<sup>511</sup> admissibility or seisin. The importance of distinguishing jurisdictional issues from those pertaining to admissibility or seisin was considered in Chapter 3.

The task for this chapter is to distinguish those conditions prescribed in an investment treaty that are properly characterized as 'conditions precedent to the consent of the host contracting state party to the arbitration of investment disputes' from other stipulations in

---

<sup>509</sup> E.g. *Petrobart v Kyrgyz Republic* (Merits) (whether the UK had extended the application of the BIT to Gibraltar).

<sup>510</sup> E.g. *Kardassopoloulos v Georgia* (preliminary Objections).

<sup>511</sup> Such as a provision in the treaty requiring the exhaustion of local remedies before the commencement of international arbitration: *Maffezini v Spain* (Preliminary Objections) 5 ICSID Rep 396, 403/35-6; *TSA Spectrum v Argentina* (Preliminary Objections) para 107; *Wintershall v Argentina* (Preliminary Objections) paras. 119-22.

the investment treaty. By ‘seisin’ of the tribunal is meant: those procedural steps that must be taken by the claimant to commence arbitration proceedings before a tribunal is constituted pursuant to an investment treaty.

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

In this chapter, the Author will try to address following questions and propose unified rules and principles based on which they might be clarified for future reference. Questions such as:

Can ICSID’s jurisdiction be established through a unilateral act of the host State? Is it possible to give consent to ICSID’s jurisdiction with respect to disputes that may arise in the future? Does every reference to ICSID arbitration in national legislation amount to an expression of consent to jurisdiction? Is it possible for a host State to withdraw its expression of consent to ICSID’s jurisdiction contained in national legislation by repealing the legislation? Can the investor forestall such an attempt to withdraw consent? Is it possible to establish ICSID’s jurisdiction merely through a provision in a treaty between the host State and the investor’s State of nationality?

Is it possible to give consent to jurisdiction after the institution of arbitration proceedings? Is it necessary to exhaust local remedies before instituting ICSID arbitration? Is it plausible to argue that consent to ICSID’s jurisdiction given by a State must be interpreted restrictively since such consent constitutes derogation from that State’s sovereignty? Can a State terminate consent to the jurisdiction of ICSID by cancelling an investment licence that contained the consent clause?

## 8.2. THE CONCEPT OF ‘CONSENT’ IN ARBITRATION

### A. The Concept and Scope of Consent

The scope of consent to arbitration offered in treaties varies. Many BITs in their consent clause contain phrases such as ‘all disputes concerning investments’ or any legal dispute concerning investment’. These provisions do not restrict a tribunal’s jurisdiction to claims arising from the BIT’s substantive standards. By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include disputes that arise from a contract in connection with the investment.

In *saline v Morocco*, Article 8 of the applicable BIT defined ICSID’s jurisdiction in terms of ‘[t]ous les différends ou divergences ... concernant un investissement’.<sup>512</sup> The tribunal noted that the terms of this provision were very general and included not only a claim for violation of the BIT but also a claim based on contract: ‘... Article 8 oblige the state to respect the jurisdictional choice arising by reason of breaches of the bilateral Agreement and of any breach of a contract which binds it directly’.<sup>513</sup>

In *Compania de Aguas del Aconquija, S. A. & Vivendi Universal*,<sup>514</sup> Article 8 of the BIT between France and Argentina, applicable in that case, offered consent for ‘[a]ny dispute relating to investments’. In its discussion of the BIT’s fork in the road clause, the ad hoc Committee said;

‘... Article 8 deals with disputes “relating to the investments made under this Agreement between one Contracting Party and an investor of the other Contracting party”. It is those disputes which may be submitted, at the investor’s option, either to national or international adjudication. Article 8 does not use a narrow formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself; it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with article 11 of the BIT [dealing with state-state dispute settlement], which refers to disputes ‘concerning the interpretation or application of this Agreement’, or with Article 1116 of the NAFTA, which provides that an investor may

---

<sup>512</sup> Italy/Morocco BIT Article 8.

<sup>513</sup> *Salini Costruttori SpA and Italstrade SpA v Royaume du Maroc* (Decision on Jurisdiction) 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Rep 400, at para 61.

<sup>514</sup> *Compania de Aguas del Aconquija, S. a. and Vivendi Universal (formerly compagnie Générale des Eaux) v Argentine Republic* (Decision on Annulment) 3 July 2002, 6 ICSID Rep 340.

submit to arbitration under Chapter 11 “a claim that another Party has breached an obligation under” specified provisions of that Chapter.”<sup>515</sup>

The tribunal in *SGS v Pakistan* reached a different conclusion. Article 9 of the applicable BIT between Switzerland and Pakistan referred to ‘disputes with respect to investments’. The tribunal; found that the phrase was merely descriptive of the factual subject matter of the disputes and did not relate to the legal basis of the claims or cause of action asserted in the claims. The tribunal said:

‘... from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9’.<sup>516</sup>

Therefore the tribunal held no jurisdiction with respect to contract claims that did not also constitute breaches of the substantive standards of the BIT. That decision has attracted criticism.<sup>517</sup>

Other BIT clauses offering consent to arbitration do not refer to investment disputes in general terms but circumscribe the types of disputes that are submitted to arbitration. A provision that is typically for United States BITs is contained in Article VII of the Argentina-US BIT of 1991. It offers consent for investment disputes, which are defined as follows:

‘a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (2) an investment authorization granted by that Party’s foreign investment authority (if any such authorization exists to such a national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.’

A narrower offer of consent to arbitration in BITs, cover only violations of the BIT’s substantive standards. For instance, the BIT between El Salvador and the Netherlands contains a submission to arbitration in Article 9 only for: ‘... *disputes which arise within the scope of this agreement between one Contracting Party and an investor of the other Contracting Party concerning an investment.* ...’

---

<sup>515</sup> Ibid. para 55.

<sup>516</sup> *SGS v Pakistan* (Decision on Jurisdiction) 6 august 2003, 8 ICSID Rep 406, at para. 161.

<sup>517</sup> See also *Tokios Tokeles v Ukraine* (Decision on Jurisdiction) 29 April 2004, note 42 at para 52.

Similarly under Article 1116 of the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself. Also, under Article 26(1) of the ECT, the scope of the consent is limited to claims arising from alleged breaches of the ECT itself.

The Author asserts that an umbrella clause in the BIT should extend the jurisdiction of tribunals to violations of contracts even if the consent to arbitration is restricted to claims arising from breaches of the treaty. If it is true that under the operation of an umbrella clause violation of a contract relating to the investment became treaty violations, it would follow that even a provision in a BIT merely offering consent to arbitration for violations of the BIT extends to contract violations covered by the umbrella clause. Some expressions of consent to arbitration are narrowly confined as to their subject matter. Typical examples for narrow clauses of this kind are expressions of consent that are limited to the amount of compensation for expropriation.<sup>518</sup> For instance, the China-Hungry BIT of 1991 provides in Article 10(1):

*‘Any dispute between, either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal.’*

Some national laws also offer consents only in respect of narrowly circumscribed issues. In *Tradex v Albania* the consent expressed in the Albania Law on foreign Investment was limited in the following terms

*‘...if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, ...’*<sup>519</sup>

After a detailed examination of the facts, the tribunal found that the claimant had not been able to prove that an expropriation had occurred.<sup>520</sup>

## **B. The Condition to Consent – (Exhaustion of Cooling off period)**

Most consent clauses in treaties provide for procedures that must be followed. A common condition for the institution of arbitral proceedings is that an amicable settlement has been attempted through consultation or negotiations. This requirement is subject to certain time

---

<sup>518</sup> For applications of consent clauses of this kind, see *Telenor v Hungry*, Award, 13 September 2006, paras 18(2), 25, 57, 81-83; *ADC v Hungry*, Award, 2 October 2006, paras 12, 445.

<sup>519</sup> *Tradex v Albania* (Decision on Jurisdiction) 24 December 1996, 5 ICSID Rep 47, at pp. 54-55.

<sup>520</sup> *Tradex v Albania* (Award), 29 April 1999, 5 ICSID Rep 70 at paras. 132-205.



limits ranging from three to twelve months. If no settlement is reached within that period, the claimant may proceed to arbitration. The NAFTA (Article 1120) prescribes a waiting period of six months since the events giving rise to the claim. Article 26(2) of the ECT offers consent to arbitration if the dispute cannot be settled within three months from the date on which either party requested amicable settlement.

In Author's view, the arbitral tribunals have not reacted uniformly to these provisions of an amicable settlement.<sup>521</sup> In the majority of cases the tribunals found that the claimants had complied with these waiting periods before proceeding to arbitration.<sup>522</sup> In other cases, the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.<sup>523</sup> The author contends to the view that periods foreseen for negotiations are not of jurisdictional nature. The reason being that, by the time the tribunals make a decision on this issue, any waiting period would likely to have collapsed. Under these circumstances insistence on the compliance with the waiting period before the institution of proceedings would make little sense and would merely compel the claimant to start proceedings anew.

The question is therefore: Whether a claimant's failure to comply with the prescribed cooling-off period before commencing the arbitration proceedings against the host state be construed as an ultimate obstacle for the exercise of the jurisdiction or constitutes a breach of a procedural rule relating to the seisin of the tribunal ?

---

<sup>521</sup> For more detailed treatment, see C Schreuer, 'Travelling the BIT Route – Of waiting Periods., Umbrella Clauses and Forks in the Road' (2004) 5 Journal of World Investment and Trade 231, 232.

<sup>522</sup> *Salini Costruttori SpA and Italstrade SpA v Royaume du Maroc* (Decision on Jurisdiction) 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Rep 400, at paras 15-23; *CMS v Argentina*, (Decision on Jurisdiction), 17 July 2003, 7 ICSID Rep 494, at paras 121-123; *Generation Ukraine v Ukraine*, (Award), 16 September 2003, 10 ICSID Reps 240, paras 14.1-14.6; *Azurix v Argentina*, (Decision on Jurisdiction), 8 December 2003, 43 ILM 262 (2004) at para 55; *Tokios Tokelés v Ukraine*, (Decision on Jurisdiction), 29 April 2004, paras 101-107; *LG & E v Argentina*, (Decision on Jurisdiction), 30 April 2004, para 80; *MTD v Chile*, (Award), 25 May 2004, para 96; *Occidental v Ecuador*, (Award), 1 July 2004, para 7; *Siemens v Argentina*, (Decision on jurisdiction), 3 August 2004, paras 163-173; *L.E.S.I.- DIPENTA v Algeerie*, (Award), 10 January 2005, paras 32,33; *Corp. v Arengtina*, (Decision on Jurisdiction), 26 April 2005, paras 62-71.

<sup>523</sup> The first such case was decided under 1120 of the NAFTA: *Ethyl Corp. v Canada*, (decision on Jurisdiction)), 24 June 1998, (Decision on Jurisdiction), 7 ICSID Rep 12 at paras 76-88: the tribunal dismissed the objection based on the six-month provision, since further negotiations would have been pointless. In *Wena Hotels v Egypt*, (decision on Jurisdiction), 29 June 1999, 6 ICSID Reps pp. 74, 87, the tribunal noted approvingly that the respondent had withdrawn its objection to jurisdiction based on the waiting period. In *Ronald s. Lauder v The Czech Republic*, (Final Award), 3 September 2001, 9 ICSID Reps 66, para 187, the tribunal found that the waiting period of six-month was not a jurisdictional provision. In *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v Pakistan*, (Decision on Jurisdiction), 14 November 2005, paras 88-103, the tribunal found that a requirement to give notice of the dispute for the purpose of a negotiated settlement was not a precondition to jurisdiction.

The question is aggravated in the circumstances where there is no real prospect to reach an amicable resolution which, as Schreuer aptly notes, adds little sense to observe the above mentioned requirement. The ICJ jurisprudence has dealt with the foregoing query in *Nicaragua* case, and jurisdiction thereof was based upon article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956:

‘Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.’

Remarkably, the aforementioned dispute resolution provision does not contain a limit within which a dispute shall be ‘adjusted by diplomacy’. The United States invoked the argument that attempt to resort to amicable resolution was a pre-requisite to submitting a dispute to the competence of the ICJ and that Nicaragua ‘had never raised the Treaty in its negotiations with the United States.’ The motion of the United States was, however, rejected by the ICJ:

‘In view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty ... It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

‘...the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned’

The above mentioned judicial reckoning is based on the premise that prior consultation is not a pre-requisite for jurisdiction, but rather a formality. In *Ronald S. Lauder v The Czech Republic*, the arbitral proceeding was held under the UNCITRAL Arbitration Rules on the basis of the BIT between the Czech Republic and the United States. Article VI(3) of the BIT provided:

‘At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration ...’

The Tribunal affirmed that the cooling off period was to start not from the date on which the alleged breach took place, but from the date on which the State was advised of the breach. The motion of the Respondent as to non-observance of the waiting period was

nevertheless rejected by the Tribunal. It held that the foregoing provision was procedural and was not to bar the Tribunal from considering the case on its merits.

In addressing the question above, this research supports the paradigm that it clearly goes to the seisin of the tribunal rather than its jurisdiction. It would be extraordinary, for instance, if the court at the seat of the arbitration could entertain an application to quash the tribunal's award because it deemed the dispute to have arisen too early, or ruled that any negotiation was futile in light of the host state's conduct. In other words, one should be cautioned against overreliance on the procedural requirement of the waiting period. Indeed, the jurisprudence of the arbitral tribunals adds value to this proposition as tribunals have by and large construed the consultation periods as 'directory and procedural' rather than 'mandatory and jurisdictional in nature'.<sup>524</sup>

A common condition for the institution of proceedings before ICSID is that an amicable settlement has been attempted through consultations or negotiations. Where this is the case, negotiations must be undertaken in good faith. Some national investment laws<sup>525</sup> and numerous BITs contain the condition that a negotiated settlement must be attempted before resort can be had to the Centre. In order to forestall dilatory tactics and in order to make it clear when the condition precedent for settlement under the Convention has been satisfied, the treaties typically lay down time limits for negotiations. If no settlement is reached within a certain period of time, access to ICSID is open.

In *Tradex v. Albania*, the consent clause in the Albanian Law was subject to the condition that the dispute "cannot be settled amicably".<sup>526</sup> The Tribunal noted that Tradex had sent five letters over four months to the competent Albanian Ministry but that none of these was answered or resulted in any relevant action. The Tribunal found these letters to be a sufficient good faith effort to reach an amicable settlement.

---

<sup>524</sup> *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 18 ICSID Rev. – F.I.L.J. 184 (2003).

<sup>525</sup> Albania Law on Foreign Investments, 1993, Art. 8(2); Cameroon Investment Code, 1990, Art. 45; Tanzania National Investment (Promotion and Protection) Act, 1990, sec. 29(1); Togo Investment Code, 1985, Art. 4; Uganda Investment Code, 1991, Art. 30(2).

<sup>526</sup> *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 174 (1999).

Another procedural condition that may be inserted into a consent clause concerns conciliation. Since conciliation is one of two procedures under the ICSID Convention, provision for it is not, strictly, a condition for the Centre's jurisdiction. But arbitration can be made contingent upon prior unsuccessful conciliation under the Convention. Under the 1993 Model Clauses 1 and 2, consent can be given for conciliation followed, if the dispute remains unresolved within a certain period of time, by arbitration.

### **C. The Condition to Consent – (Exhaustion of Local Remedies)**

Provisions giving consent to investment arbitration do not, in general, require the exhaustion of local remedies before international proceedings are instituted. One of the purposes of investor-state arbitration is to avoid the vagaries of proceedings in the host state's courts.

It is open to a host state to make the exhaustion of local remedies as a condition of its consent to arbitration. Also some BITs offering consent require the exhaustion of local remedies. But clauses of this kind are rare and are found mostly in older BIT's.<sup>527</sup> In the absence of such a proviso, the investor does not need to exhaust local remedies before starting an international arbitration. The tribunal in *Generation Ukraine v Ukraine*<sup>528</sup> said:

'13.4. The first sentence of Article 26 secures the exhaustively of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exhaustively is the waiver by Contracting State to the ICSID Convention of the of the remedies rule, so that the investor is not compelled to pursue remedies in the respondents state's domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent.'<sup>529</sup>

Some BITs provide that before an investor may bring a dispute before an international tribunal, he or she must seek its resolution before the host state's domestic courts for a certain period of time, often 18 months.<sup>530</sup> The investor may proceed to international

---

<sup>527</sup> C Schreuer, *The ICSID Convention: A Commentary* (2001) 392.

<sup>528</sup> *Generation Ukraine Inc. v Ukraine*, (award), 16 September 2003, 44 ILM 404, 10 ICSID Report 240.

<sup>529</sup> Para 13.4. See also *Lanco International Inc. v Argentina*, (Decision on Jurisdiction), 8 December 1998, 40 ILM 457 (2001), 5 ICSID Reports 369, para 39; *AES Corporation v The Argentine Republic*, (decision on Jurisdiction), 26 April 2005, paras 69,70.

<sup>530</sup> For more detail, see C Schreuer, 'Calvo's Grandchildren: the Return of Local Remedies in Investment Arbitration' (2005) 4 *Law and Practice of International Courts and Tribunals* 1, 3-5.

arbitration if the domestic proceedings do not result in the dispute's settlement during that period or if dispute persists after the domestic decision.

Author contends that the usefulness of such requirement is questionable. It creates a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute. In author's view, the most likely effect of a clause of this kind is delay and additional cost since it is unlikely that the dispute will be resolved before the domestic courts within that time frame. The most notorious example of a requirement to waive local remedies is Article 1121 of NAFTA, which is entitled 'Conditions Precedent to Submission of a Claim to Arbitration' and directs claimants to:

'[W]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that it alleged to be a breach of an obligation under the NAFTA.'

Based on Article 26 of the ICSID Convention, a State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention. In the absence of such a provision there is no requirement to exhaust local remedies. Only a few States have conditioned their consent to ICSID jurisdiction on the prior exhaustion of local remedies. A relatively small number of bilateral investment treaties and a few investment agreements with investors contain such a condition.

The condition that local remedies must be exhausted before ICSID arbitration can be instituted, may be expressed by a State party to the Convention only up to the time consent to arbitration is perfected but not later. This is a consequence of the principle that once consent to jurisdiction has been given, it may not be unilaterally withdrawn or restricted.

In the annulment proceedings to *Amco v. Indonesia*, Indonesia argued 'that the Tribunal manifestly exceeded its powers by holding that Amco could bring its claim for compensation of damages based on the acts of the army and police personnel involved directly to an ICSID Tribunal without previously seeking redress before the Indonesian

courts in conformity with the general international law rule on exhaustion of local remedies.’<sup>531</sup> The *ad hoc* Committee had little problem to dispose of this argument:

‘... By acceptance of ICSID jurisdiction without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right ...’<sup>532</sup>

It is questionable whether insistence by a host State on the exhaustion of local remedies prior to ICSID arbitration serves any useful purpose. Resort to local remedies before the institution of ICSID arbitration may be seen by the investor as a waste of time and money. The public proceedings in the host State’s courts may further exacerbate the dispute between the parties and may affect the host State’s investment climate. If the ICSID tribunal overturns a decision by the host State’s highest court, this may be a source of acute embarrassment. Therefore, it seems wisest to leave the Convention’s basic rule of non-exhaustion in place and to follow the example of the vast majority of consent agreements in not requiring the exhaustion of local remedies.

#### **D. The ICSID’s approach to consent**<sup>533</sup>

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

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.’

The parties giving consent must be a State party to the ICSID Convention (or a designated constituent subdivision or agency) and a national of a State party to the ICSID Convention. In addition, there must be a legal dispute arising directly out of an investment. Participation in the Convention alone does not carry any obligation or even

---

<sup>531</sup> 1 ICSID Reports 526.

<sup>532</sup> 1 ICSID Reports 526.

<sup>533</sup> See also the ‘*COURSE ON DISPUTE SETTLEMENT - Module 2.3. ICSID: Consent to Arbitration.*’ (UNCTAD/EDM/Misc.232/Add.2), at <<http://www.unctad.org>>, accessed 22 August 2011.

expectation that there will be consent to jurisdiction. A Contracting State remains free as to whether or not, and if so to what extent, it wishes to give consent.

Under the Convention, consent must be in writing. But there is no particular form in which this must be done. Consent in writing will normally be communicated between the parties but there is no need to notify the Centre at the time of consent. In fact, the Centre has no precise knowledge of the number and the contents of various consent clauses covering investments. But proof of consent in writing will be required at the time a request for arbitration is made. Consent in writing must be explicit and not merely construed.

In *Cable TV v. St. Kitts and Nevis*, the Respondent was not a party to the agreement containing the consent clause. The Claimant argued that consent by the Respondent could be construed from the institution of proceedings by the Attorney-General of St. Kitts and Nevis against the Claimants in a domestic court of the Respondent. The purpose of the domestic court proceedings was to obtain an injunction to restrain the Claimant from raising its rates prior to the resolution of the dispute through ICSID arbitration. The Tribunal held that the references in the court documentation to the ICSID clause in the agreement were merely statements of fact and did not amount to consent by any person to ICSID jurisdiction.<sup>534</sup>

In practice, consent is given in one of three ways. The most obvious way is a consent clause in a direct agreement between the parties. Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. ICSID has prepared and published a set of Model Clauses to facilitate the drafting of these contracts.<sup>535</sup>

Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always

---

<sup>534</sup> *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review–Foreign Investment Law Journal 328, 354-361 (1998).

<sup>535</sup> ICSID Model Clauses, Doc. ICSID/5/Rev. 2 of 1993. Reproduced in 4 ICSID Reports 357.

based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings.

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

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

The Report of the Executive Directors (see Appendix 3) summarizes the foregoing in the following way:

'The scope of such consent is within the discretion of the parties. In this connection, it should be noted that ratification of the ICSID Convention is, on the part of a Contracting State, only an expression of its willingness to make use of ICSID machinery. As such, ratification does not constitute an obligation to use that machinery. That obligation can arise only after the State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or classes of disputes. In other words, the decision of a State to consent to ICSID arbitration is a matter of pure policy and it is within the sole discretion of each



Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID.<sup>536</sup>

Article 25 of the ICSID Convention provides that ICSID extends its jurisdiction over dispute, which the parties to this dispute ‘*consent in writing to submit to the Centre*’ and such consent must be obtained from both or all parties. This is referred to as the only formal requirement for consent under the ICSID Convention.<sup>537</sup>

Remarkably, as Schreuer aptly notes, consent in writing ‘must be explicit and not merely construed’.<sup>538</sup> In *Cable TV v St. Kitts and Nevis*, the Government of Nevis, the executive entity of the Nevis Island Administration and a constituent element of the Federation of St. Christopher and Nevis (hereinafter, the Federation), entered into the agreement dated 18 September 1986 (hereinafter, the Agreement) with Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. (hereinafter, Cable), granting the latter the exclusive right to provide cable television services on the island of Nevis. Clause 16 of the Agreement read:

‘any disputes relating to this agreement, its performance or nonperformance shall be referred to arbitration under the rules of procedure for arbitration proceedings (hereinafter the ‘Rules’) in effect as of February 1, 1981 adopted under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States.’<sup>539</sup>

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

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

---

<sup>536</sup> G Delaume, ICSID Arbitration, pp. 104/5.

<sup>537</sup> See Schreuer, Commentary to ICSID, p. 193.

<sup>538</sup> See UNCTAD Handbook.

<sup>539</sup> Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings, Ltd. v The Federation of St. Christopher (St. Kitts) and Nevis; ICSID Case No. ARB19512; para. 1.03, p. 332.

article 25 (2b) of the ICSID Convention.<sup>540</sup> The Claimants also argued that institution of the court proceeding by the Attorney General of the Federation to obtain injunction to restrain the Claimants from raising its rates for cable television services on Nevis *prior to the completion of ICSID arbitration* serves as a confirmation of Federation's consent to ICSID Arbitration.

In response to Claimants' motion, the Respondent argued that the Tribunal was not competent to substitute the Federation for Nevis Island Administration. The Federation submitted that Nevis Island Administration was party to the Agreement with Cable and was therefore the proper party to arbitration.

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

## **E. The Interpretation of Consent**

In a number of cases the respondent argues that an expression of consent to arbitration should be construed restrictively. Most tribunals have rejected this argument. The vast majority of tribunals have favoured a balance approach that accepts neither a restrictive nor an expansive approach to the interpretation of consent clauses.<sup>541</sup>

---

<sup>540</sup> *Cable TV v St. Kitts and Nevis*, ICSID Reports, vol. 5, pp. 106-107.

<sup>541</sup> *Amoco v Indonesia*, (Decision on Jurisdiction), 25 September 1983, 1 ICSID Reports 389 at paras 12-24; *Soabi v Senegal*, (Award), 25 February 1988, 2 ICSID Reports 190, paras 4.08-4.10; *Cable TV v St. Kitts and Nevis*, (Award), 13 January 1997, 5 ICSID Reports 108 at para 6.27; *CSOB v Slovakia*, (Decision on Jurisdiction), 24 May 1999, 5 ICSID Reports 335 at para 34; *Ethyl Corp. v Canada*, (Decision on Jurisdiction), 24 June 1998, (Decision on Jurisdiction), 7 ICSID Reports 12 at para 55; *Loewen v United States*, (decision on Competence and Jurisdiction), 9 January 2001, 7 ICSID Reports 425, para 51; *Methanex v United States*, (Preliminary Award on Jurisdiction), 7 August 2002, paras 103-105; *El Paso Energy Intl. Co. v Argentina*, (Decision on Jurisdiction), 27 April 2006, para 68-70; *Suez, Sociedad General de Aguas de Barcelona S. A., and InterAguas Servicios Integrales del Agua S.A. v Argentina*, (Decision on jurisdiction), 16 May 2006, paras 59, 64; *Pan American v Argentina*, (Decision on Preliminary Objections), 27 July 2006, paras 97-99.

Some tribunals seem to be leaning more towards an extensive interpretation on consent clauses.<sup>542</sup> In *Tradex v Albania*,<sup>543</sup> the tribunal expressed a certain preference, although with some qualifications, in favour of a doctrine of effective interpretation for clauses conferring jurisdiction upon ICSIID.

Occasionally tribunals seemed to favour a restrictive approach towards the interpretation of consent clauses.<sup>544</sup> Tribunals have held consistently that expressions of consent were to be interpreted not in the light of the host state's domestic law but in the framework of international law. The tribunals have also held that questions of jurisdiction are not subject to the law applicable to the merits of the case. Rather, questions of jurisdiction are governed by their own system, which is defined by the instruments determining jurisdiction.<sup>545</sup>

Exceptionally, the host state's domestic law is relevant to jurisdiction if the consent to arbitration is based on a provision in its legislation.<sup>546</sup> This was the case in *SPP v Egypt*.<sup>547</sup> The tribunal refused to accept the argument that the parties' consent to arbitration should therefore be interpreted in accordance with Egyptian law. Neither did it accept the argument that the arbitration clause was subject to the rules of treaty interpretation.<sup>548</sup>

A recurrent theme in the pleadings before ICSID tribunals is the argument that consent by the host State to the Centre's jurisdiction should be construed restrictively. Respondent Governments have insisted on the need for a restrictive interpretation of a State's undertaking to arbitrate which had to be seen as a derogation from its sovereignty. The Claimants have at times attempted to invoke an alleged principle of interpretation in the opposite sense: that of effective interpretation epitomized in the Latin phrase of *ut res magis valeat quam pereat*. ICSID tribunals have repeatedly refused to embrace either of the two principles.

---

<sup>542</sup> *SGS v Philippines*, (Decision on Jurisdiction), 29 January 2004, 8 ICSID Reports 518, para 116; *Eureka v Poland*, (Partial Award), 19 August 2005, para 248.

<sup>543</sup> *Tradex v Albania*, (Decision on Jurisdiction), 24 December 1996, 5 ICSID Reports 47.

<sup>544</sup> *Noble Ventures v Romania*, (Award), 12 October 2005, para 55.

<sup>545</sup> *Camuzzi v Argentina*, (Decision on Jurisdiction), 11 May 2005, paras 15-17, 57; *AES Corp. v Argentina*, (Decision on Jurisdiction), 26 April 2005, paras 34-39; *Jan de Nul N.V., Dredging Intl. N.v. v Egypt*, (Decision on Jurisdiction), 16 June 2006, paras 65-68.

<sup>546</sup> See also *Inceysa v el Salvador*, (award), 2 August 2006, at paras 131, 22-264.

<sup>547</sup> *SPP v Egypt*, (Decision on Jurisdiction) II, 14 April 1988, 3 ICSID Reports 131.

<sup>548</sup> *Ibid.* at paras 55-60.

In *Amco v. Indonesia*, the Tribunal was confronted with the argument that the consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty should be construed restrictively.<sup>549</sup> The Tribunal rejected this contention categorically. It said:

‘... like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law. Moreover—and this is again a general principle of law—any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.’<sup>550</sup>

In the Tribunal’s view, the proper method for the interpretation of the consent agreement was to read it in the spirit of the ICSID Convention and in the light of its objectives. ICSID arbitration was in the interest of both parties, a thought that was expressed in the first paragraph of the Convention’s Preamble. The investor’s interest in submitting investment disputes to international arbitration was matched by a parallel interest of the host State: to protect investments is to protect the general interest of development and of developing countries.<sup>551</sup>

In *SPP v. Egypt*, the argument of the restrictive interpretation of jurisdictional instruments was raised in relation to an ICSID clause in national legislation. The Tribunal found that there was no presumption of jurisdiction, particularly where a sovereign State was involved, and that jurisdiction only existed insofar as consent thereto had been given by the parties. Equally, there was no presumption against the conferment of jurisdiction with respect to a sovereign State. After referring to a number of international judgements and awards, the Tribunal said:

---

<sup>549</sup> (Decision on Jurisdiction), 25 September 1983, 1 ICSID Reports 393, 397.

<sup>550</sup> Ibid. at p. 394. See also remarks to the same effect at pp. 398 and 402. See also *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Review—Foreign Investment Law Journal 328, 386 (1998); *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 263 (1999).

<sup>551</sup> Ibid. at p. 400.

‘Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in favour of it is preponderant.’<sup>552</sup>

Therefore, neither of the two presumptions or alleged principles of interpretation carry much weight when applied to expressions of consent to the jurisdiction of ICSID. Neither a principle of restrictive interpretation nor a doctrine of “*effet utile*” will do justice to a consent clause.

A special problem of interpretation is the applicability of consent clauses to successive legal instruments. Investment operations often involve complex arrangements expressed in a number of successive agreements. Some such related agreements concern peripheral operations such as financing or arrangements with subcontractors. These agreements may be concluded in stages and over a period of time. Though economically interrelated, the agreements are legally distinct and often have different features. At times, ICSID clauses are included in some of these agreements but not in others. If ICSID clauses are neither repeated nor incorporated by reference in related agreements, the question arises whether the parties’ consent to ICSID’s jurisdiction extends to matters regulated by these related agreements.

ICSID tribunals have dealt with this question in a number of cases.<sup>553</sup> These cases suggest that ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties’ overall relationship. Therefore, a series of interrelated contracts may be regarded, in functional terms, as representing the legal framework for one investment operation. ICSID clauses contained in some of the different contracts may be interpreted to apply to the entire operation.

The need to settle an investment dispute finally and comprehensively would make any other solution impracticable. A situation in which an ICSID tribunal were to address only

---

<sup>552</sup> (Decision on Jurisdiction), 14 April 1988, 3 ICSID Reports 143/4.

<sup>553</sup> *Holiday Inns v. Morocco*, (Decision on Jurisdiction), 12 May 1979; Lalive, *The First ‘World Bank’ Arbitration*, 51 *British Yearbook of International Law* 123, 156-159 (1980); *Klöckner v. Cameroon*, (Award), 21 October 1983, (Decision on Annulment), 3 May 1985, 2 ICSID Reports 13-18, 65-69, 89-93, 97-117; *SOABI v. Senegal*, (Decision on Jurisdiction), 1 August 1984, (Award), 25 February 1988, 2 ICSID Reports 185-188, 204-208, 293-322.

some of the issues between the parties but would leave other related ones to be litigated elsewhere would be highly unsatisfactory. Partial settlements are uneconomical and liable to delay resolution even further.

Ideally, the parties might eliminate most problems of this nature through consistency in the drafting of their various documents. But experience tells that arbitration clauses often do not get the detailed attention they deserve. Therefore, the approach developed in the practice of ICSID tribunals would appear to be the only reasonable solution. But this approach can be maintained only to the extent that it reflects the parties' presumed intentions.

### **8.3. MODALITIES OF CONSENT TO ARBITRATION**

#### **A. Consent Through Designated Subdivision or Agency**

As per paragraph (3) of article 25, 'consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.'

Nevis Island Administration (hereinafter, NIA) in *Cable TV v St. Kitts and Nevis* was considered to be the constituent subdivision of the Federation for the purposes of article 25 (3). Pursuant to the Constitution of the Federation, the NIA had the power to enter into the Agreement on its own and independently of the Federation. The Tribunal held in this context:

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

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

a province or a municipality which enters into agreements with investors. After lengthy discussions and debates as to what constitutes ‘constituent subdivision’, the drafters of the ICSID Convention intended to create maximum flexibility and include ‘any territorial entity below the level of the State itself. The term ‘agency’ was agreed to be read ‘not in structural terms but functionally’ and what matters most is whether it performs public functions on behalf of the Contracting State or one of its constituent subdivisions.’<sup>554</sup> It is also noteworthy that the very fact of designation by the Contracting State would entail a very strong presumption that the entity in question is indeed a ‘constituent subdivision or agency’.

## **B. Consent through Separate Instruments**

Any investment arbitration dispute is grounded in the provisions of an investment treaty, an investment contract with a dispute resolution clause which refers to ICSID or the provisions of the foreign investment legislation of the host State. Parties to the dispute, which has already arisen, may submit their consents to jurisdiction through submission agreements, or so-called ‘*compromis*’ agreement which has the meaning of an agreement to arbitrate concluded by separate act. Hence, it is equally possible for the parties to grant consents to arbitrate for future and existing disputes.

An arbitration agreement also need not be embodied in a single instrument. An investment application made by investor may provide for arbitration and, provided the state gives its approval to such application, be reflective of consent to arbitration by both parties. In this regard, in *Amco v Indonesia* the investor had applied for establishing a locally incorporated entity to carry out investment activities to the Indonesian Foreign Investment Board. The application, inter alia, contained a clause which effectively enabled dispute resolution through ICSID. When a dispute arose, investor referred to ICSID, which upheld the application. The government of Indonesia accepted the existence of the consent in principle at the same time denying the applicability of that consent to the dispute and to the subject matter, the Tribunal held:

---

<sup>554</sup> C H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) p. 151.

‘while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them.’

Despite the possibility of submitting *compromis* to arbitrate the dispute which has already arisen, the majority of cases brought to ICSID arbitration hinge on consent provisions, which refer to future disputes. These consent clauses are conventionally embodied in foreign investment legislation of host states, bilateral or multilateral investment agreements (BITs/MITs).

### **C. Consent through Host State Legislation**

The possibility of consenting to ICSID arbitration through host state legislation is now becoming an accepted practice. Indeed, a State may commit to refer a dispute to ICSID in its foreign investment code or the law for the promotion of foreign investment.<sup>555</sup> Pate argues that while some foreign investment laws do express unequivocal consent to ICSID arbitration, some are not clear and are not inclusive of all types of disputes. According to his analysis, it is commonplace for a host state to offer investors a number of options as to dispute resolution – either ICSID arbitration, or arbitration under the aegis of the International Chamber of Commerce, or through separate agreement with state, etc.

Pate classifies these foreign investment laws into three categories. The first category includes foreign investment laws which contain express or unequivocal consent to settle disputes under ICSID or ICC. These are considered to be unilateral offers, which require only acceptance by investors. The second category comprises foreign investment laws which refer to the *possibility* of referring to ICSID or ICC, which allows foreign investors to choose among the options. It is also commonplace that these laws include dispute resolution methods such as conciliation/mediation mechanisms or national courts of the host state. The third category includes those foreign investment laws which require an express agreement with a foreign investor as to international arbitration.

---

<sup>555</sup> Ibid. page 199.



**Table 4: Classification of National Investment Legislations<sup>556</sup>**

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

Category 1 – Unilateral offer is given.

Category 2 – list of dispute resolution options is given to the investor.

Category 3 – only by agreement.

<sup>556</sup> Source: T Pate, 'The past, present, and future of the arbitral clause in foreign investment legislation: In Pursuit of the Balance'.

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

‘If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal in the Republic of Albania in accordance with its laws. In addition , if the dispute arises out of or relates to expropriation, compensation for expropriation or discrimination and also for the transfers in accordance with Article 7, then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for the settlement of Investment Disputes established by the Convention on the Settlement of Investment Dispute between States and Nationals of Other States, done at Washington, March 18, 1965.’

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

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

It is noteworthy that in Gaith Pharaon v. Republic of Tunisia the Claimant referred to the foregoing provision as a basis for ICSID jurisdiction. The case was eventually settled, and Tunisia’s objections to ICSID jurisdiction based on the aforementioned article were never addressed. The Tunisian government however undertook measures to change the then existing legislation, and as a result the Industrial Promotion Agency was established and new foreign investment laws were adopted. The current Law Promulgating the Investment Incentives Code provides for dispute resolution in local courts of Tunisia:

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

Hence, the aforementioned provision permits arbitration provided there is an explicit agreement thereto. In contrast, the 1970 Settlement of Investment Disputes Act of Botswana was alluded to by one commentator as containing an implicit and ‘potential

unilateral consent in writing to submit disputes to ICSID.’ The Section 11 of the law reads:

‘Any national of any other State which is party to the [ICSID] Convention may submit to the Centre, for settlement by conciliation or arbitration in pursuance of the Convention, any legal dispute with Botswana, provided that such foreign national has within one year after the commencement of this Act or within one year after the making of the investment, whichever is the later, filed with the Minister a consent in writing to the like submission to the Centre by Botswana of any such legal dispute’.

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

‘Any disputes on foreign investments, which may arise between the foreign investor and the State shall be considered by the courts of the Republic of Armenia based on the legislation of the Republic of Armenia.

Other disputes where the Republic of Armenia is not involved as a side, shall be considered, based on the legislation of the Republic of Armenia, by the courts of the Republic of Armenia or other bodies resolving economic disputes, unless it is otherwise specified by international contracts or preliminary agreement of the sides (on the basis of foundation documents, economic agreements, etc.)’

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

This is also confirmed by the jurisprudence of the Tribunal in *Tradex v. Albania*<sup>557</sup>, *SPP v. Egypt*,<sup>558</sup> *Manufacturers Hanover Trust Co. v. Egypt and General Authority for Investment and Free Zones*.

The most prominent case on this issue was *SPP v. Egypt*, where a central issue on jurisdiction was the discussion of the legislative provision of Egypt’s Law Concerning the Investment of Arab and Foreign Funds and the Free Zone that stated:

---

<sup>557</sup> *Tradex v. Albania*, (Decision on Jurisdiction), 24 December 1996, 14 ICSID Review – Foreign Investment Law Journal (1999) 161, 187.

<sup>558</sup> *SPP v. Egypt*, (Decision on Jurisdiction) I, 27 November 1985, 3 ICSID Rep 112, 114/5. 16 ILM (1977) 1476, 1479.

“Investment disputes in respect of the implementation of the provision of this law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor’s home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered.”<sup>559</sup>

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

*‘On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express ‘consent in writing’ to the Centre’s jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreement upon method of dispute settlement and no applicable bilateral treaty’*<sup>560</sup>

This reasoning is stated to be rooted in common law concepts of offer and acceptance and is firmly entrenched on common law notions of arbitration.<sup>561</sup> However, another point in this vein is that not all references in host state legislation amount to consent to compulsory arbitral jurisdiction. The parallel is again drawn to the common law approach that differentiates between a definite offer and merely an invitation to treat.

In this regard, Egypt argued that the use of expressions “within the framework of the Convention” and “where it applies” implies a need for separate consent to ICSID jurisdiction. In fact, Egypt did not regard its legislation as constituting an offer. It manifested that simple reference to the Convention was insufficient, and even amended the legislation immediately after the case.<sup>562</sup>

In *SPP v. Egypt* ICSID tribunal rejected the arguments of Egypt and took the view that the requirement *ratione voluntatis* has been met grounding its decision on general principles of statutory and treaty interpretation,<sup>563</sup> historical considerations,<sup>564</sup> a decree implementing the original legislation<sup>565</sup> and principles of international law applicable to unilateral

---

<sup>559</sup> *Ibid.*

<sup>560</sup> *SPP v Egypt*, (Decision on Jurisdiction) I, 27 November 1985, 3 ICSID Reports 161.

<sup>561</sup> M Sornarajah, *The international law on foreign investment* (3<sup>rd</sup> ed., Cambridge University Press 2010) p. 210.

<sup>562</sup> *Ibid.*

<sup>563</sup> *SPP v. Egypt*, (Decision on Jurisdiction) I, 3 ICSID Reports 142/3.

<sup>564</sup> *Ibid.* at 158.

<sup>565</sup> *Ibid.* at 150/1.

declarations”.<sup>566</sup> The position of ICSID on the method of interpretation of consent is not entirely uniform.<sup>567</sup>

#### **D. Consent through Multilateral Investment Treaties**

References to ICSID mechanism of dispute resolution can be found in the North American Free Trade Agreement (NAFTA), the 1994 Energy Charter Treaty, the 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone and the 1994 Free Trade Agreement between Mexico, Colombia and Venezuela.

For instance, NAFTA’s Chapter 11 on Investments contains article 1122, which entitles aggrieved investors to seek dispute resolution under ICSID:

- ‘1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
- 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
  - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility rules for written consent of the parties.’

It should be, however, noted that, as of 2010, only the United States have ratified the ICSID Convention, meaning that the mechanism is still of limited relevance. It follows that as long as Canada and Mexico are not parties to Washington Convention, the NAFTA’s provision will not take effect to confer ICSID’s jurisdiction. The Energy Charter Treaty also contains an unconditional consent of its Member States to ICSID and, where applicable, to the ICSID’s Additional Facility.

Similarly, article 9 of the 1994 Colonia and Buenos Aires Investment Protocols of the Common Market of the Southern Cone and articles 17-18 of the Free Trade Agreement Between Mexico, Colombia and Venezuela offer an unequivocal consent of their member states to international arbitration, thereby enabling investors to seek redress under, *inter alia*, ICSID facility.

---

<sup>566</sup> Ibid. at 142/3.

<sup>567</sup> C H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) p. 248.

## **E. Consent through Bilateral Investment Treaties**

Schreuer argues that the majority of contemporary BITs include an express consent of the Contracting States to ICSID arbitration. A simple ICSID dispute resolution clause can be found in the 1980 United Kingdom and Sri Lanka BIT:

‘Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (herein referred to as ‘the Centre’) for settlement by conciliation or arbitration under the Convention ... any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.’<sup>568</sup>

There is also a possibility of mentioning ICSID dispute resolution mechanism as one of the alternatives. For instance, article 12 of the 1991 Switzerland-Ghana BIT provides:

‘(2) If such dispute cannot be settled according to the provisions of paragraph (1) of this article within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall be submitted to international arbitration or conciliation.

(3) Where the dispute is referred to international arbitration or conciliation, the aggrieved party may refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes ...; or

(b) an international arbitrator or an ad hoc arbitration tribunal to be appointed by a special agreement or established under the arbitration rules of the United Nations Commission on International Trade Law.

(4) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration or conciliation.’

However, not every dispute resolution provision echoes such tactics. Some references by signatory states may not qualify as advance consent to the ICSID arbitration. For instance, there are instances wherein seemingly obligatory character of dispute resolution under the ICSID is rather misleading. For example, the 1979 treaty between Sweden and Malaysia reads:

‘In the event of a dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes

---

<sup>568</sup> 19 ILM 886, 888 (1980).

established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated March 18, 1965.’

Another interesting approach was adopted in treaties concluded by the Netherlands. For instance, the 1970 treaty between the Netherlands and Kenya stipulates:

‘The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.’

It is obvious that the foregoing provision does not itself constitute Contracting state’s consent to the ICSID jurisdiction; however it explicitly urges the signatory states to give such consents if requested by investors. Remarkably, other treaty also concluded by the Netherlands and Pakistan in 1988 apparently contains an obligation, yet not the consent itself, of the Contracting states to give assent to arbitration under the ICSID:

‘The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for arbitration or conciliation, to the Centre established by the Convention of Washington of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any dispute that may arise in connection with the investment.’

Dolzer and Stevens note that similar provisions can be found in Japanese BITs, and some other BITs concluded by Australia, France and the United Kingdom. It should be noted that, under none of these dispute resolution mechanisms, would investors gain immediate access to ICSID’s dispute settlement procedure. Such right is contingent on the host state’s granting of the required assent.

The difference between the 1988 Netherlands-Pakistan treaty and 1970 Netherlands-Kenya BIT is that, should any of the Contracting states of the former treaty fail to give consent to ICSID arbitration, it would be tantamount to a breach of the international obligation contained in the bilateral investment treaty, and remedy for which would possible fall within the rubric of inter-governmental arbitration under BIT.

Other type of BITs merely foresees a future agreement as to granting of consent to arbitrate. Article 6 of the 1978 Sweden-Yugoslavia BIT explicates the notion in the following paragraph:

‘In the event of a dispute between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for the Settlement of Investment Disputes’.

## **8.4. OTHER CRITERIA OF CONSENT<sup>569</sup>**

### **A. Time of Consent**

The time of consent is determined by the date at which both parties have agreed to ICSID’s jurisdiction. If the consent clause is contained in an offer by one party, its acceptance by the other party will determine the time of consent.

If the host State makes a general offer to accept ICSID’s jurisdiction in its legislation or in a treaty, the time of consent is determined by the investor’s acceptance of the offer. At the latest, this offer may be accepted through bringing a request for conciliation or arbitration to the Centre. The investor is under no time constraints to accept the offer and thus to complete the consent unless the offer, by its own terms, provides for acceptance within a certain period of time. But it should be borne in mind that consent, once completed, has a number of legal consequences. Therefore, care should be taken to perfect consent at the appropriate time and not to rely on a standing offer without actually taking it up.

In *Holiday Inns v. Morocco*, no fewer than three conditions for the full validity of consent were lacking at the time the agreement containing the consent clause was signed: (i) the host State had not yet ratified the Convention; (ii) the investor’s home State had not yet ratified the Convention; and (iii) one of the corporate parties to the dispute had not yet been created. The Tribunal noted that all these defects had been cured before the institution of proceedings and stated that ‘... it is the date when the conditions are

---

<sup>569</sup> See also the ‘*COURSE ON DISPUTE SETTLEMENT - Module 2.3. ICSID: Consent to Arbitration.*’ (UNCTAD/EDM/Misc.232/Add.2), at < <http://www.UNCTAD.org> >, accessed 22 August 2011.



definitely satisfied ... which constitutes in the sense of the Convention the date of consent...'.<sup>570</sup>

Consent to the jurisdiction of the Centre triggers a number of legal consequences under the Convention. The most important one is that consent, once perfected, becomes irrevocable under the last sentence of Article 25(1). The nationality of the foreign investor under Article 25(2) is determined by reference to the date of consent. Both, natural and juridical persons must be nationals of another Contracting State on the date of consent. Article 44 of the Convention provides that proceedings will be conducted in accordance with Arbitration Rules in effect on the date on which the parties have given their consent.

Consent by both parties must exist at the time of the institution of the proceedings. It does not make sense to go through the procedure of constituting a tribunal if it is likely that it will find that there is no jurisdiction. Therefore, manifest absence of consent is an absolute bar against a request ever reaching a tribunal.

In *Tradex v. Albania*, the Claimants relied on the bilateral investment treaty between Albania and Greece as one of two bases for jurisdiction. The Tribunal noted that the Request for Arbitration was dated 17 October 1994 but that the BIT had come into force only on 4 January 1995. It found that jurisdiction must be established on the date of the filing of the claim and rejected the BIT as a basis for jurisdiction.<sup>571</sup>

Once the proceedings are instituted, the parties may confirm or even extend their consent to jurisdiction. A tribunal will examine the validity or scope of consent only if a party raises a jurisdictional objection. A party that has not challenged the existence of consent at an early stage in the proceedings is precluded from doing so later on.

## **B. Limitations on Consent**

Article 25 of the ICSID Convention merely defines the outer limits of the consent that the parties may give. There is nothing to stop them from circumscribing it in a narrower way. The parties are free to delimit their consent by defining it in abstract terms, by excluding

---

<sup>570</sup> Lalive, *The First 'World Bank' Arbitration*, 51 *British Yearbook of International Law* 123, 146 (1980).

<sup>571</sup> *Tradex v. Albania*, (Decision on Jurisdiction), 24 December 1996, 14 *ICSID Review—Foreign Investment Law Journal* 161, 178-180 (1999).

certain types of disputes or by listing the questions they are submitting to ICSID's jurisdiction.

In practice, broad inclusive consent clauses are the norm. They are also generally preferable. Narrow clauses, listing only certain questions or excluding certain questions, are liable to lead to difficulties in determining the tribunal's precise competence. Moreover, narrow clauses may inadvertently exclude essential aspects of the dispute.

References to ICSID contained in national investment legislation typically relate to the application and interpretation of the piece of legislation in question. Some national laws are more sweeping and simply refer to disputes 'concerning foreign investment'. Others describe the questions covered by consent clauses in narrower terms. These may include the requirement that 'the dispute is fundamental to the investment itself' or that the dispute must be 'in respect of any approved enterprise'.

Some national laws circumscribe the issues that are subject to ICSID's jurisdiction narrowly. The Albanian Law on Foreign Investment of 1993 offers consent to ICSID's jurisdiction but limits this consent in the following terms:

'... if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, ...' <sup>572</sup>

In *Tradex v. Albania*, the Tribunal held that it had jurisdiction subject to joining to the merits the issue as to whether or not an expropriation had been shown to exist.<sup>573</sup> In its Award it found, after a detailed examination of the facts that the Claimant had not been able to prove that an expropriation had occurred.<sup>574</sup>

Clauses in bilateral investment treaties (BITs) are generally quite broad and refer to 'any legal dispute . . . concerning an investment'.<sup>575</sup>

---

<sup>572</sup> See *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 174 (1999). Article 7 deals with the investor's right to transfer funds abroad.

<sup>573</sup> *Ibid.* At pp. 185, 196.

<sup>574</sup> *Tradex v. Albania*, Award, 29 April 1999, 14 ICSID Review—Foreign Investment Law Journal 197, 217, 223, 232-248 (1999).

<sup>575</sup> Great Britain Model Agreement, Art. 8, Dolzer/Stevens, *Bilateral Investment Treaties*, p. 234. Most of the other Model Agreements contain similarly sweeping clauses.

Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide. For instance, the host State's investment legislation or its BIT with the investor's home State may provide for the Centre's jurisdiction in the most general terms. If the investor accepts ICSID jurisdiction only with regard to a particular dispute or in respect of certain investment operations, the consent between the parties will be thus limited. It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the legislation or treaty would apply irrespective of the terms of the investor's acceptance. If the terms of acceptance do not correspond with the terms of the offer there is no perfected consent.

### **C. Irrevocability of Consent**

Article 25 (1), last sentence of the ICSID Convention provides: 'When the parties have given their consent, no party may withdraw its consent unilaterally.'

The binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim "*pacta sunt servanda*" and applies to undertakings to arbitrate in general. The applicability of this maxim is obvious where the consent is expressed in a compromissory clause contained in an agreement. It applies equally where an offer of consent is contained in national legislation or in a treaty which has been accepted by the investor. Consent to ICSID's jurisdiction is always by agreement even if the elements of agreement are expressed in separate documents.

The irrevocability of consent operates only after the consent has been perfected. A mere offer of consent to ICSID's jurisdiction may be withdrawn at any time unless, of course, it is irrevocable by its own terms. In the case of national legislation and treaty clauses providing for ICSID jurisdiction, the investor must have accepted the consent in writing to make it irrevocable. Therefore, it is inadvisable for an investor, to rely on an ICSID consent clause contained in the host State's domestic law or in a treaty without making a reciprocal declaration of consent. This may be done by a simple letter addressed to the

host State. Alternatively, the investor may accept the offer of consent simply by instituting proceedings before the Centre but in doing so runs the risk that the offer may be withdrawn at any time before then.

The irrevocability of consent only applies to unilateral attempts at withdrawal. It is clear that the parties may terminate consent to jurisdiction by mutual agreement either before or after the institution of proceedings.

The ICSID Convention not only declares the unilateral withdrawal of consent inadmissible but also makes provision for the institution and continuance of proceedings despite the refusal of a party to cooperate. The provisions on the constitution of arbitral tribunals (Articles 37-38) on *ex parte* procedure (Article 45) and on the enforcement of awards (Article 54) are designed to secure the successful conclusion of proceedings even in the face of a recalcitrant party.

The parties are free to subject their consent to limitations and conditions. However, once consent has been given, its irrevocability extends to the introduction of new limitations and conditions. In other words, the prohibition of withdrawal covers the full extent of the consent to jurisdiction. Consent, once it is perfected, may not be withdrawn indirectly through an attempt to remove one of the other jurisdictional requirements under the Convention. To this end Article 72 of the ICSID Convention provides that the Convention's denunciation by the host State or the investor's home State shall not affect consent to jurisdiction given previously. Similarly, if the consent to ICSID's jurisdiction was given by way of an investment licence or similar authorization, the withdrawal of the licence will not defeat jurisdiction.

A host State is free to change its investment legislation including the provision concerning consent to ICSID's jurisdiction. An offer of consent contained in national legislation that has not been taken up by the investor will lapse when the legislation is repealed. The situation is different if the investor has accepted the offer in writing while the legislation was still in force. The consent agreed to by the parties then becomes insulated from the

validity of the legislation containing the offer. It assumes a contractual existence independent of the legislative instrument that helped to bring it about. Therefore, repeal of investment legislation providing for ICSID's jurisdiction will not affect a withdrawal of consent if the investor has accepted the offer during the legislation's lifetime.

Bilateral investment treaties (BITs) and multilateral international instruments providing for consent to ICSID's jurisdiction are more difficult to terminate than national legislation. The fact remains that consent based on treaties is only perfected once it is accepted by the investor. It is only after its acceptance by the investor that an offer of consent contained in a BIT or other international instrument becomes irrevocable and hence insulated from attempts by the host State to terminate the treaty.

In *CSOB v. Slovakia*, the Tribunal found that the BIT had never entered into force despite the fact that it was published in Slovakia's Official Gazette together with a notice announcing its entry into force. After the institution of ICSID proceedings, Slovakia published a corrective notice in its Official Gazette asserting the BIT's invalidity. The Tribunal said:

'In this connection, it should be noted that if the Notice were to be held to constitute a valid offer by the Slovak State to submit to international arbitration, the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997, asserting the invalidity of the BIT, would be of no avail to Respondent, since Claimant accepted the offer in the Request for Arbitration filed prior to the publication of the corrective notice.'<sup>576</sup>

If an investment agreement between the host State and the investor containing a clause providing for ICSID's jurisdiction is alleged to be invalid or is terminated, it may be argued that the consent clause is also invalidated or ceases to operate. But a unilateral invocation of invalidity or termination of the investment agreement will not defeat the consent clause. A tribunal must have the power to decide on disputes concerning the alleged invalidity of investment agreements even if the tribunal's very existence depends on the agreement's validity. Under the doctrine of the severability or separability of the arbitration agreement, the agreement providing for arbitration assumes a separate

---

<sup>576</sup> *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 267 (1999).

existence, which is autonomous and legally independent of the agreement containing it. This principle of severability of the arbitration agreement is supported by the weight of international arbitral codifications<sup>577</sup> as well as by national and international arbitral practice.<sup>578</sup>

The argument that a State's own expression of consent was defective under its law and hence invalid is unlikely to succeed. There are weighty arguments to dismiss a plea of incapacity as vitiating a State's consent. It is the primary duty of the Contracting State to ensure the observance of its own law. Alternatively, good faith requires that any incapacities or procedural requirements must be divulged to the other side. A party may not avail itself of its own violation of legal rules.

## 8.5. CONCLUSION

'Consent' of the respondent host state to investor/state arbitration in the investment is one of the most important conditions for the vesting of adjudicative power in the tribunal. Despite such eminent role the range of scholarly research available on jurisdiction *ratione voluntatis* - as to whether or not the respondent host state has consented to the arbitration of investment disputes remains to be relatively narrow.

Increasing but yet still insufficient recognition is being accorded to the analysis of *ratione voluntatis* – or of consent to arbitrate – which is the fundamental requirement for a dispute to be arbitrable. Tribunals have faced tedious challenge in deciding whether the particular issue alleged to constitute an impediment to the tribunal's power to adjudicate the investment dispute is one relating to the consent to the investment arbitration (jurisdiction) or admissibility.

The task for this chapter was to distinguish those conditions prescribed in an investment treaty that are properly characterized as *ratione voluntatis* from other stipulations in the

---

<sup>577</sup> See ICC Rules of Arbitration (1998), Art. 6(4), 36 ILM 1604, 1609 (1997); UNCITRAL Arbitration Rules (1976), Art. 21(2), 15 ILM 701, 709 (1976); UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 16(1), 24 ILM 1302, 1306 (1985); Institut de Droit International, Resolution on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises, Art. 3(a), 63 Annuaire II 324, 326 (1989).

<sup>578</sup> Schwebel, International Arbitration: Three Salient Problems, 24-59 (1987).

investment treaty. It also surveyed the pre-requisite of *ratione voluntatis* within the framework of article 25 of the ICSID Convention. Some expressions of consent to arbitration are narrowly confined as to their subject matter. Typical examples for narrow clauses of this kind are expressions of consent that are limited to the amount of compensation for expropriation. Some national laws also offer consents only in respect of narrowly circumscribed issues.

The author contends to the view that periods foreseen for negotiations are not of jurisdictional nature. The reason being that, by the time the tribunals make a decision on this issue, any waiting period would likely to have collapsed and would merely compel the claimant to start proceedings anew. Author also asserts that the usefulness of such requirement is questionable. In Author's view, the most likely effect of a clause providing exhaustion of the host state's domestic courts is delay and additional cost since it is unlikely that the dispute will be resolved before the domestic courts within that time frame.

Ambiguous expressions of consent have been, and still are, the source of discontent and academic debate, and have led to controversy in a number of cases before ICSID. It is generally accepted that consent which falls under the aegis of a BIT/MIT and ambiguities associated with it are to be interpreted in accordance with general principles of public international law. The Author's view favours a balance approach that accepts neither a restrictive nor an expansive approach to the interpretation of consent clauses. The Author contends that good faith requires that any incapacities or procedural requirements must be divulged to the other side. A party may not avail itself of its own violation of legal rules.

Article 25 of the ICSID Convention merely defines the outer limits of the consent that the parties may give. There is nothing to stop them from circumscribing it in a narrower way. In practice, broad inclusive consent clauses are the norm. They are also generally preferable. This research affirms that narrow clauses, listing only certain questions or excluding certain questions, are liable to lead to difficulties in determining the tribunal's precise competence. Moreover, narrow clauses may inadvertently exclude essential aspects of the dispute.

## **9. CHAPTER NINE: SUMMARY CONCLUSIONS**

Over the last two decades, few areas of international economic law and policy have experienced such tectonic changes as international investment. The transformations affecting international investments have been profound and multi-dimensional. They relate not only to the direction of the flows of international investment, but also to the nature of investment and, above all, to the international rules and disciplines governing investment activity.

Investment has also become one of the most dynamic areas of international economic law. This has been the result of the negotiation of a patchy but extensive network of International Investment Agreements (IIAs) around the globe, and of the increasing application of these agreements to address conflicts surging between foreign investors and states hosting the investment. By 2010, according to UNCTAD, the number of existing IIAs was over 3,000, and the cumulative number of known treaty-based investor-State disputes submitted to international arbitration was more than 350.

An arbitral setting is composed of the parties, arbitrators, institutions, interest groups such as NGOs, scholars etc. The nationality of the parties, the growing proliferation of international arbitral institutions, the autonomous nature of the principles, and the ability of the parties to reap the fruit of their labour by enforcing successful arbitral awards against private and state entities across the globe are all hallmarks to the assertion that arbitration is indeed a form of international justice. International courts and tribunals are generally seen as administrators of justice in international fora.

The establishment of the Permanent Court of International Justice and subsequently of the International Court of Justice are some forms of attestations to the linkage between the conception of justice in abstract and the concrete institutional representation. Indeed, arbitral courts and tribunals such as the Permanent Court of Arbitration (PCA), investment treaty tribunals (under ICSID, NAFTA, BITs) and other international institutional arbitral tribunals are seen within the wider context of international administrators of justice.



The International Centre for the Settlement of Investment Disputes is portrayed as the world's foremost arbitral institution to counteract imbalances on the landscape previously dominated by the concept of sovereign immunity. Availability of neutral arbitration of investment disputes reinforces investor confidence and makes it possible for them to mitigate political risk. As events and political turmoil in Middle East unfold, 2012 and 2013 are expected to bring further deterioration of expropriation and regulatory risk indices, which will presumably trigger further explosion in ICSID arbitration proceedings.

At the same time, relatively immature nature of academic scholarship on ICSID jurisprudence rests on the statistics which reveals that over half of all ICSID cases for its thirty seven year history have been registered within the period 2004-2010.

The thesis is among pioneering in-depth study of article 25 of the 1965 Washington Convention on the Settlement of Investment Disputes (hereinafter, the Washington Convention), which articulates three arbitrability requirements for dispute resolution under the aegis of ICSID – *ratione materiae*, *ratione personae* and *ratione voluntatis*. Quite expectedly, it is the Respondent that usually alleges a dispute's inadmissibility under article 25 of the Washington Convention, and this scenario is virtually ubiquitous.

Divergence of views on article 25 of the ICSID Convention coupled with uncertainty surrounding three jurisdictional criteria articulated therein pose a threat to the international uniformity and is further exacerbated by inconsistent practice of ICSID tribunals. In view of this, this study sought legal clarity on the requirements *ratione personae*, *ratione materiae* and *ratione voluntatis* as lack of it marks a challenge for the system and immediate stakeholders, i.e. investors and host governments. Construction of legal argument in the context of these jurisdictional requirements *ratione personae*, *ratione materiae* and *ratione voluntatis* lacks coherence and consistency, and is extensively premised on references to secondary sources of law, as main concepts remain vague and ill-formulated under primary treaty law. Accordingly, the thesis attempted to streamline contending interpretations of these requirements by ICSID tribunals and in the legal scholarship and extract a coherent line of reasoning.

While the core claim of this research deals with significance of arbitral jurisprudence for the interpretation and development of international investment law, author has endeavoured to reach beyond a static perspective of investment jurisprudence in an attempt to make a contribution towards developing a theory of international investment law that conjoins the subtleties of arbitral jurisprudence and investment treaty making. It contends on resolving one of the principal impediments to developing a theory of international investment law, namely the fragmented, disintegrated and disordered state of the law that is entrenched in several, largely bilateral treaties and implemented by arbitral tribunals which, established on a case-by-case basis, that generate increasing jurisprudential inconsistencies.

This research is expected to provide, hopefully, a conceptual taxonomy for apprehending the nature and functioning of international investment law as a genuine system of law and dispute resolution and offer remedies to several practical and theoretical complications, *inter alia*, questions of treaty interpretation, of the use of the notions of investor, investment and consent regarding the establishment of jurisdiction of arbitral tribunals and admissibility of claims.

Author's personal experience of ambiguities surrounding arbitral awards rendered by ad hoc tribunals caused by implementation of contradictory interpretation of jurisdictional and admissibility requirements under the auspices of international arbitration institutions has been the main motivation behind initiating this research. It is thus expected that this research may pave the path forward in laying down foundations of the basis for legal unification and harmonization in investment arbitration based on constitution of set of rules and regulations deliberately instituted for the purpose of tackling jurisdictional and admissibility issues.

## **9.1. REVISITING RESEARCH OBJECTIVES**

International investment law has become increasingly prominent in the international legal order. This rise to prominence and the current surge of investor-state disputes have, however, not always been matched by academic reflection on the content of procedure of international investment law which is coined by the dispute settlement activities of arbitral

tribunals under investment treaties. International investment law transpires and develops more on arbitral precedent and case law than textual approaches to treaty interpretation. Like every legal system that relies on the judicial solutions of individual conflicts the treaty based investment arbitration needs to deal with conflicting and contradictory decisions.

Inconsistence and incoherence in decision making of investment tribunals has ensued great concern and debate about investment treaty arbitration. A number of factors rooted in substantive international investment law are responsible for the potential for inconsistent decisions. Fragmentation of sources of international investment law, differing assessments of law and fact, inconsistent interpretation of terminologies and multiplicity of proceedings can be among numerous potential factors. For an investment treaty tribunal to proceed to adjudge the merits of claims arising out of an investment, it must have jurisdiction over the parties and the claims, and the claims submitted to the tribunal must be admissible. Thus the main research question:

*How can the uncertainties surrounding jurisdictional and admissibility issues related to the notions of investment, investor and consent be resolved in investment arbitration?*

The main hypotheses, findings and suppositions of the research are as follows:

- 1) ICSID's jurisdictional double-filtering, which has been largely overlooked in ICSID jurisprudence, is fundamental to correct decision-making by ICSID tribunals.
- 2) 'Fraudulent intent' criterion, which borrows its rationale from the concurrent themes in international law jurisprudence, is instrumental to test nationality compliance as required in the upper jurisdictional keyhole.
- 3) The compliance with the objective requirements of article 25 of the ICSID Convention measured through the 'bona fide investor' test runs counter to the object and purpose of the ICSID Convention.
- 4) 'Dynamic' test for the contemplated investment, rather than plain 'objective' test, is an adequate pattern to ensure compliance with article 25 of the ICSID Convention due to evolving meaning of such generic term.

5) Legal unification and harmonization is proposed through introduction of a set of rules, principals and mechanisms for tackling waivers of arbitrability and upholding jurisdiction (*lex Juridictio*).

The first contribution of the thesis to the field of investment arbitration has been a thorough review of extant literature, whereby much attention was dedicated to make this overview systematic. Existing literature dealt with these jurisdictional criteria in a narrower and context-specific style. While some writings have made an attempt to analyse three jurisdictional criteria imposed by article 25 of the ICSID Convention on all requests for arbitration registered with ICSID, these attempts are rather fragmentary and insufficient to capture the peculiarities surrounding the double-jurisdictional nature of ICSID arbitration.

Indeed, most authors disregard these two jurisdictional keyholes in their analysis of ICSID-based investment arbitration. It is understood that ICSID's double-jurisdictional test – or a 'double-barrel' test or a 'double-jurisdictional keyhole' approach – requires the claimant to persuade the ICSID tribunal that the respective jurisdictional requirements are met under both the applicable consent instrument – generally BIT or MIT – **and** article 25 of the ICSID Convention. Hence, for instance, such double-jurisdictional test would require the asset in question qualify as 'investment' not only under the BIT or the MIT, but also meet the requirements of being an 'investment' under article 25 of the ICSID Convention as well.

While the qualification under the BIT or the MIT is largely easy to establish as the respective definition of 'investment' is usually contained in article 1 of most BITs and MITs, the notion of 'investment' under article 25 of the ICSID Convention remains nebulous as the Convention provides no definition. Neither does the Convention contains criteria for the same and explanation as to what constitutes an 'investment' under the ICSID Convention.

In view of the above, attempts to ascertain the meaning of article 25 of the ICSID Convention by citing interpretations of and/or offering a range of texts from BITs/MITs, whose reading and construction are regarded as falling within the ambit of a lower

jurisdictional threshold, are *misleading and incorrect*. For instance, it was established through this research that implicit refusal to double-filter respective notions of ‘investment’ can be traced in several arbitration awards, including *SGS v Pakistan*, *M.C.I. Power Group L.C. v Ecuador*, ICSID Annulment Committee in the *Malaysian Historical Salvors, Biwater v Tanzania*.

In order to clarify the meaning of article 25, which lies within upper jurisdictional keyhole, one should analyse the Washington Convention itself, and not the BIT that might ‘advise’ the meaning of ‘investment’ and of ‘investor’ as it is understood in lower jurisdictional framework.

The first working hypothesis has been formulated as follows:

- 1) *ICSID’s jurisdictional double-filtering, which has been largely overlooked in ICSID jurisprudence, is fundamental to correct decision-making by ICSID tribunals as to what constitutes ‘investment’ under requirement *ratione materiae*, what nationality a corporate investor has for the purposes of the requirement *ratione personae* and what constitutes consent under requirement *ratione voluntatis*.*

Undeniably, BITs, which are bilateral arrangements between two state parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT, being based on a test agreed between two States, cannot set aside the definition of the ICSID Convention, which is a multilateral agreement.

The hypothesis outlined above has immediate implications for non-ICSID arbitrations and the jurisdictional threshold thereof, i.e. non-ICSID investment arbitration requires compliance only with the respective jurisdictional criteria expressed in the relevant consent document – a BIT or a MIT.

Tribunals under MIT’s such as the Energy Charter Treaty at times have affirmed the existence of an investment dispute under the treaty, but at the same time omitted the discussion of the so-called typical ‘*characteristics of an investment*’. In other words they thereby disregard any ‘limiting phrases’, which such typical ‘characteristics of an

investment’ may impose on the asset in question under article 25 of the ICSID Convention.

In view of the foregoing, it is also noteworthy that the research aimed to marry two so far isolated, albeit corresponding, legal debates, that is of subjective vs. objective test under, or restrictive vs. deferential approach to, *ratione materiae* requirement and the debate on double-filtering of ICSID’s jurisdiction. Hence, mere compliance of the respective jurisdictional definitions with the subjective test contained in the relevant consent document – BIT/MIT – would be construed as passing the lower jurisdictional filter, whilst their conformity with the objective criteria/test bears witness to their observance of the upper jurisdictional requirement/threshold.

In other words, the subjective test, or a lower-jurisdictional keyhole, is by and large controlled by the parties’ agreement or generally contained in article 1 of the relevant BIT/MIT or other consent instrument, whilst the objective test refers to the notion of ‘investment’ envisaged under the ICSID Convention, whose criteria should be met in order for a dispute to be considered as arising ‘out of investment’ as it is required by article 25 of the ICSID Convention. The tribunal in *Petrobart v. Kyrgyz Republic* has manifestly delineated the distinction between ICSID arbitrations and those administered by other institutions, such as the Stockholm Chamber of Commerce arbitration facility. The conclusion drawn is that a non-ICSID institution would not require the investor to pass the so-called objective test, or to establish that the asset in question has the objective, rather than only subjective, ‘characteristics of an investment’, as it would have been required had the arbitration been held under the auspices of ICSID.

Remarkably, a number of countries, including the United States, in their recent BITs which contain different options as to dispute resolution, including non-ICSID arbitration, are gradually attempting to introduce uniformity between ICSID and non-ICSID dispute resolution and are including the above mentioned objective criteria (‘characteristics of an investment’) for an asset to qualify as ‘investment’ to wipe out aforementioned jurisdictional distinction between the two.

This research therefore suggests that such growing acceptance among the countries of the distinct character of ICSID arbitration demonstrates growing conviction in objective, rather than only subjective, nature of jurisdictional requirements of ICSID arbitration, therefore the requirement to double-filter the respective notions remains imperative.

The research presented several important considerations regarding verification and validation of this hypothesis. The presented hypothesis has been verified through integration with all existing – at times even conflicting - theories on ICSID’s jurisdictional requirements. In regard of the requirement *ratione materiae*, some authors have contended that at the time of drafting the ICSID Convention the assumption was that in most cases there would be an agreement in writing on consent to arbitrate thereby suggesting that if the parties surrendered their dispute to the competence of ICSID, such parties obviously had agreed that there had been investment, whilst others vehemently reject the foregoing contention stating that parties are indeed at liberty to settle on what constitutes investment, but only within those ‘outer limits’, and beyond those ‘outer limits’ their consent is of no use when establishing conformity with ICSID’s requirement of investment.

This notwithstanding, the considerable unanimity has been reached among commentators in terms of the existence of marginal limits which rule out ‘truly exceptional cases’ under the ICSID Convention, and that those ‘characteristics of an investment’ enunciated by the *Salini* tribunal and which form the upper jurisdictional threshold may be relevant to expose such ‘truly exceptional cases’. In other words, ‘short-term’, ‘occasional’ arrangements having the nature of ‘volatile capital’, yielding only ‘quick gains’ and which followed by ‘immediate departure from the host country’ might not be construed as investment.

Historical context of the ICSID Convention as well as the referenced literature has proved the validity of the first hypothesis. The novelty value of the hypothesis has been demonstrated in terms of publication of the paper which contained analysis of the literature review and author’s conclusions stemming therefrom in one of the leading peer-reviewed journals and in terms of references to literature that demonstrate how the hypothesis builds upon and extends.

The proof of the hypothesis provides an important step in addressing the first research question. While the first research question originally was centred around the *Salini* test, also referred to as containing the criteria of the objective test to establish that the asset is ‘investment’ for the purposes of article 25 of the ICSID Convention, the fundamental premise of the first hypothesis lays solid background as to necessity of passing such objective test at upper jurisdictional threshold. Moreover, uncertainty surrounded by divergent views as to *Salini* criteria has been resolved through the above mentioned literature review. As it is noted above, the review of extant literature upheld the characteristics of ‘investment’ professed by *Salini* tribunal, however, affirmed that ICSID tribunals do have leeway in application of these characteristics and that the test is not onerous.

In addition to it, the review of extant literature gave sound footing for another premise outlined in the working hypothesis, that is as to relevance and applicability of the objective test, and, therefore, of double-filtering to the requirement *ratione personae*. This aspect has been *overlooked or neglected* as the foregoing debates as to subjective versus objective tests have been, and still are, centred around the notion of investment and their applicability thereto. Hence, for the purposes of ICSID arbitration, the imperative to meet both the subjective and objective test, and, therefore, the double jurisdictional threshold, is categorical and binding not only on the notion of an ‘investment’ (i.e. under the requirement *ratione materiae*), but also on the definition of an ‘investor’ (i.e. under the requirement *ratione personae*).

For the purposes of passing the ‘objective’ test or upper jurisdictional keyhole, the investor should meet the respective ‘subjective’ criteria in regard of the definition of ‘investor’ articulated in the consent instrument, which is, as it was mentioned earlier, usually contained in article 1 of the BIT or MIT, and satisfy the ICSID Convention’s requirements as to the notion of ‘investor’. In this regard, while the criteria of the subjective test are generally readily available in the BIT or the MIT, no attempt was made so far to define or formulate what constitutes ‘the objective test’ for the requirement *ratione personae*. This research attempted to scrutinize this perspective and offer the concept of ‘bona fide investor’ test which is discussed further in detail.



(2) The second contribution revolves around definition of nationality and the requirement *ratione personae* applicable to legal entities under article 25 of the ICSID Convention, which lies within upper jurisdictional keyhole.

The standing of international law as to nationality of a physical person is lucid as it is predominantly subject to each state's municipal law, which settles the rules governing its acquisition and loss. The notion of corporate nationality, on the other hand, remains vague. Although the main criterion to attribute nationality dwells on incorporation theory which prevails in countries like the United Kingdom, Ireland, Denmark, Sweden, Finland, the Netherlands, other states like Germany, France, Austria, Belgium, Luxembourg, Greece, Portugal, Spain and Italy largely follow the doctrine of the real seat or of *siege social*. Bilateral treaties with these countries generally resemble these preferences. The opinions of scholars converge towards the consensus that these two theories, i.e. either the incorporation or incorporation and *siege social*, shall advise the nationality of the legal entity.

In addition to it, the scholarship accepts the existence of the third 'control' standard to establish corporate nationality, which, however, does not fall squarely within the above mentioned orthodox parameters.

It was first submitted that both the treatment and interpretation of the control criterion to establish corporate nationality are not yet clear. The doctrine of corporate veil-lifting is closely intertwined with the aforementioned control standard, which asserts that veil-lifting is necessary in instances where protection offered to shareholders by the corporate veil was objectively abused.

International law jurisprudence as well as the jurisprudence of the European Court of Justice have been investigated to prove the relevancy of the assumption that corporate veil lifting may be justified to reach for the reality behind the cover of nationality, primarily to 'prevent misuse of legal personality' and 'evasion of legal requirements or obligations'. In view of article 38 (1) of the ICJ Statute, which is widely recognized as a definitive statement of sources of international law, the reasoning adopted by the ICJ and the ECJ was proved to be applicable in the analysis of corporate veil-lifting by ICSID tribunals.

Hence, the second hypothesis professed in the thesis has been formulated as follows:

- 2) *'Fraudulent intent' criterion, which borrows its rationale from the concurrent themes in international law jurisprudence and is detected in the jurisprudence of the EU courts and the international tribunals, is instrumental to test compliance with the requirement racione personae as required in the upper jurisdictional keyhole.*

Tribunals have referred to fraud as a critical factor triggering recourse to the veil-lifting process. In support of this statement, the tribunal cited *Barcelona Traction* case which, albeit being premised on a municipal law rationale, is considered to play a similar role in international law. Awards of this sort support the paradigm that in international law the corporate veil can be pierced in order to prevent the misuse of the privileges of legal personality or to prevent the evasion of legal requirements or obligations. Furthermore, the recent awards such as the *Phoenix case* (*Phoenix v The Czech Republic*) confirm that in cases of abuse of a corporate structure, the tribunal should look beyond the apparent facts and lift the corporate veil.

This research reveals that indeed, the country of incorporation and/or the siege social seems to be the most appropriate and favourable connecting factor in establishing corporate nationality as it is required by article 25 of the ICSID Convention to uphold arbitrability of the dispute under ICSID's facility, except in cases where foreign investors abuse this rule. Additionally, it is also a common practice for a recipient state to impose the requirement on foreign investors to incorporate a local company and carry out investment activities through such entity. Assuming that the very existence of such agreement on nationality implies the existence of foreign control, this scenario should naturally render it possible for investors to refer disputes to ICSID.

Conventionally, the agreement which establishes corporate nationality of the investor is contained in the consent document – BIT/MIT or an investment contract, - and it shall be unequivocally explicit. Ambiguous phrasing such as that 'the nationality requirements are fulfilled' may entail unwanted ramifications and complications to enforce ICSID's jurisdiction and will not serve the best interests of the foreign investor, which is intent to refer disputes to ICSID. Additionally, the argument stemming from the main hypothesis as

to *ratione personae* is that foreign control is assumed to be an objective requirement which should be examined independently of the agreement on corporate nationality.

Certain national and supranational jurisdictions and international tribunals uphold the veil-lifting process in certain circumstances which are largely controlled by public policy considerations. In this context, the general principle as to corporate veil-lifting is that it is justified if inequitable or wrongful conduct, fraud, misrepresentation or evasion of contractual obligations takes place. This conclusion resembles the approach professed by courts of the United States in *Paumier v. Barge B.T.* that held: '[G]ood faith is immaterial. If good faith were to become a defence in actions of this type, every defendant would claim good faith of some sort even though he did exactly what he intended to do in misrepresenting certain facts to an innocent party ... [T]he corporate identity can be pierced to prevent not only fraud, but any injustice.'

Indeed, this research affirms that while the rationale to use corporate form to stimulate risk-taking in the market and lessen shareholders' financial exposure thereby limiting the liability is legitimate, 'there is nothing illegal about it as long this is done appropriately'.

As to the EU law, the European Company Law, which is regarded as supranational law and is submitted in this research to be the source of public international law as per the aforementioned article 38 (1) of the ICJ Statute, while recognizing that company is a separate legal entity from its shareholders upholds that this principle is not absolute. Corporate veil-lifting is required to prevent shareholders from pursuing goals that cause their company to act in a prohibited manner. The same logic is applicable to parent-subsidary relationship. This scenario would also trigger veil-lifting whereby wrongful conduct would be imputed to the parent corporation had the parent been the real force behind such prohibited conduct.

**(3)** The third contribution is the proposal in regard of the objective interpretation of *ratione personae* requirement. The objective test for the notion of 'investor' and the hypothesis stemming therefrom benefits greatly from the foregoing discussion on corporate nationality and the argument on the double-barrelled approach to the jurisdictional requirement *ratione personae*. In this context, the concept of 'bona fide investor' test has

been developed in response to the requirement to ascertain compliance of corporate entities invoking their status as investors with the ICSID Convention's jurisdictional threshold.

In view of the above, the third working hypothesis was posited as follows:

- 3) *In view of the double-jurisdictional nature of ICSID arbitration, the compliance with the objective requirements of article 25 of the ICSID Convention as to *ratione personae* is measured through the 'bona fide investor' test, which implies that abuse of corporate structure and inequitable conduct, which encompasses fraud and misrepresentation and entails corporate veil-lifting, runs counter to the object and purpose of the ICSID Convention.*

As the research revealed, two methods have been developed by the EU institutions to expose instances where the corporate veil is to be lifted: *the presumption* and *the examination* approach. While the context under the EU law is rather to define the level of control necessary to lift the veil and reach parent companies for actions of their subsidiaries, these methods contribute to the toolbox of mechanisms to establish nationality and address the inquiry as to whether investors are investors in good faith, or 'bona fide investors'.

Under the EU's presumption approach, absent the rebuttal of the presumption that the parent exercises control over the subsidiary, 'it is proper for the parent and the subsidiary to be treated as a single undertaking', and that 'the presumption can only be rebutted if it is shown affirmatively, by those concerned to rebut it, that the subsidiary in fact conducted its business autonomously'. On the other hand, under the examination approach, the burden of proof lies with the claimant, and 'the actual exercise of the parent's power of control must be shown by those who request the veil to be lifted'.

Applying the logic to the 'bona fide investor' test, the proposal as to suggested application of the test was to combine the method of presumption with that of examination. It was therefore suggested that a plausible approach would rather entail a rebuttable assumption that investors acted in good faith, and it is for the concerned party to unambiguously prove otherwise and reverse the tribunal's inference.

(4) Inspired by the analysis on treaty interpretation techniques, a fourth contribution is the proposed concept of the ‘dynamic test’ in respect of the notion of ‘investment’. The explanatory sway for putting forth the argument as to ‘dynamic’ nature of the test – particularly, of ‘objective’ test – applicable in the upper jurisdictional threshold lies in the discussion of the *Salini* criteria. The quest for an exhaustive definition of ‘investment’ is seen as rather elusive; however, a careful consideration of the *Salini* paradigm demonstrates its ‘forward-looking’ component and at the same time proves that *Salini* criteria are justified by, perhaps paradoxically, the mandate of uniformity. In other words, while *Salini* test is viewed as being flexible, or ‘forward-looking’, there is a growing consensus that these characteristics are typical to ‘investment’.

As regards its ‘forward-looking’ component, the fourth hypothesis was formulated as follows:

- 4) *‘Dynamic’ test for the contemplated investment, rather than plainly ‘objective’ test professed by Salini tribunal, is an adequate pattern to ensure compliance with article 25 of the ICSID Convention due to evolving meaning of such generic term as ‘investment’.*

The concept bears ample evidence to the conclusion drawn above in respect of the first hypothesis and the *Salini* criteria. Hence, the development of public values and further evolution of the concept of ‘investment’ will naturally trigger development of new legal standards and prompt international tribunals to adapt to changed societal and legal environment.

The model for the aspirations of the ‘dynamic test’, among others, was the recent judgment of the ICJ on the *Dispute Regarding Navigational and Related Rights* in regard of the interpretation of the 1858 Treaty which delineates the borders between Costa Rica and Nicaragua. There is perhaps no better example to substantiate the dynamic jurisprudence on many generic terms similar to the notion of ‘investment’, such as the notion of commerce envisaged by ICJ in *Costa Rica v Nicaragua*.

This research asserts that the treaty terms must be understood to have the meaning they bear on each occasion on which a treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of investment does not have the same

meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

Thus, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

(5) As for the jurisdictional requirement *ratione voluntatis*, the diversity of interpretative decisions in this context may thwart the efforts towards international uniformity; however, a constructive dialogue on an international level would be required to reach a consensus as to method of interpretation. At the same time, implicit in such rhetoric is a persisting and living nature of law which is based on certain fundamental principles and having the capacity to adapt to dynamically new environment.

‘Consent’ of the respondent host state to investor/state arbitration in the investment is one of the most important conditions for the vesting of adjudicative power in the tribunal. Despite such eminent role the range of scholarly research available on jurisdiction *ratione voluntatis* - as to whether or not the respondent host state has consented to the arbitration of investment disputes remains to be relatively narrow.

This research proposes the necessity of according more recognition to the analysis of *ratione voluntatis* – or of consent to arbitrate – which is the fundamental requirement for a dispute to be arbitrable. Tribunals have faced tedious challenge in deciding whether the particular issue alleged to constitute an impediment to the tribunal’s power to adjudicate the investment dispute is one relating to the consent to the investment arbitration (jurisdiction) or admissibility.

The author contends to the view that periods foreseen for negotiations are not of jurisdictional nature. The reason being that, by the time the tribunals make a decision on this issue, any waiting period would likely to have collapsed and would merely compel the claimant to start proceedings anew. Author believes that tribunals should neglect the requirement for exhaustion of local remedies as the most likely effect of a clause of this

kind is delay and additional cost since it is unlikely that the dispute will be resolved before the domestic courts within that time frame. This research also favours a balance approach that accepts neither a 'restrictive' nor an 'expansive' approach to the interpretation of consent clauses.

(6) This research sought to scrutinize waivers of arbitrability of disputes, absence of essential pre-requisites to establish a jurisdiction of a particular forum as well as claims related to invalidity of the agreement that contains the arbitration clause – which in author's view fall under the purview of a broader concept of *lex juridictio* – law related to establishing a jurisdiction of a particular forum. The author contends that *lex juridictio* is a multifaceted area of law, which embraces a number of fundamental and so far least researched aspects.

The principles which could be used as rules for prosecuting claims in investment treaty arbitration are very limited in number and quite general in prescription in the texts of investment treaties. The crucial task of development of these rules seems to be apparently entrusted to the international tribunals constituted on *ad hoc* and incremental basis. In Author's view, such faith should not provide a *carte blanche*; the rules for prosecuting claims must be fair and just and the system for the resolution of disputes must be internally coherent and sustainable for the duration of treaties.

Solutions to the problems of jurisdiction and admissibility must ultimately contribute to the expected fairness and justice of the system for resolving disputes. The dispute resolution system needs to be sustainable as well. Sustainability and coherency of the system, in Author's opinion, can be achieved through legal unification and harmonization of the principles and rules governing the existence and exercise of tribunals' adjudicative power.

In the existing literature on investment arbitration much seems to have been said about the importance of attaining consistency from one investment treaty award to the next. But, what about coherency (consistency in principle) that is required to ensure a single and comprehensive vision of justice? The investment arbitration under unclearly defined notions of jurisdiction and admissibility, with no appellate review, is exposed to the

danger inherent in the uncritical adoption of a previous solution to a recurring problem. We have been warned by earlier writers that ‘consistency in dealing is compatible with great iniquity’. The instances in legal history are plentiful and notorious. This research thus proposes the hypothesis that the international rules and principles of jurisdiction and admissibility in investment law must aspire to the higher value of coherency rather than mere statements of law revealed in different *ad hoc* arbitral awards.

This research proposes the hypothesis that there are clear signs of a missing body of international jurisdictional rules and principals within the purview of international investment law concerning the admission of claims ,establishment and uphold of jurisdiction of the arbitral tribunal which in author’s view should be named *lex Juridictio*.

This research also affirms application of following rules (extracted from the relevant ICSID tribunals’ awards) to jurisdiction *ratione personae* for inclusion within the propose set of law, *lex juridictio*:

RULE 1: The jurisdiction *ratione persone* extends to legal entities which hold the nationality of a contracting state party in accordance with provision of the investment treaty and the municipal law of that contracting state party and Article 25 of the ICSID Convention.

RULE 2: The nationality at the time of the alleged breach of the obligation and continuity of the tie until the arbitral proceedings are commenced is the determining factor for upholding jurisdiction.

Rule 3: The control over the investment at the time of the alleged breach of the obligation and not the continuous control over the investment thereafter are taken in consideration to establish jurisdiction.

RULE 4: If an investment treaty specifies, then it is immaterial that the investment is held through an intermediary with the nationality of a third State.

RULE 5: The claimant must have capacity to sue in accordance with its personal law or the *lex societatis*, at the time adjudicative power is established.

RULE 6: There is no requirement that the capital invested by the claimant originates from the claimant or another legal entity or individual with the nationality of the claimant.

RULE 7: The tribunal’s jurisdiction *ratione personae* may extend to a legal entity having the nationality of the host contracting state party where such legal entity is under the control of an individual or legal entity, in accordance with an express provision in an investment treaty or by application of the ICSID Convention.



RULE 8: Where an individual claimant hold dual nationality, the tribunal's jurisdiction *ratione personae* extends to such an individual only if the former nationality is the dominant of the two, subject to the application of the Article 25 of the ICSID Convention.

RULE 9: The rules for nationality of claims in the general international law of diplomatic protection do not apply to issues of nationality in investment treaty arbitration.

This research also affirms application of following rules (extracted from the relevant ICSID tribunals' awards) to jurisdiction *ratione materiae* for inclusion within the propose set of law, *lex jurisdictionis*:

RULE 10: Where a property is recognized by the rules of the host state's private international law or is created by the municipal law of the host state, the acquisition of a bundle of rights in property is legally realized as an investment.

RULE 11: The economic realization of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expropriation of commercial return.

RULE 12: The rights in *personam* as between the contracting parties and rights in *rem* that are memorialized by the contract must be distinguished by tribunals. The rights in *personam* do not generally qualify as an investment independently of the rights in *rem*.

RULE 13: The tribunal's jurisdiction *ratione materiae* may extend to claims related to an investment treaty obligation, a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party.

RULE 14: The tribunal's *ratione materiae* may extend to counter claims by the host contracting state party related to a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party directly related to the investment.

RULE 15: The legal foundation of investment claims as above must be objectively determined in ruling upon the scope of jurisdiction *ratione materiae* in a preliminary decision.

RULE 16: The tribunal's *ratione materiae* may extend to claims related to an international obligation on the treatment of foreign nationals and their property in general international law, an applicable investment treaty obligation, a contractual obligation, a tort, unjust enrichment or a public act of the host state party relating to claimant's investment.

This research also affirms application of following rules (extracted from the relevant ICSID tribunals' awards) to jurisdiction *ratione voluntatis* for inclusion within the propose set of law, *lex jurisdictionis*:

RULE 17: The parties must have consented to the arbitration of investment disputes pursuant to the provisions of the investment treaty and ICSID Convention. Such consent if

valid at the time the arbitration proceedings are commenced can support tribunal's jurisdiction – *ratione voluntatis*.

RULE 18: The claimant must have satisfied any conditions precedent to the arbitration of investment disputes as stipulated in the investment treaty for the existence of jurisdiction-*ratione voluntatis*.

This research also affirms application of following rules (extracted from the relevant ICSID tribunals' awards) to *arbitrability* for inclusion within the propose set of law, *lex juridictio*:

RULE 19: For an investment treaty tribunal to adjudge the merits of investment claims, it must have jurisdiction over the parties and the claims, and the claims must be admissible and arbitrable.

RULE 20: A decision whether a claim is arbitrable is a decision on the merits insusceptible of review beyond that which is available to decision on the merits generally.

## **9.2. RECOMMENDATION FOR FURTHER RESEARCH**

This research has also attempted to prompt the ever increasing requirement for institution of codified domain of law that is at a nascent stage of development and that is barely idle for more than an instant.

Notwithstanding the inevitable imperfection of this attempt, it is hoped that the argument deployed to justify the *lex Juridictio* will be met with approval and with dissent in awards and pleadings and academic writing. Constructive disagreement will lead to the development of better rules.

Constitution of *lex juridictio* based on unification and harmonized principles require focused study and comparative analysis of municipal laws of active nations in international investment field. It would also require a rigorous attempt to superimpose the national law to those of international law. Such academic objectivity can be the subject of similar and complementary research by itself and could not fall within the purview of the current thesis.

### 9.3. LIMITATIONS

This research was limited to the intersection between domestic systems and transnational investment law to the extent they relate to adjudication and dispute settlement. Mere policy formulations do not fall within the purview of this research except where such policies constitute a clear state measure affecting foreign investor.

Indeed, another limitation to the study was the differences in the treaty text, thereby strengthening the principle that treaty binds only the parties. Same limitation goes to arbitral awards as they bind only the parties to the award. Therefore, it is difficult to justify a generic study of various treaties and awards. The adjudicatory method seems, however, to debunk this reasoning as tribunals do rely on previous awards regardless of the parties involved on the basis of relevancy.

Lastly, there is an inherent limitation to all comparative studies that the comparator may not match in all respect. Similarly, where comparative judicial practice is seen as judicial decision making, the discretionary powers of the adjudicator are wider, thus susceptible to abuse. In legal research however, adjudicators are notoriously known for relying on precedents, and where none exist, they transpose from precedents decided in other regimes. Therefore, the role of adjudicators is no longer passive but active.

*‘Judicial law-making is a general phenomenon in societies where justice is administered by judicial tribunals... International tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law.’<sup>579</sup>*

---

<sup>579</sup> E Lauterpacht, *The absence of an international legislature and the compulsory jurisdiction of international tribunals in Hersch Lauterpacht, Disputes, War and Neutrality* parts ix-xiv (CUP 2004) p. 210.

## BIBLIOGRAPHY

- Adebiyi I.**, 'Is the doctrine of sovereign immunity a threat to investment arbitration?' (CEPLMP, 2009).
- Adhar A.**, 'Economic Development Institute of the World Bank, Terms Used in Investment Decision making: A Glossary' (1996).
- Alvarez G. A., Park W.**, 'The new face of investment arbitration: NAFTA Chapter 11' (2003) Yale J Int'l L.
- Alvarez J.**, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) Texas International Law Journal 38.
- Alvarez J. E. and Sauvant K. P.**, 'The Evolving International Investment Regime' (Oxford University Press 2011).
- Astorga R.**, 'The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence' (2007) Max Planck UNYB, Vol. 11.
- Barcelo J.**, 'Who decides the arbitrators' jurisdiction? Separability and competence-competence in transnational perspective' (2003), 36 Vanderbilt Journal of Transnational Law 1114.
- Bennett S.**, 'Developing American approach to arbitrability' (2003), Dispute Resolution Journal.
- Bergsten E.**, 'The Course on Dispute Settlement in International Trade, Investment and Intellectual Property', United Nations Conference on Trade and Development.
- Berlin A.**, 'Managing political risks'.
- Bishop R.**, 'A practical guide for drafting international arbitration clauses' (2000), Int'l Energy LTR 1.
- Blyschak P. M.**, 'State consent, investor interests and the future of investment arbitration: reanalyzing the jurisdiction of investor-state tribunals in hard cases' JIBTL.
- Boissession M. and Clay T.**, 'Recent developments in arbitration in civil law countries' [1998] int. ALR.
- Broches A.**, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction', 5 CJTL.
- Brownlie I.**, 'Principles of Public International Law' (6<sup>th</sup> edition, OUP, Oxford 2000).
- Cameron P.**, 'International Energy Investment Law: The Pursuit of Stability', (OUP, England, 2010).
- Carboneau T. E.**, 'Mitsubishi: The folly of Quixotic International' (1986).
- Cheng B.**, 'General principles of law as applied by international courts and tribunals', (Cambridge University Press 2006).
- Cheng T.**, 'Power, Authority and International Investment Law' (2005) American University International Law Review 20.
- Churchill R. and Ulfstein G.**, 'Marine management in disputed areas: the case of Barents Sea' (London, Routledge, 1992).
- Clermont K. and Eisenberg T.**, 'Xenophilia in American Courts' (1996) Harvard Law Review.
- Collier J. and Lowe V.**, 'The Settlement of Disputes in International Law' (Oxford University Press 1999).
- Connerty A.**, 'Dispute resolution in the oil and gas industry – recent trends'.
- Cooter R. and Ulen C.**, 'Law and Economics', (4<sup>th</sup> edition 2004).
- Dalhuisen J. H.**, 'The arbitrability of competition issues' (1995).
- Davis K.**, 'A Model for arbitration law: autonomy, cooperation and curtailment of state power' (1999), 26 Fordham Urb. L.J.
- Delaume G.**, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1966) 1 International Lawyer.
- Delaume G.**, 'The Pyramids Stand- The Pharaohs can rest in peace' (1993) ICSID Review.
- Dolzer R. and Schreuer C.**, 'Principles of International Investment Law' (Oxford University Press 2008).
- Douglas Z.**, 'The International Law of Investment Claims', (Cambridge University Press 2009).
- Estes T.**, 'The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture' (2006)
- Fitzmaurice G.**, 'The law and Procedure of the International Court of Justice' (1996).
- Franck S.**, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decision' (2005) Fordham Law Review 73.
- Franck S.**, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) NYLSJ of Int'l and Comparative Law 20.
- Gaillard E. and Banifatemi Y.**, 'Introductory note to ICSID: *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (Proceeding on jurisdiction)' (2003) 42 ILM.
- Gaillard E.**, 'The Denunciation of the ICSID Convention' (2007) N.Y.L.J.
- George L.**, 'Expropriation' (2002) International Energy Law and Taxation Review 3.
- Ghaffari P.**, 'Jurisdictional Requirements under Article 25 of the ICSID Convention' (2011) 12 4 TJWIT 603.
- Gross P.**, 'In Competence of Competence: An English View' (1992), 8 Arb. Int'l 206.
- Harris J.**, 'Property and Justice' (Oxford: Clarendon Press, 1996).
- Harten G. and Loughlin M.**, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) EJIL.
- Huber S.**, 'Arbitration and Contract' (August 19, 2003), Espresso Preprint Series. Working Paper 31.
- Hunter M. and Barbuk A.**, 'Reflection on the Definition of an Investment' (2005).
- Jackson J. H.**, 'Global Economics and International Economic Law' (1998) 1 J. Int'l Econ. L.
- Jalili M.**, 'Kompetenz-kompetenz: Recent U.S. and U.K. Developments' (1996), 13 J. Int'l Arb 4.
- Jason X.**, 'A Brief Introduction to the 'Kompetenz-Kompetenz' Principle in International Commercial.'

**Jones R.**, 'NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?' (2002) BYU L Rev.

**Kent J.**, 'Commentaries on American law', (O Halsted New York, 2002).

**Kirry A.**, 'Arbitrability: current trends in Europe' (1996) Arbitration International.

**Kline J. M.**, 'International Regulations of Transnational Business' (February 1993) 2 Transnational Corp.

**Krajewski M.**, 'Public services and the scope of the general agreement on trade in services'.

**Krishnan D.**, 'A notion of ICSID investment' (2009) Oil, Gas and Energy Law journal.

**Lauterpacht E.**, *The absence of an international legislature and the compulsory jurisdiction of international tribunals in Hersch Lauterpacht, Disputes, War and Neutrality* parts ix-xiv (CUP 2004).

**Lee T. H.**, 'Encyclopedia of international commercial litigation.'

**Lelewer J.**, 'International Commercial Arbitration as a Model for Resolving Treaty Disputes' (1989) New York University Journal of International Law and Policy 21.

**Malanczuk P.**, 'Akehurst's Modern Introduction to International Law' (London, UK: Routledge, 2003).

**Maniruzzaman A.**, 'The new law of international commercial arbitration in Bangladesh: a comparative perspective' (2003).

**Matthew B.** 'Essential Economics' (2004) The Economist.

**Minda G.**, 'Arbitration in the post-cold-war era – Justice Kennedy's view of post-expiration arbitrability in *Litton Financial Printing Division v. NLRB*' (1992), 22 Stetson L. Rev. 83.

**Monestier T.**, 'Nothing comes of nothing or does it? A critical re-examination of the doctrine of separability in American arbitration,' (2001) 12 Am. Rev. Int'l Arb.

**Mortenson J.**, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 HJIL.

**Murphy S.**, 'The ELSI case: an investment dispute at the international court of Justice' (1991) YJ of Int'l Law 16.

**Murray C, Holloway D. and Timson-Hunt D.**, 'The Law and Practice of International Trade' (11th edition, Sweet & Maxwell 2010).

**Nolan M. and Sourgens F.**, 'The interplay between state consent to ICSID arbitration and denunciation of ICSID Convention' (2007) OGEL.

**O Spiermann.**, 'Individual rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 Arbitration International.

**Obadia E.**, 'ICSID, Investment Treaties and Arbitration: Current and Emerging Issues'.

**Olsen J. S. (ed.)** 'Historical Dictionary of European Imperialism' (Greenwood Press 1991).

**Park W.**, 'Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators' (1997), 8 AM. Rev. Int'l ARB.

**Park W.**, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989).

**Park W.**, 'Neutrality, Predictability and Economic Co-operation' (1995) J.Int'l Arb.

**Park W.**, 'The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of Kompetenz - Kompetenz Has Crossed the Atlantic?' (1996) 12 ARB. INT'L.

**Parra A.**, 'Principles governing foreign investments, as reflected in national investment codes' (1992) 7 ICSID Review – FILJ.

**Pate T.**, 'The Past, Present and Future of the Arbitral Clause in Foreign Investment Legislation: in pursuit of the Balance'.

**Paulsson J.**, 'Arbitration Without Privity' (1995), ICSID Review – Foreign Investment Law Journal 10.

**Paulsson J.**, 'Jurisdiction and Admissibility', in *Global Reflection on International Law, Commerce and dispute Resolution*.

**Petrus C.**, 'Spanish perspectives on the doctrines of kompetenz - kompetenz and separability: a comparative analysis of Spain's 1988 Arbitration Act' (2000), 11 Am. Rev. Int'l Arb.

**Phillip S.**, 'Is the Supreme Court bucking the trend? *First Options v. Kaplan* in light of European reform initiatives in arbitration law', (1996) 14 B.U. Int'l L.J. 119.

**Price D.**, 'NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?' (2001) Can.-U.S. L.J.

**Pugh R., Schachter O., Smit H., Henkin H.**, 'International Law: Cases and Materials' (3<sup>rd</sup> ed., West Publishing Co., St. Paul).

**Raftopoulos E.**, 'The inadequacy of the contractual analogy in the law of treaties' (Hellenic institute of international and foreign law 1990).

**Rajski J.**, 'Arbitration in Central and Eastern Europe' (1999), 2 Int. A.L.R. 1999 2.

**Rau A.**, 'Everything you really need to know about "separability" in seventeen simple propositions' (2003).

**Rau A.**, 'The Arbitrability Question Itself' (1999) 10 AM. REV. INT'L ARB.

**Rayfuse R.**, 'ICSID reports: reports of cases decided under the Convention on the Settlement of Investment disputes between States and Nationals of Other States' (1994).

**Redfern A. et al.**, 'Law and practice of international commercial arbitration', (4<sup>th</sup> edition, Sweet & Maxwell 2004).

**Reed L. et al.**, 'Guide to ICSID Arbitration' (Kluwer Law International, The Hague 2006).

**Reisman M. and Arsanjani M.**, 'The Question of Unilateral Governmental Statements as Applicable law in Investment Disputes' (2004), 19 ICSID Review-FILJ 328.

**Rosen J.**, 'Arbitration Under Private International Law: The Doctrines of Separability and *Compétence de la Compétence*' (1997), 17 FORDHAM INT'L L.J.

**Rubin S. J. and Alexander D. C.**, 'NAFTA and investment', (Kluwer Law International 1995).

**Sachs J. D.**, *'The Context: Foreign Investment and the Changing Global Economic Reality'* (Oxford University Press 2011).

**Sandrock O.**, *'Arbitration Between U.S. and West German Companies: An Example of Effective Dispute Resolution in International Business Transactions'* (1987) 9 U. Pa. J. Int'l B. L. 27.

**Schill S. W.**, *'The Multilateralization of International Investment law'* (Cambridge University press 2009).

**Schlosser P.**, *'The Competence of Arbitrators and of Courts'* (1992), 8 Arb. Int'l 199.

**Schmitthoff**, *'International Commercial Arbitration'* in C Murray, D Holloway and D Timson-Hunt (ed.), *Export Trade: The Law and Practice of International Trade* (1999).

**Schreuer C.**, *'The ICSID Convention: A Commentary'*, (CUP, Cambridge 2001).

**Schücking W.**, *'The international union of the Hague conferences'*, (Clarendon Press, 1918).

**Schwarzenberger G.**, *'International law'*, (3<sup>rd</sup> Edition, 1957).

**Scott J. B.**, *'The Hague Convention and Declarations of 1899 and 1907'*, (New York, 1915).

**Shahabuddeen M.**, *'Dissenting opinion of Judge Mohamed Shahabuddeen'*.

**Shihata I.**, *'The Legal Framework for Development: Role of the World Bank in LTA'* (1995) IBL.

**Shihata I, A Parra**, *'The Experience of the International Centre for Settlement of Investment Disputes'* (1999) 14 ICSID Review – Foreign Investment Law Journal 299.

**Simma B.**, *'From Bilateralism to Community Interest in International Law'* (1994) Recueil des Cours.

**Sinclair A.**, *'Nationality requirements for investors in ICSID arbitration – the award in Soufraki v. the United Arab Emirates'*.

**Smit H.**, *'The Arbitration Clause: Who Determines Its Validity and Its Personal and Subject Matter Reach?'* (1995), 6 AM. REV. INT'L ARB. 395.

**Smit R.**, *'Separability and Competence-competence in international arbitration: ex nihilo nihil fit? Or can something indeed come from nothing?'* (2002) 13 Am. Rev. Int'l Arb. 19.

**Smith J. E. and Marshall J.**, *'Definer of a Nation'* (1998).

**Solanes M. and Jouravlev A.**, *'Revisiting privatization, foreign investment, international arbitration, and water'*.

**Sornarajah M.**, *'The Pursuit of Nationalized Property'*, (Martinus Nijhoff, Dordrecht-Boston-Lancaster 1986).

**Sornarajah M.**, *'The Settlement of Foreign Investment Disputes'*, (Kluwer Law International, London 2000).

**Stern B.**, *'Some New Trends in the Protection of Foreign Investments: the Example of the International Centre for the Settlement of Investment Disputes (ICSID)'* (2001) 4 ICCLP.

**Svernlöv C.**, *'What Isn't, Ain't: The Current Status of the Doctrine of Separability'* (1991) J. INT'L ARB.

**UNCTAD**, *'Dispute Settlement, General Topics'*.

**UNCTAD**, *'Investor-state dispute settlement and its impact on investment rulemaking'*.

**UNCTAD**, *'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking'*, New York & Geneva (2007).

**UNCTAD**, *'International Investment Agreements: Key Issues'*, Vol.1, New York & Geneva (2004).

**Vandevelde K.**, *'Investment liberalization and economic development: the role of bilateral investment treaties'* (1998) CJTL.

**Vandevelde K.**, *'The Bilateral Investment Program of the United States'* (1988) 21 Cornell Int'l LJ 201.

**Veeder V. V.**, *'The Lena Goldfields arbitration: the historical roots of three ideas'* (1998) 47 ICLQ.

**Villiger M.**, *'Customary International Law And Treaties: A Study Of Their Interactions And ... The Agony Of Algeria'* (Stone, M. - London: Hurst, 1997).

**Von Bogdandy A.**, *'Globalization and Europe'* (2004) 15 Eur. J. Int'l L.

**Waelde T.**, *'Investment arbitration under the Energy Charter Treaty'*.

**Waelde T.**, *'The Russian Oil and Gas Industry and Foreign Investment'* (1994) Opec-Bulletin 7.

**Waelde T.**, *'Stabilising International Investment Commitments: International Law Versus Contract Interpretation'*, (1996) 31 Tex Int'l LJ 215.

**Walt A.**, *'Decision by Division: The Contractarian Structure of Commercial Arbitration'* (1999), 51 Rutgers L. Rev

**Weiler T.**, *'Investment Treaty Arbitration and International Law'* (Juris Publishing, New York: 2008).

**Weiler T.**, *'The Ethyl Arbitration: first of its kind and a harbinger of things to come'*, (2000) A.Rev. of Int'l Arb. 11.

**Wetter J. G.**, *'The International Arbitral Process'*, vol. 1 (New York, 1979).

**Wilson R.**, *'United States Commercial Treaties and International Law'* (1960).

**Wyss N.**, *'First Options of Chicago, Inc. v. Kaplan: a perilous approach to kompetenz-kompetenz'* (1997), 72 Tul. L. Rev.

## LIST OF ABBREVIATIONS

|                 |  |
|-----------------|--|
| <i>ASEAN</i>    | Association of Southeast Asian Nations                         |
| <i>BIT</i>      | Bilateral Investment Treaty                                    |
| <i>EC</i>       | European Commission  |
| <i>ECJ</i>      | European Court of Justice                                      |
| <i>ECT</i>      | Energy Charter Treaty  |
| <i>EU</i>       | European Union   |
| <i>FCN</i>      | Friendship, Commerce, and Navigation                           |
| <i>FDI</i>      | Foreign Direct Investment                                      |
| <i>GATT</i>     | General Agreement on Tariffs and Trades                        |
| <i>ICC</i>      | International Chamber of Commerce                              |
| <i>ICJ</i>      | International Court of Justice                                 |
| <i>ICSID</i>    | International Centre for the Settlement of Investment Disputes |
| <i>ILA</i>      | International Law association                                  |
| <i>ILC</i>      | International Law Commission                                   |
| <i>MAI</i>      | Multilateral Agreement on Investment                           |
| <i>MIT</i>      | Multilateral Investment Treaty                                 |
| <i>MNE</i>      | Multi National Enterprise                                      |
| <i>NAFTA</i>    | North American Free Trade Agreement                            |
| <i>OECD</i>     | Organization for Economic Cooperation and Development          |
| <i>PCA</i>      | Permanent Court of Arbitration                                 |
| <i>PTIA</i>     | Preferential Trade & Investment Agreement                      |
| <i>TPP</i>      | Trans-Pacific Partnership                                      |
| <i>UNCITRAL</i> | United Nations Commission on International Trade Law           |
| <i>UNCTAD</i>   | United Nations Centre for Trade and Development                |
| <i>VCLT</i>     | Vienna Convention on the Law of Treaties                       |

## **LIST OF TREATIES, CONVENTIONS, RESOLUTIONS and RULES**

Albania Law on Foreign Investments, 1993.  
Argentina/USA BIT 1991.  
Cameroon Investment Code, 1990.  
Cartagena Free Trade Agreement 1996.  
Colonia Investment Protocol of Mercosur 1991.  
Courts and Legal Services Act 1990.  
El Salvador -Netherlands BIT.  
Energy Charter Treaty 1991.  
European Convention on State Immunity and Additional Protocol 1972.  
Netherlands-Bolivia BIT.  
French Code of Civil Procedure 2011.  
Hague Peace Conference 1899.  
Harvard Draft Convention on the International Responsibility of States for Insurers to Aliens.  
Monroe-Pinckney Treaty 1806.  
Morocco-Italy BIT.  
Multilateral Agreement on Investment (MAI).  
North American Free Trade Agreement (NAFTA).  
Organization for Economic Cooperation and Development (OECD).  
Peru-China BIT.  
Rules of Arbitration of the Euro-Arab Chambers of Commerce.  
Rules of Arbitration of the former USSR Chamber of Commerce and Industry.  
Rules of Arbitration of the International Chamber of Commerce (ICC).  
Rules of Arbitration of the London Court of International Arbitration (LCIA).  
Rules of Arbitration of the Netherlands Arbitration Institute.  
Rules of Arbitration of the Stockholm Chamber of Commerce.  
Rules of the Cour Commune de Justice et d'Arbitrage (CCJA).  
Swiss Law on Private International Law 1987.  
Switzerland-Albania BIT.  
Tanzania National Investment (Promotion and Protection) Act, 1990.  
Togo Investment Code, 1985.  
Treaty of Amity, Commerce and Navigation ('Jay Treaty').  
Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956.  
Tunisian Law Relative to the Code of Investments.  
Uganda Investment Code, 1991.  
UK-Egypt BIT.  
UNCITRAL Model law on International Commercial arbitration.  
United Kingdom State Immunity Act of 1978.  
United Kingdom-Sri Lanka BIT 1980.  
United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.  
United States Federal Arbitration Act.  
Vienna Convention on the Law of Treaties.  
US Federal Arbitration Act.  
Washington Treaty 1871.  
United Nations Draft Code of Conduct on Transnational Corporations.  
US Foreign Sovereign Immunities Act 1976.  
Washington Convention on the Settlement of Investment Disputes 1965 (ICSID).



## LIST OF COURT & TRIBUNAL CASES

*Aguas del Tunari S.A. v Republic of Bolivia* (ICSID Case No. ARB/02/3).  
*AIG Capital Partners v Republic of Kazakhstan*, (ICSID Case No. ARB/01/6).  
*Allied Marine Ltd. v Vale Do Rio Doce S.A.* [1985] 1 W.L.R. 925.  
*Amco Asia Corporation and others v Republic of Indonesia*, (ICSID Case No. ARB/81/1).  
*Attorney-General v Mobil Oil NZ Ltd.* [2005] EWHC 2239, [2006] 1 WLR 1420.  
*Autopista v. Venezuela* (ICSID Case No. ARB/00/5).  
*Belgium v Spain (Barcelona Traction, Light and Power Co., Ltd.* (ICJ case1970).  
*Bremer Vulkan S.und M. v South India Shipping Corp.* [1981] 1 AC 909; [1981] 2 WLR 141; [1981] 2 All ER.  
*Belgium, France, Switzerland & UK v Federal Republic of Germany* 59 ILR 524 (1980).  
*Burden v. Check into case of Kentucky LLC.* 267 F. 3d at 489.  
*Burton Marks & Harry Umann v Iran* (Case ITL, 53-458-3, 26 June 1985) 8 Iran-US CTR 290, 296.  
*Buttes Gas and Oil Co. v Hammer* [1982] AC 888.  
*Cable Television of Nevis Ltd. v Federation of St. Kitts and Nevis*, (ICSID Case No. ARB/95/2).  
*Champion Trading Co. and Ameritrade Int. Inc. v Arab Rep of Egypt*, (ICSID Case No. ARB/02/9).  
*Chastain v Robinson-Humphrey Co.* 957 F.2d 851 (11th Cir. 1992).  
*Chicago v. Kaplan* 514 U.S. 938 (1995).  
*Christopher Brown v. Genossenschaft Oesterreichischer* [1954] 1 QB 8.  
*City of London v Ashok Sancheti* [2008] EWCA Civ 1283.  
*CMS v Argentine Republic* (ICSID Case No ARB/01/8).  
*Compania de Aguas del Aconquija and Vivendi Universal v Argentine* (ICSID Case No. ARB/97/3).  
*CSOB v Slovakia* (ICSID CASE No. ARB/97/4).  
*Denmark v. Norway* [1933] P.C.I.J. Ser. A/B, No. 53, 71.  
*EnCana v Ecuador EnCana Corporation v. Republic of Ecuador* LCIA Case No. UN3481, UNCITRAL.  
*Enron v Argentina* (ICSID Case No. ARB/01/3).  
*ETI Euro Telecom Intrenational BV v Republic of Bulivia and Entel SA* [2008] EWCA Civ 880.  
*Fedax N.V. v Republic of Venezuela* (ICSID Case No. ARB/96/3).  
*Food Corp. of India v Antelizo Shipping Co.* [1988] 1 WLR 603, [1988] 2 All. ER 513.  
*Foremost-McKesson HBOC Inc. v Iran* Case 220-37/231-1, 10 Iran-US CTR 228.  
*Foster v. Neilson*, 27 U.S. 253, 314 (1829).  
*Framatome v The Atomic Energy Organization of Iran* ICCA Commercial Arbitration.  
*Ghaith R. Pharaon v Republic of Tunisia* (ICSID Case No. ARB/86/1).  
*Harbour Assurance Co. Ltd. v Kansa General International Insurance Co. Ltd.* (1992) 1 Lloyd's Rep. 81.  
*Holiday Inns S.A. and others v Morocco* (ICSID Case No. ARB/72/1).  
*Honduras v Nicaragua*, ICJ Reports (1960).  
*Hornsby v Greece* 24 EHRR 250.  
*Iran v USA* (Case DEC 32-A18-FT, 6 April 1984) 5 Iran-US CTR 251 (Dual Nationality).  
*Johnson v Gore Wood Co.* [2001] 1 All ER 481, 532.  
*Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11).  
*Kaiser Bauxite Company v Jamaica* (ICSID Case No. ARB/74/3).  
*Klöchner v Cameroon* (Merits) 2 ICSID Rep 9; (Annulment) 2 ICSID Rep 95.  
*Lanco International Inc v Argentine Republic* (ICSID Case No. ARB/97/6).  
*Liberian Eastern Timber Corp. v Republic of Liberia* (ICSID Case No. ARB/83/2).  
*Libyan American Oil Company v Government of the Libya Ad Hoc Tribunal ILC* 1958.  
*Malaysian Historical Salvors, SDN, BHD v Malaysia* (ICSID Case No. ARB/05/10).  
*Manufacturers Hanover Trust Co. v Egypt* (ICSID Case No. ARB/89/1).  
*Mavrommatis Palestine Concessions (Greece v. U.K.)* 1924 P.C.I.J. (ser. B) No. 3.  
*Medellin v Dretke*, 125 S.Ct. 2088, 2103 (2005).  
*Mihaly International Corp. v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2).  
*Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.* 473 US 614 (1985), (1985) 24 ILM 1064.  
*Liechtenstein v. Guatemala* I.C.J. Report 1955.  
*Nykomb Synergies Tech. Holding AB v Republic of Latvia*, SCC, Case No. 118/2001, 11 ICSID Rep 158.  
*Occidental Exploration & Production Co. v Republic of Ecuador* LCIA Case No. UN3467 (US/Ecuador BIT).  
*Offshore International SA v Banco Central SA* (1976) 2 Lloyd's Rep. 402 at 407.

*Outtley v. Sheepshead Nursing Home* 688 F. 2d 883, 898 (2d Cir. 1982).  
*Paul Smith Ltd. v. H & S International Holding Co. Inc.* [1991] 2 Lloyd's L. Rep., 127.  
*Petroleum Development (Trucial Coast) Ltd. v Sheikh of Abu Dhabi* (1951) 18 ILR 122, (1952) 1 ICLQ 247.  
*Phoenix v The Czech Republic* (ICSID Case No. ARB/06/5).  
*Plama Consortium Limited v Republic. of Bulgaria* (ICSID Case No. ARB/03/24).  
*Pollux Marine Agencies v Louis Dreyfus Corp.* 455 F. Supp. 211, 219 (S.D.N.Y. 1978).  
*Prima Paint v. Flood & Conklin* 388 U.S. 395 (1967).  
*Republic of Nicaragua v Standard Fruit Co.* 937 F.2d 469, 479 (9th Cir.1991).  
*Rio Grande Irrigation and Land Company Ltd (UK v USA)* 6 RIAA 131, 135 (1923).  
*Ronald S. Lauder v The Czech Republic* 9 ICSID Rpts 66.  
*Salini Construttori SpA and Italstrade SpA v Morocco* (Case No. ARB/00/4).  
*Sanchez-Llamas v Oregon* 126 S.Ct. 2669, 2695 (2006).  
*Sanghi Polyesters Ltd (India) v KCFC (Kuwait)* [2000] 1 Lloyd's Rep. 480.  
*Sapphire International Petroleum Ltd. v National Iranian Oil Co.* (1963) 35 ILR 136, (1964) 13 ICLQ 1011.  
*Saudi Arabia v Arabian American Oil Co. (Aramco)* (1958) 27 ILR 117.  
*Scherk v Alberto-Culver*, 417 U.S. 506, 518-519 (1974).  
*Schooner Exchange v M'Faddon*, 11 U.S. (7 Cranch.) 116, 3 L. Ed. 287  
*Sedco v NIOC and Iran* (CaseITL 55-129-3, 28 October 1985) 9 Iran-US CTR 245, 256.  
*SGS v Philippines* (ICSID Case No. ARB/02/6)  
*Siemens AG v Argentine Republic*, (ICSID case No. ARB/02/8, 12).  
*Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13).  
*Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6).  
*Société Ouest-Africaine des Bétons Industriels (SOABI) v Republic of Senegal* (ICSID Case No. ARB/82/1).  
*Sphere Drake Ins. Ltd. v. All Am. Ins. Co.* 256 F.3d 587, 589 (7th Cir.2001).  
*SPP v Egypt*, (ICSID Case No. ARB/97/4), IIC 49 (1999).  
*Steelworkers v Warrior & Gulf Navigation Co.* 363 U.S. 574, 582-83 (1960).  
*Stretford v The Football Association Ltd & Another* (CA). [2007] EWCA Civ 238; [2007] 2 Lloyd's Rep 31.  
*Tanzania Electric v Independent Power Tanzanian* (ICSID Case No ARB/98/8), IIC 241 (2001).  
*Tokios Tokelés v Ukraine*, (ICSID Case No. ARB/02/18).  
*Total v Argentina*, (ICSID Case No. ARB/04/01).  
*Tradex v Albania* (ICSID Case No. ARB/94/2).  
*Trafalgar Shipping Co. v. Int'l Milling Co.* 401 F.2d 568, 573 (2d Cir. 19680).  
*Trendtex Trading Corp v Central Bank of Nigeria* 1(1977) 1 All ER 881.  
*Tza Yap Shum v Republic of Peru* (ICSID Case No. ARB/07/6).  
*United Kingdom v Japanese House Tax* (1905). 11 UNRIAA 51.  
*United Kingdom v Muscat Dhows* (1905). 11 UNRIAA 83.  
*United Kingdom v North Atlantic Coast Fishers* (1910). 11 UNRIAA 167.  
*United Kingdom v Savarkar* (1911) 11 UNRIAA 243.  
*United Kingdom v Venezuelan Preferential Claims* (1904). 6 UNRIAA 99.  
*United Kingdon v Chevreau* (1931). 2 UNRIAA 1113.  
*USA v Italy*, 1989 ICJ Rep 15.  
*Vacuum Salt Products Ltd. v Ghana* (ICSID Case No. ARB/92/1).  
*Valentine v. U.S. ex rel. Neidecker*, 57 S.Ct. 100, 103 (1936).  
*Waguih Elie Georg Siag and Clorinda Vecchi v Egypt* (ICSID case No. ARB/05/15).  
*Waste Management v Mexico* (ICSID Case No. ARB(AF)/ 00/3).

## LIST OF TABLES & FIGURES

**Table 1:** Summary of econometric results of medium-term baseline scenario of FDI flows, by region.

**Table 2:** National regulatory changes, 2000-2011.

**Table 3:** The various aspects of scope of jurisdiction.

**Table 4:** Classification of National Investment Legislations.

**Figure 1:** Trends of BITs & MITs, 1980-2011

**Figure 2:** Legal Research Styles

**Figure 3:** Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules:

**Figure 4:** Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by State Party Involved.

**Figure 5:** Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by Economic Sector.

**Figure 6:** Arbitration Proceedings under the ICSID Convention and Additional Facility Rules – Outcomes.

**Figure 7:** Disputes Decided by Arbitral Tribunals under the ICSID Convention and Additional Facility Rules – Outcomes.

**Figure 8:** Conciliation Proceedings under the ICSID Convention – Outcomes.

**Figure 9:** Conciliation Proceedings under the ICSID Convention – Commission Reports.

**Figure 10:** Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases. Registered under the ICSID Convention and Additional Facility Rules – Distribution of Appointments by Geographic Region.

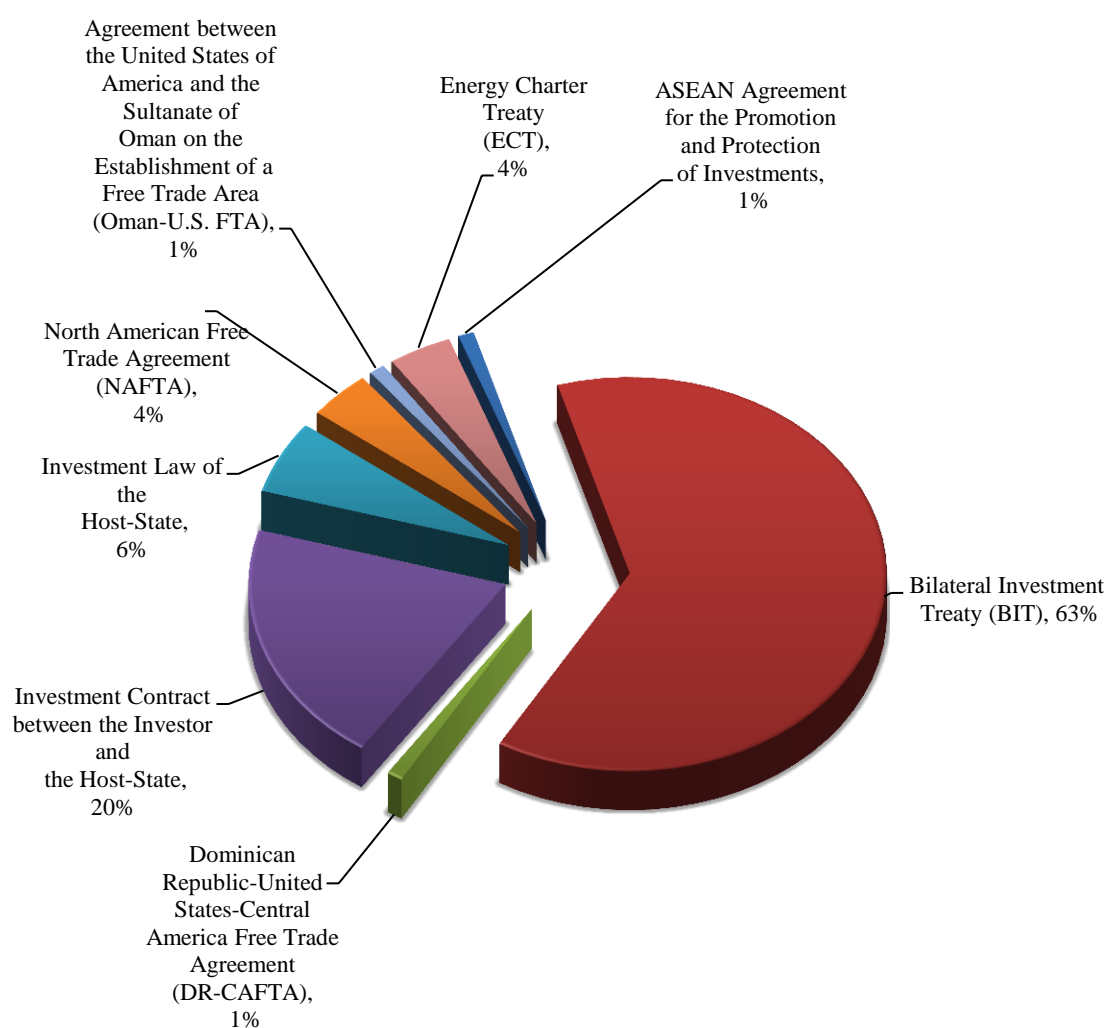
## LIST OF APPENDIXES

1. **Appendix 1:** ICSID Reports 2012 (excerpts).
2. **Appendix 2:** Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ICSID (excerpts)
3. **Appendix 3:** Report of the Executive Directors on the Convention on The Settlement of Investment Disputes between States and nationals of Other States.

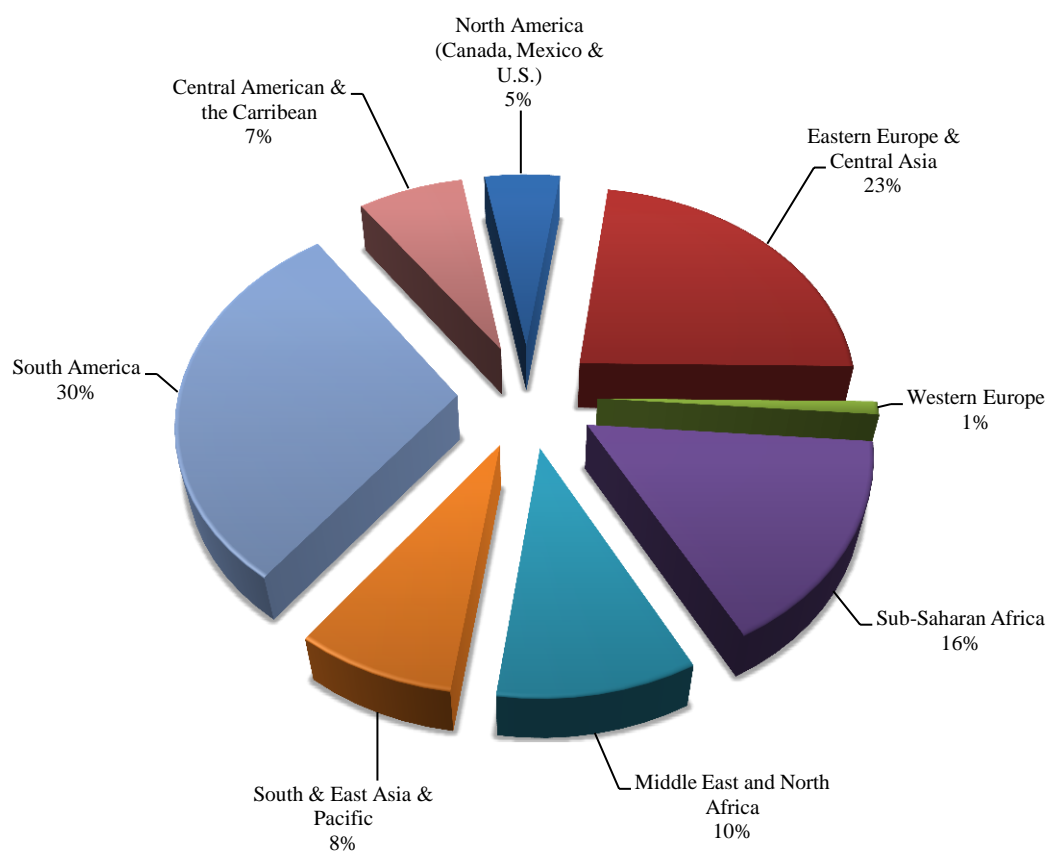
## APPENDIX 1

### ICSID REPORTS: 2012 (Excerpts)

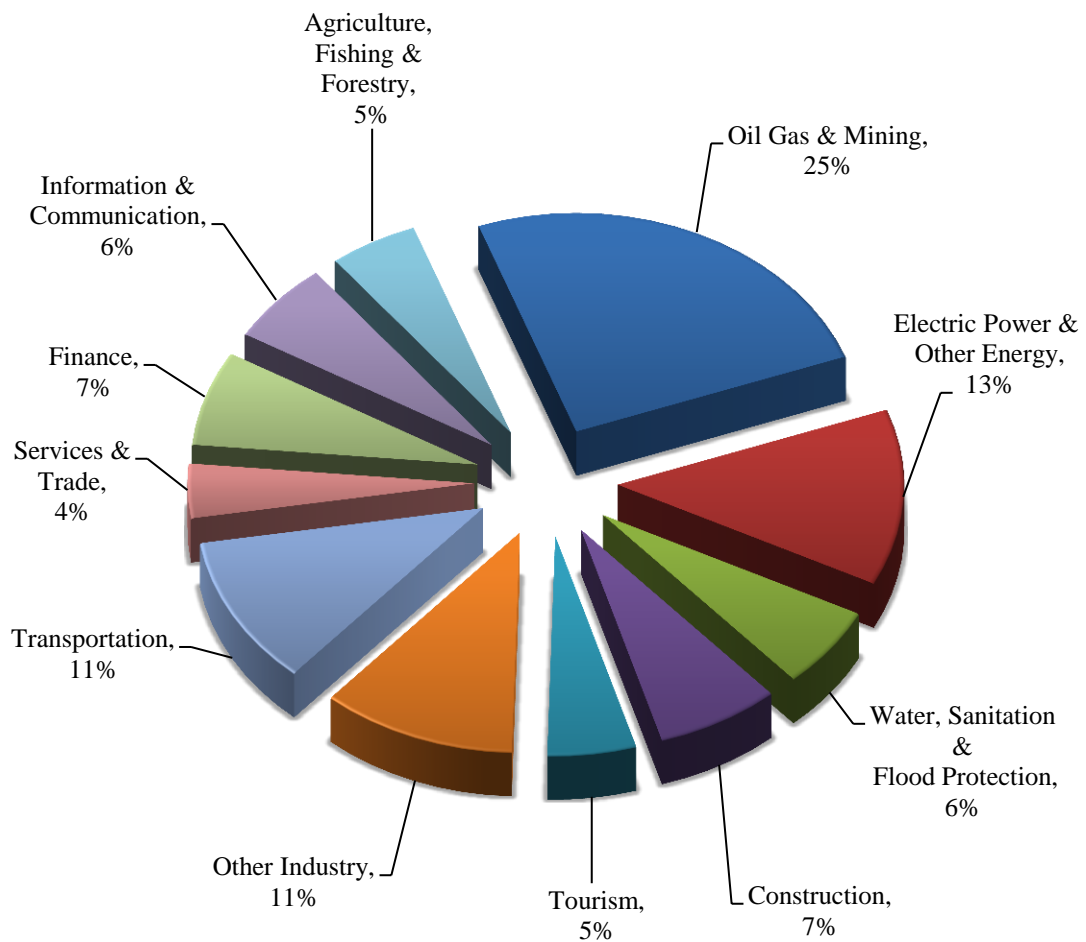
**Figure 3:** Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules:



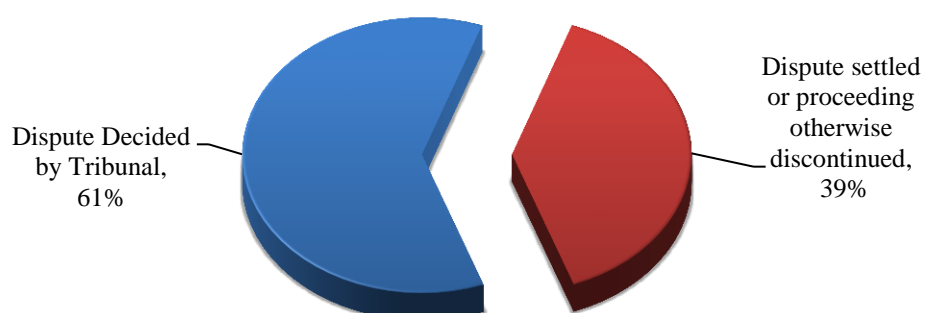
**Figure 4:** Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by State Party Involved:



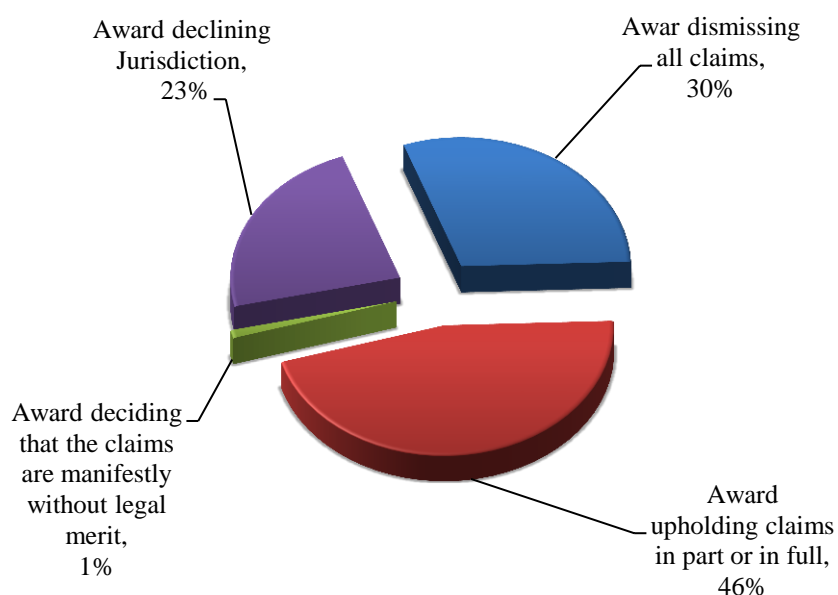
**Figure 5:** Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by Economic Sector:



**Figure 6:** Arbitration Proceedings under the ICSID Convention and Additional Facility Rules – Outcomes:

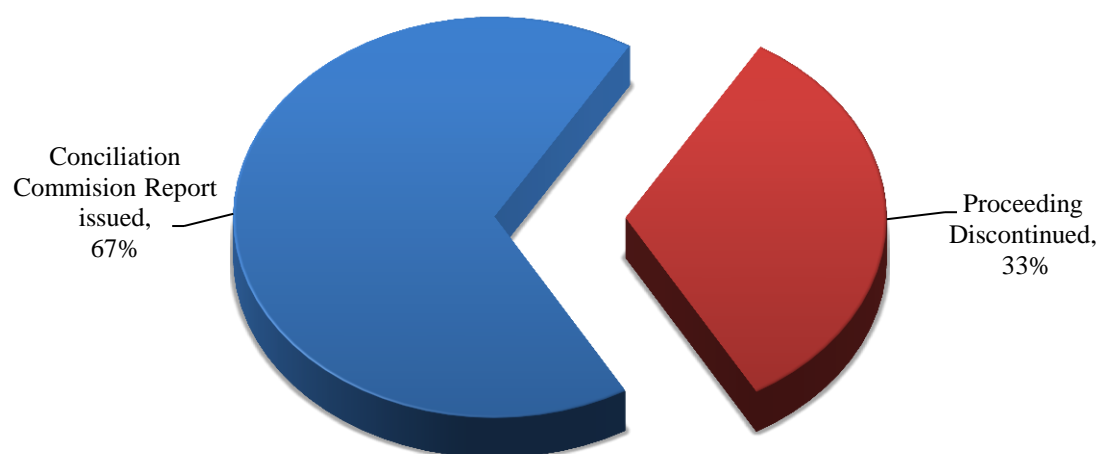


**Figure 7:** Disputes Decided by Arbitral Tribunals under the ICSID Convention and Additional Facility Rules – Outcomes:

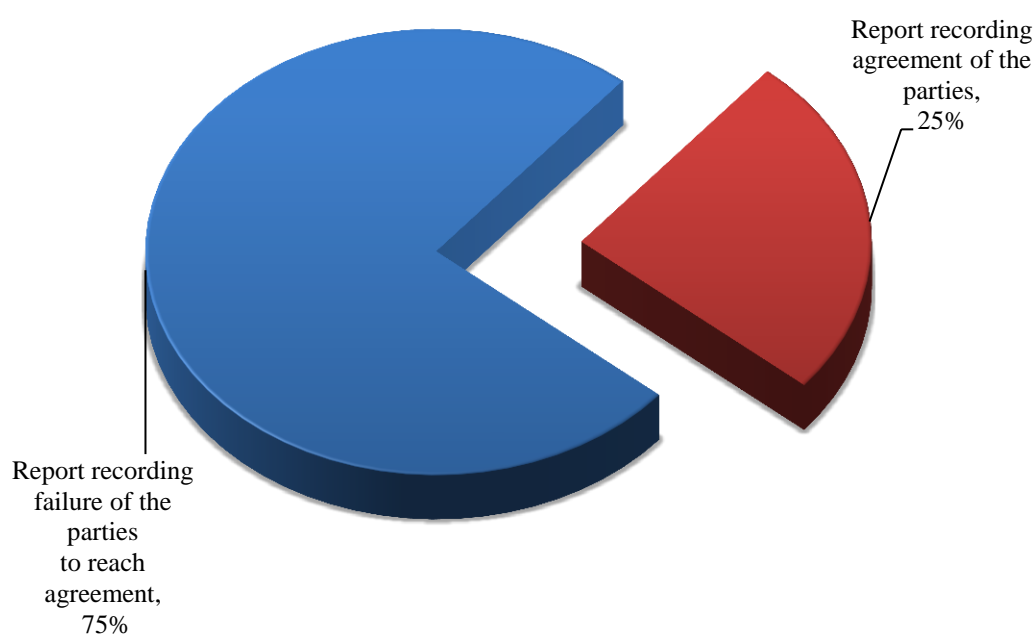




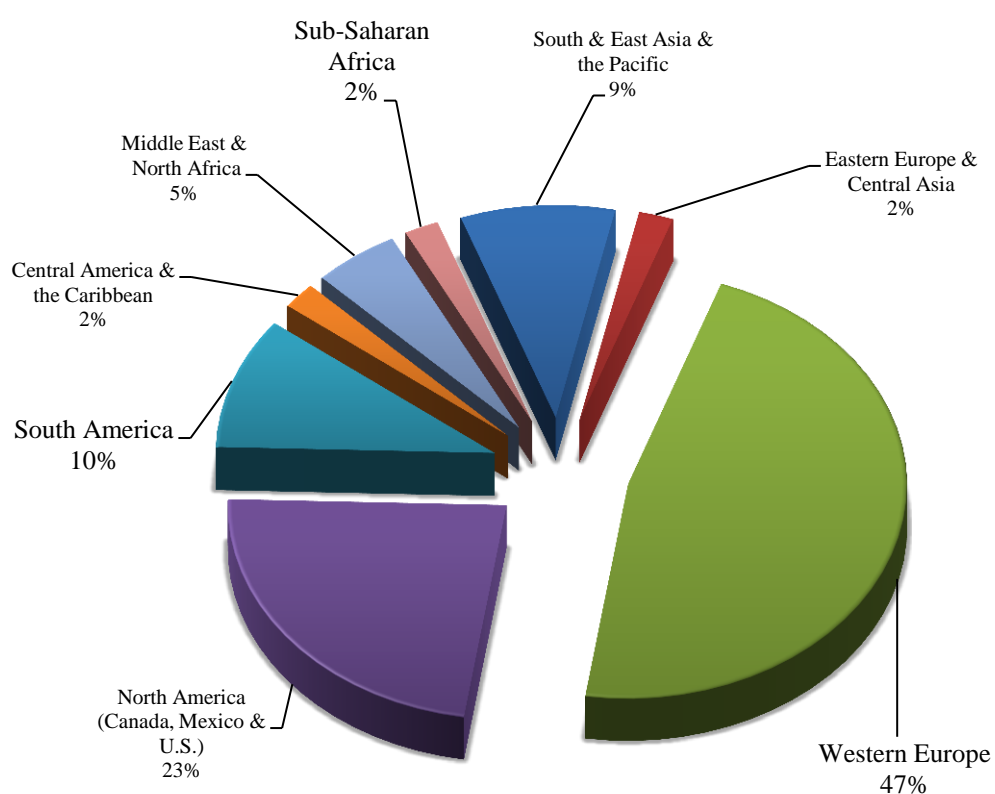
**Figure 8:** Conciliation Proceedings under the ICSID Convention – Outcomes:



**Figure 9:** Conciliation Proceedings under the ICSID Convention – Commission Reports:



**Figure 10:** Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules – Distribution of Appointments by Geographic Region:



## APPENDIX 2

### CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (1965) – ICSID (excerpts)

#### PREAMBLE

##### **The Contracting States**

**Considering** the need for international cooperation for economic development, and the role of private international investment therein;

**Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

**Recognizing** that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

**Attaching particular importance** to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

**Desiring** to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

**Recognizing** that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

**Declaring** that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

**Have agreed** as follows:

[...]

#### CHAPTER II Jurisdiction of the Centre

##### **Article 25**

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the

parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

## **Article 26**

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. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

## **Article 27**

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

[...]

## **CHAPTER IV**

### **Arbitration**

#### **Section I**

#### **Request for Arbitration**

##### **Article 36**

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

#### **Section 2**

#### **Constitution of the Tribunal**

##### **Article 37**

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

##### **Article 38**

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

##### **Article 39**

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

#### **Article 40**

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

### **Section 3 Powers and Functions of the Tribunal**

#### **Article 41**

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

#### **Article 42**

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

#### **Article 43**

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

#### **Article 44**

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

#### **Article 45**

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

#### **Article 46**

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

#### **Article 47**

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

### **Section 4 The Award**

#### **Article 48**

- (1) The Tribunal shall decide questions by a majority of the votes of all its members.
- (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
- (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (5) The Centre shall not publish the award without the consent of the parties.

#### **Article 49**

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

## **Section 5**

### **Interpretation, Revision and Annulment of the Award**

#### **Article 50**

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

#### **Article 51**

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

#### **Article 52**

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a



member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

## **Section 6**

### **Recognition and Enforcement of the Award**

#### **Article 53**

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

#### **Article 54**

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

#### **Article 55**

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

## **APPENDIX 3**

### **REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES**

#### **I**

1. Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, provides as follows:

**"RESOLVED:**

(a) The report of the Executive Directors on "Settlement of Investment Disputes," dated August 6, 1964, is hereby approved.

(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.

(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.

(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate."

[...]

#### **IV**

### **The International Centre for Settlement of Investment Disputes**

#### **General**

15. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes \* \* \*" (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

16. As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

17. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established.

[...]

## V

### **Jurisdiction of the Centre**

22. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25-27).

#### **Consent**

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromise regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

#### **Nature of the Dispute**

26. Article 25(1) requires that the dispute must be a "legal dispute arising directly out of an investment." The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

## **Parties to the Dispute**

28. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a "national of another Contracting State." The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

## **Notifications by Contracting States**

31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

## **Arbitration as Exclusive Remedy**

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

### **Claims by the Investor's State**

33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honour the award rendered in that dispute.

[...]

## **VII**

### **Place of Proceedings**

44. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

[...]

## **VIII**

### **Disputes Between Contracting States**

45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.