THE ICSID JURISDICTION: AN ISSUE ALREADY SOLVED OR A QUESTION STILL OPEN

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1 INTRODUCTION

Foreign Direct Investment (hereinafter referred as to "FDI") is increasingly an integral part of world economy. Those investments may be of such a considerable amount that in developing countries they often relates to core components of the national

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economy. All these factors make foreign investment particularly vulnerable to possible interference by the State hosting it (i.e. the "Host State").[1]

To create a favorable climate for foreign investment, and to protect their own citizens, States have entered into large numbers of bilateral and multilateral treaties, example of which are the Energy Charter Treaty, the North American Free Trade Agreement, and bilateral investment treaties (hereinafter referred to as "BITs"). On the internal side of those States, the treaties entered into by them are implemented into specific investment laws to provide the necessary legal certainty sought by investors.

Many States have adopted those investment protection laws. Their objective is to provide an "investor friendly" environment and attract foreign investment by guaranteeing certain minimum standards such as national treatment, no discrimination and no expropriation without fair compensation. These national laws usually provide for arbitration as a means of dispute settlement.[2]

It has however to be underlined that few areas of international law have undergone more change in the last years than the relationship between investors and the foreign countries in which they invest. The aforementioned BITs, which govern the relationship between investors of one state and the government of another, have been increasingly prevalent since the 1960s.[3]

In these efforts to promote and protect investment the issue of dispute resolution is of crucial importance. Accordingly, in addition to providing a number of substantive protections to international investors, many BITs provide for investor-state arbitration before the International Center for the Settlement of Investment Disputes (hereinafter referred to as "ICSID" or "the Centre"). Established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as "the Convention"), ICSID provides an arbitration and conciliation forum to all states who are signatories to the ICSID Convention. Dispute resolution clauses in BITs overwhelmingly provide for ICSID arbitration, either exclusively or as an available alternative. Consequently, the increase of BITs has seen a corresponding surge in ICSID arbitrations. The stakes in this type of arbitration are substantial, with most awards constituting hundreds of millions of dollars.

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1. Lew, J.D. (et al), *Comparative International Commercial Arbitration*, 2000, Kluwer, The Hague, London, New York, at p.762,
2. The Report of the Executive Directors of the World Bank accompanying the 1965 ICSID Convention refers, in para. 24, to the provisions in national investment legislation as one possible way to submit to the jurisdiction of the Centre. For an overview of provisions found in national investment laws see Parra, A.R., "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral investment Treaties and Multilateral Instruments" (1997) 12 *ICSID Rev-FILJ* 287, at p. 31.
3. Dolzer, R. and Stevens, M., *Bilateral Investment Treaties*, 1995, Martinus Nijuhoff Publishers.

According to the importance ICSID has achieved at the international level and the proliferation of BITs it becomes necessary for all the parties involved to know exactly when ICSID is to have jurisdiction to adjudicate a given dispute.

The matter of ICSID's jurisdiction is related to the definition of some concepts such as "investment" and "nationality of investor", for example. The purpose of the present article is to analyse ICSID's case-law and doctrine in order to determine which are the problems related to jurisdiction and their solutions.

The lack of certainty regarding jurisdiction might pave the way for elusive defenses on the side of the respondents/host countries, and for abusive behavior on the side of the investors.[4] Taking into consideration that foreign investments are crucial to the development of international trade and the continuation of the globalisation process, the article will try to find answers to the aforementioned questions or, at least, it will give suggestions about a narrower definition of the concept of investment, within the BITs, in order to avoid the uncertainty surrounding the jurisdiction of the Centre. Indeed, success of arbitration tribunals significantly depends on the fact that they are conflict resolution places that the parties to a dispute agree upon to settle differences. An arbitration tribunal such as the Centre needs to be consistent in its decisions on jurisdiction to provide clear guidance, to avoid uncertainty and to be continuously chosen by the parties to a dispute.

It appears from the case law that the Centre is still struggling to define its jurisdiction. There are decisions creating doubts on Centre's interpretation of the Convention. Indeed, the Centre seems to enlarge its jurisdiction by further delimiting the sovereignty of member states through a line of inconsistent decisions concerning corporate nationality and consent.

To do this the three main jurisdictional requirements set out by of Article 25 of the ICSID Convention will be analysed. These are: jurisdiction *Ratione Personae*, jurisdiction *Ratione Materiae* and, lastly, the written consent of the parties to submit legal disputes to ICSID arbitration.

This paper is divided in four chapters. The first Chapter concentrates on the reasons of the emersion of the BITs, on the context of the creation of the ICSID Convention, and on the establishment of the Centre.

In the second Chapter, the core chapter of this paper, it will be discussed the extent of the ICSID's jurisdiction addressing the three different above mentioned jurisdictional requirements. To do this, art. 25 of the ICSID Convention will be cut into pieces and

4 *Supra* fn 1.

its main parts will be explained and analysed according to the legal doctrine and some of the most relevant cases addressing the ICSID's jurisdiction.

The last chapter contains the conclusion over the issue and considerations about future development of the role of the Centre.

2 THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

As mentioned in the Introduction to this paper, cross-border direct investment constitutes a substantial sector of the international financial market and is also an important vehicle for the transfer of technology and the modernisation of national economies. In recent years, international arbitration has gained a prominent role as a means of settlement of foreign investment disputes. The number and size of investment disputes under arbitration have risen significantly due to the growing number of BITs and increased use of arbitration under multilateral investment treaties.

In developing countries foreign investment often relates to core components of the national economy. These factors make foreign investment particularly vulnerable to possible interference by the Host State. While clear-cut nationalisations are rare there are a number of other measures of a lower threshold which may affect foreign investment, such as:

1. currency restrictions preventing repatriation of profits
2. prohibitions on price increases
3. tax increases or new taxes
4. environmental legislation [5]

In light of the aforementioned considerations, it is essential to underline that investment disputes differ in several respects from ordinary commercial disputes. Frequently the amount in dispute is remarkable and the issues may have considerable political implications. Disagreements often concern:

1. the objectives of the investment
2. the repatriation of revenues
3. the ultimate control and benefit of the investment.

The investment may relate to vital infrastructure the completion of which is of significant importance for the national economy. The outcome of the dispute may also affect the general investment climate in a country. In addition one party is a state

[5] Mistelis, L., "Investment Arbitration and Specialist Arbitration", in *Regulation and Infrastructure of International Commercial Arbitration*, 2005, published by the University of London Press.

vested with sovereign powers which is nevertheless in need of foreign investment and is bound by international instruments.

These factors influence the conduct of the arbitration in various respects. In the composition of the tribunal the nationality of the arbitrators may become a more important issue than in ordinary commercial arbitrations. Concerning the applicable substantive and procedural laws there is a much stronger tendency to delocalise and apply principles of international law. Investment disputes can have a greater impact on parties other than those involved and thus may be more in the public domain. Investment disputes may relate to legislation which not only affects a specific investor, but also a complete class of investors and the relationship between the host state and the investor's home state.

The observation that "[i]nvestment has overtaken trade in global economic importance, but so far investment has failed to inspire the creation of mature legal institutions"[6] is fundamentally correct. Changes to the dispute settlement process should be seen in the context of a developing international law regime rather than simply as a tinkering with the arbitration procedures.

There is also greater public interest in investment arbitration and this is also evidenced by the policy adopted in relation to the publication of awards, which is much more liberal than in commercial arbitration.[7]

The greatest difference to commercial arbitrations is the source of the tribunal's power. Commercial arbitrations require an arbitration agreement between the parties. By contrast, in investment disputes arbitration may also be possible without such an arbitration agreement in the ordinary sense. National legislation or treaties may give each party the right to initiate arbitration proceedings against the other. There may even be no contractual relationship between the parties at all, which has led to labeling investment arbitration "arbitration without privity".[8]

Investment arbitrations are frequently based:

1. on provisions in national investment protection laws

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6 See Cosbey, A., Mann, H., Peterson, L. von Moltke, K., *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, available at <http://www.iisd.org/publications/publication.asp?pno=627>.

7 *Supra* fn 5.

8 See Paulsson, I., "Arbitration Without Privity" (1995)10 *ICSID Rev-FILJ* 232; Werner, J., "Arbitration of Investment Disputes: The First NAFTA Award – Introductory Comments on the Ethyl Corporation Case" (1999) 16(3) *J. Int'l Arb* 139; see for example ICSID, case ARB/97/3, Award of 21 November 2000, Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux (now Vivendi Universal) v. Argentine Republic, 40 ILM 426 (2001).

2. on international treaties by which the state agrees generally to arbitrate investment disputes.

These provisions constitute a unilateral standing offer to the public to submit to arbitration with any party fulfilling the requirements. The offer is accepted by the investor when it initiates arbitration proceedings against the state.[9] Until that time the investor is not bound to arbitrate and the state cannot initiate proceedings against the investor.

2.1 BILATERAL INVESTMENT TREATIES

BITs are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. Governments have embarked upon an ambitious effort to conclude international treaties that purport to protect, promote and, in some instances, remove barriers to foreign investment flows. The international rules governing FDI first came to broad public notice in the mid-1990s during the OECD's ultimately unsuccessful efforts to negotiate a Multilateral Agreement on Investment (hereinafter referred as to "MAI").

Although the failure of MAI generated considerable scrutiny, less attention has been paid to the broader universe of BITs which have been negotiated worldwide for several decades. The number of BITs exploded during the 1990s and into the new century. There are now about 2,600 such treaties in existence.[10] Most of these agreements have been concluded between a developed and a developing country, owing to their origins as instruments governing investment into the developing world. An increasingly sizable number, however, are concluded between two developing countries, and even between least developed countries.

BITs have been negotiated since the late 1950s. While sweeping characterisations would belie the diversity of these treaties, a number of general features have emerged. The typical modern BIT will include provisions designed to offer certain absolute standards of treatment (for example "fair and equitable treatment"); relative standards of treatment (National treatment or Most-Favored Nation); protections against expropriation or nationalisation; and recourse to dispute-settlement (state-to-state and investor-to-state). Many BITs also include provisions allowing for transfer of monies

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9 Cremades, B.M., "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties" in Briner, R, Fortier, L.Y., Berger, K.B. (eds), 2001, *Liber Amicorum Karl-Heinz Böckstiegel*, at p. 156 et seq. For a detailed analysis of the differences see Wälde, T. "Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation" (1996), 12 *Arb. Int.* 429, at p. 434 et seq.

10 UNCTAD, *Number of Bilateral Investment Treaties Quintupled During the 1990s*, Media Release TAD/INF/2877, available at: <http://r0.unctad.org/en/press/pr2877en.pdf>.

and for some protection from war and civil disturbance.[11] A small number of BITs also contain provisions on the movement of key employees, and prohibiting certain forms of performance requirements.[12] Generally, treaty provisions will only apply to investments once they have been established in the Host State. However, some treaties - particularly those championed by the U.S., Canada and Japan - may extend protections to the pre-establishment phase, i.e., prior to the establishment of the investment in the Host State's territory.[13] In terms of the sectors of the economy that are covered by the substantive disciplines, it is common for treaties to cover all sectors, with the exception of those which are expressly carved-out of the treaty, or exempted from the reach of certain of its provisions.

A long-standing rationale for the conclusion of investment treaties has been their purported usefulness in stimulating new investment flows between the signatory countries. In essence, there is a straightforward expectation that the treaties will encourage new investment, which will, in turn, contribute to the economic development of the host state. Assuming that FDI can contribute to economic development, it remains questionable whether BITs play a major role in stimulating those desired FDI flows.

Several former officials involved with U.S. BITs negotiation during the 1980s have conceded that the treaties were not intended to 'catalyse' new flows, but rather to protect existing (and subsequent) investments.[14] In this regard, Kenneth Vandevelde suggests that capital-exporting states "may have given priority in BITs negotiations to states that already were hosts to large amounts of its investment, so that BITs may be caused by investment flows and not the other way around."[15]

Some investment lawyers have highlighted the lack of "tangible evidence […] to demonstrate investment flows and a link to investment treaties."[16] Indeed, two self-described proponents of the investor protections contained in such agreements,

11 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, pp. 73-80, (United Nations, New York and Geneva 1998).

12 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, pp. 81–3; provisions covering performance requirements are found in some United States of America, Canadian and Japanese treaties.

13 UNCTAD, pp. 26–8, Admission and Establishment, 1999.

14 Gudgeon, K.S., "United States bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards", 1986, *4 Int'l Tax & Bus. Law.*, available at: http://scholarship.law.berkeley.edu/bjil/vol4/iss1/3; Vandevelde, K., "Investment Liberalization and Economic Development: the Role of Bilateral Investment Treaties" (1998) 36(3) COLUMBIA *Journal of Transnational Law* at pp. 501-511.

15 See *ibid.*

16 Walde, T. with Dow, S., "Treaties and Regulatory Risk in Infrastructure Investment. The effectiveness of international law disciplines versus sanctions by global markets in reducing the political and regulatory risk for private" (2000) 34(2) *Journal of World Trade* 2000, vol. 34, no. 2, pp. 1-61.

concede that the agreements may be negatively correlated to investment flows: with countries like Brazil and Nigeria seeing large investment flows despite shying away from such treaties, while many Central African or Central American nations have seen little investment despite having entered into rafts of BITs. Similarly, countries such as China and Cuba have seen sizable flows of investment from countries with which they have not concluded BITs.[17] Recently, the World Bank's 2008 Report on the Global Economic Prospects of the Developing Countries concluded that "[e]ven the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries."[18] The Bank relies upon a 2002 study by Mary Hallward-Driemeier of 20 years of data, which indicates that "[c]ountries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact." Notwithstanding these nagging doubts about the impact of investment treaties upon investment flows, western nations have continued to champion the agreements, more likely, due to the enthusiasm of domestic investors for their protection standards, than as a result of any real evidence to show their efficacy in increasing FDI flows to developing countries.[19] More puzzling, however, is the enthusiasm of many developing countries to continue to enter into these treaties with developed states and increasingly with their counterparts in the developing world.

As already underlined, a BIT is a treaty between two States that constitutes a legal framework for the treatment of investments between the two countries.[20] Despite the fact that BITs are entered into by two States, they entitle investors from one of the two countries to protection for investments made within the territory of the other contracting State. In case of an investment [dispute] the claimant would be a [private] investor from one State party (the investors' Home State), and the defendant would be the State (itself) where the particular investment was made (i.e. the Host State).[21]

As some doctrine has explained, the constellation of parties to a BIT can vary, as the treaties can be entered into by namely a capital exporting nation and a developing country, two capital exporting countries or two developing countries.[22] Irrespective of this constellation, there is a common denominator for the Contracting State's parties,

17 On Cuba see Perez-Lopez, J.F., and Travieso-Diaz, M.F., "The Contribution of BITs to Cuba's Foreign Investment Program", 2001, 32 *Law and Policy in International Business* p. 529.

18 *Global Economic Prospects and the Developing Countries 2008*, World Bank, at p. xvii.

19 The International Chamber of Commerce and the Business Roundtable are two influential business groups which have recently hailed the high-level of protections afforded in these treaties. See Peterson, L.E., "Key Business Group Wary of WTO Investment Talks" (May 23, 2003) INVEST-SD Bulletin, available at: <http://www.iisd.org/investment/invest-sd/>.

20 Cremades, B.M., and Cairns, D.J.A., "Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes" in Horn and Norbert (eds), *Arbitrating Foreign Investment Disputes*, 2004, The Hague, at p. 326.

21 Salacuse, J.W., "Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain" in Horn and Norbert (eds)., ARBITRATING FOREIGN INVESTMENT DISPUTES", 2004, The Hague, at p. 57.

22 *Ibid.*, at p. 54.

namely that each State acting as a Host State is subject to derogation of State sovereignty. As it will be explained below when describing the system of ICSID, a reason for States concluding these treaties is, among others, "the role of private international investment" in "international cooperation for economic development".[23] The bottom-line, therefore, is that of investment protection; the intention of a developing country entering into such an agreement would thus be to encourage foreign investment and thereby increase the flow of capital to the country. Less risk for foreign investors thus represents an augment in capital flow.

Adding on, another interest for the Home State is to liberalise investments (i.e. to facilitate the investments to the Host State by eliminating restrictions). Whereas investment promotion lies within the realm of interest for the Host State, the liberalisation of investments improves the investment climate, which enables more investments out of interest for the Home State.[24]

These BITs have proliferated and are deemed as an effective and well used mechanism to guarantee protection of foreign investments. In addition to substantive rules, they contain dispute resolution provisions for certain defined categories of investments, invariably providing for arbitration. The scope and content of these clauses differ considerably, depending on the States involved and their respective bargaining power. In the majority of the cases they constitute a unilateral offer by the State involved to all investors from the other State party to settle disputes by arbitration. Some BITs' provisions cover all types of disputes under a very wide definition of investment; others only cover certain types of investment.[25]

Differences not only exist in the scope of investor protection provided in each BIT, but in the type of arbitration provided for. Frequently the clauses provide for ICSID arbitration, or give the investor a choice between ICSID and other institutions.[26]

Although there are some ICSID cases, both pending and concluded, in which jurisdiction has been conferred to the Centre by multilateral treaties such as the NAFTA and the ECT, the vast majority of the cases before ICSID has gotten to the Centre by a dispute settlement clause in a BIT. According to the ICSID's 2007 Annual Report, 15 out of 22 new cases registered in that year were initiated on the basis of a clause in a BIT. As a result, BITs play an outstanding role in ICSID's life (so relevant that even a complete listing of the existing BITs is provided on the Centre's website). As we will demonstrate infra, much of the Centre's jurisprudence refers both to the ICSID Convention itself and to provisions in the applicable BIT. Indeed, as it will be

23 The ICSID Convention.

24 *Supra* fn. 21, at p. 60.

25 *Supra* fn 16.

26 For an overview see *supra* fn 2, Parra.

analyzed below, the task of determining the Centre's jurisdiction rests on the construction by the Tribunal of the "dispute settlement" clause of the BIT at stake.

Consequently, it is almost impossible to talk about ICSID without talking about BIT's. Although they are completely different institutes they work together in the development of the cross-border investment business. It seems hard to imagine so many BITs being signed without the existence of ICSID, as well as it seems not only difficult but almost impossible to envisage so many cases adjudicated by the Centre without the BITs.

In addition to substantive rules they usually contain dispute resolution provisions for certain defined categories of investments.

They also invariably provide for arbitration. The scope and the content of these clauses differ considerably, depending on the states involved and their respective bargaining power.

In the majority of cases they constitute a unilateral offer by the state involved to all investors from the other state party to settle disputes by arbitration. Some, however, only contain declarations of intent to make such offers in the future.

Often the exhaustion of local remedies is made a prerequisite for the right to arbitration.

Differences not only exist in the scope of investor protection provided in each BIT, but the type of arbitration provided for will also vary. Frequently the clauses provide for ICSID arbitration or give the investor a choice between ICSID and other institutions such as the ICC, the AAA or the SCC. Often arbitration is the final stage in a multi-tier dispute resolution clause, providing first for negotiations or other diplomatic efforts to settle the dispute amicably. There have been numerous arbitration proceedings which are based on provisions in BITs.

Many pending investment arbitration proceedings derive jurisdiction from BITs.

Dispute resolution clauses in BITs overwhelmingly provide for ICSID arbitration, either exclusively or as an available alternative.[27] Consequently, the increase of BITs

[27] See United Nation Conference on Trade and Development (UNCTAD), BILATERAL INVESTMENT TREATIES, 1959-1999, p.20, United Nation Doc. UNCTAD/ITE/IIA/2 (2000); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990s, p.94–95, United Nation Doc. UNCTAD/ITE/IIT/7 (1998). See generally UNCTAD, New York, Geneva, 2003, Course on Dispute Settlement in International Trade, Investment and Intellectual Property: International Centre for Settlement of Investment Disputes: 2.1 Overview, U.N. Doc. UNCTAD/EDM/Misc.232 (prepared by Christoph Schreuer). See Reed, L. et al., *Guide to ICSID Arbitration*, 2004, Kluwer Law International

has seen a corresponding surge in ICSID arbitrations.[28] The stakes in this type of arbitration are substantial, with most awards constituting hundreds of millions of dollars.[29]

2.2 *THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES*

The Convention[30] is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank).[31] The Convention, which came into force on October 14, 1966, sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialised international methods for investment dispute settlement. One of the chief impediments to foreign investment

("[M]any, if not most BITs, include the option of ICSID dispute resolution."); Schreuer, C., "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road" (2004) 5 J. World Investment & Trade 231 ("Most [BITs] refer to ICSID"). See also The Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investments, art. 7(3) Feb. 26, 1986, S. TREATY DOC. NO. 99-22, (consenting to submit investment disputes exclusively to ICSID); The Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII (4), Nov. 14, 1991, S. TREATY DOC. No. 103-2 (consenting in advance to any one of the available forms of arbitration provided in the BIT, including but not limited to ICSID arbitration). The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. It is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues. The organisation's goals are to "maximize [sic] the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis." The creation of the conference was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations.

28 Gill, J. et al., "Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases" (2004) 21 *J. Int'l Arb.* 397, at p.397 n. 4 ("Of the 63 cases pending before the Centre during the year [2003], 47 were submitted under the dispute-settlement provisions of bilateral investment treaties").

29 See Franck, S.D., "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 FORDHAM L. REV. 1521, at p. 1521 n.1 (detailing claims seeking millions of dollars against sovereign states for breaches of international investment agreements).

30 With the ratification of Haiti, October 29, 2009, there are currently 156 signatory States to the ICSID Convention. Of these, 144 States have also deposited their instruments of ratification, acceptance or approval of the Convention and have become ICSID Contracting States.

31 The report of the Executive Directors of the World Bank accompanying the 1965 ICSID Convention refers in para. 24 to the provisions in national investment legislation as one possible way to submit to the jurisdiction of the Centre. For an overview of provisions found in national investment laws see *supra* fn 2.

in developing countries has been the investor's perception that, in the event of disputes with the host State, they would find themselves without an effective legal remedy. Investors may no longer realistically rely on their own governments to espouse their claims, at least promptly and successfully, under traditional avenues of diplomatic protection. Investors who proceeded alone against host States, feared discrimination in the local courts.

The Convention entered into force on 14 October 1966 in accordance with its Art. 68(2) (see Art. 68, para. 7). To date the Convention had 143 Parties. A further 11 States signed but not yet ratified the Convention (see Art. 68, para. 8).

The Convention is designed to facilitate private international investment through the creation of a favourable investment climate.[32]

The link between an orderly settlement of investment disputes, the stimulation of private international investments and economic development is explained in the Report of the Executive Directors on the Convention in the following terms:

> *In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.*
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> *[. . .]*
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> *12 [. . .]) adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.*[33]

32 Amerasinghe, C.F., "The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation" (1976) 9 *Vanderbilt Journal of Transnational Law*, 793 at p. 794, fn 5; Broches, A., "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972-II) 136 *Recueil des Cours* 331, at p. 342 fn 3; Kahn, P., "The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes" (1968) 44 *Indiana Law Journal* 1; Shihata, I.F.I., "Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group" (1991) 6 *ICSID Review – FILJ* 484.

33 1 ICSID Reports 25.

The Tribunal in *Amco v. Indonesia* explained that ICSID arbitration is in the interest not only of investors but also of host States. It concluded:

> *[t]hus, the Convention is aimed to protect, to the same extent and with the same vigor, the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.*[34]

Several tribunals have quoted this passage of the Preamble in support of the conclusion that an "investment" in the sense of Article 25(1) would have to contribute to the host State's economic development.[35] The Tribunal in *CSOB v. Slovakia* stated:

> *[t]his language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.*[36]

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, the Convention does not attempt to develop substantive rules for the protection of private international investments (see Art. 42, para. 1).[37] It contributes to the improvement of the investment climate by offering a procedural framework for the settlement of disputes. The substantive rules to be applied are left to the agreement of the parties. In the absence of such an agreement, Article 42 provides that a tribunal will apply the law of the host State and applicable rules of international law.[38]

The disputes in question must arise in connection with an investment (see 16 Art. 25, paras. 113–210). One party to the dispute must be a host State that has ratified the Convention (see Art. 25, paras. 211–229). The other party must be an investor

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34 See *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, para. 23. See also Award, 20 November 1984, para. 249.

35 Mitchell v. Congo, Decision on Annulment, 1 November 2006, para. 28; Malaysian Historical Salvors v. Malaysia, Award, 17 May 2007, para. 66. See also Siag v. Egypt, Decision on Jurisdiction, 11 April 2007, para. 38.

36 CSOB v. Slovakia, Decision on Jurisdiction, 24 May 1999, para. 64.

37 The Development Committee of the World Bank and of the International Monetary Fund has since adopted non-binding "Guidelines on the Treatment of Foreign Direct Investments" (1992) 7 *ICSID Review – FILJ* 295.

38 Schreuer, C.H., *The ICSID Convention: A Commentary*, 2d ed., 2009, Cambridge University Press, Cambridge.

who is a national of another State that has ratified the Convention (see Art. 25, paras. 268–302, 635–902). Certain disputes that do not meet all of these requirements may be settled by means of the Additional Facility created in 1978 (see Art. 6, paras. 25, 26; Art. 25, paras. 9–13).

Domestic courts of other countries, notably those of the investor's home State, are usually not a viable alternative. In most cases, they will lack territorial jurisdiction over investment operations taking place in another country. An agreement to submit to these courts, while theoretically possible, is usually unacceptable to the host State as a matter of principle. In addition, sovereign immunity will be a formidable obstacle to suing the host State in the courts of another country, at any rate where acts of official authority are involved.[39]

The Report of the Executive Directors on the Convention addresses this issue in the following terms:

> *[t]he Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.*[40]

Traditionally, private investors did not have access to international methods of dispute settlement. The International Court of Justice is open only to States in contentious proceedings.

The classical method for the international settlement of investment disputes was diplomatic protection by the investor's home State. But diplomatic protection has serious disadvantages.

The investor must have exhausted all local remedies in the host State. The investor depends entirely on its national government which may be unwilling to pursue the claim for political reasons (see Art. 27, paras. 1-4). The Convention does not eliminate access to the national legal process for investment disputes. It merely opens an option to the host State and to the investor to utilize international

39 For a description of unsuccessful proceedings in the domestic courts of the investor's home State see *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 20-25.

40 *Supra* fn 38.

conciliation and arbitration. Once arbitration under the Convention has been agreed to, this choice operates to the exclusion of other remedies, notably domestic courts, unless the parties agree otherwise (see Art. 26, paras. 44–54, 132–148). Exhaustion of local remedies is not a condition for arbitration under the Convention unless this is specifically required by the host State (see Art. 26, paras. 187–231).

While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, it permits the institution of proceedings by Host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.[41]

Mere adherence and ratification to the Convention does not vest jurisdiction on ICSID. Three main requirements have to be met. Thus, as already mentioned in the Introduction, the purpose of this paper is to explain the three main jurisdictional requirements set out in Article 25 of the Convention. But, before tackling the jurisdictional requirements, it is essential to briefly explain where Article 25 can be found in the Convention.

2.2.1 THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID is an autonomous international institution established under the Convention, whose main purpose is to promote increased flows of international investment by facilitating the settlement of investment disputes between governments and foreign investors.

Pursuant to the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognise and enforce ICSID arbitral awards.

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41 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Besides this original role, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the Home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction which has "features that distinguishes it from an ordinary commercial transaction."[42] The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry to examine and report on facts. In performing this task, the drafters of the Convention intended to balance the interests of investors and host States.[43] As indicated in the Preamble[44], the use of ICSID conciliation and arbitration is entirely voluntary. Indeed parties have to consent to arbitrate a dispute under the Convention, but once they have consented to arbitration, they cannot unilaterally withdraw their consent.[45] Under Article 36(3) of the Convention the Centre may refuse to register one request for arbitration due to a reason that the dispute is manifestly outside the jurisdiction of the Centre. *Asian Express Int.l PTE Limited v. Greater Colombo Economic Commission* case is an example for this proceeding.[46]

A third activity of ICSID in the field of the settlement of disputes has consisted in the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators for ad hoc (i.e., non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred as to “UNCITRAL”), which are specially designed for ad hoc proceedings.

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42 See International Investment Law: Understanding Concepts and Tracking Innovations, 2008, available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf. This OECD survey was prepared by Catherine Yannaca-Small, Investment Division, OECD Directorate for Financial and Enterprise Affairs.

43 Lamm, C.B., “Jurisdiction of the International Centre for Settlement of Investment Disputes” (1991) 6(2) *ICSID Review, Foreign Investment Law Journal*, 458, 463.

44 The Preamble reads: “[…] 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.”

45 Article 25(1) of the Convention.

46 Article 36(3) of the Convention reads: "(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."

Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about thirty investment laws and in over 1000 BITs. Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties (the North American Free Trade Agreement – NAFTA, the Energy Charter Treaty – ECT, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).

As evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID has proved to be one of the most suitable mechanisms for the resolution of disputes arising out of international investments between one country and a national of another country provided that these states are signatories to the Convention.[47]

Although the pace of the caseload development of the Centre was slow in the first years of its existence, it blossomed from 1990s to become now a very important dispute resolution mechanism chosen by the actors at international investment. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement.

The current position of ICSID is due to many different reasons. However, two of them seem to prevail over the rest: in the first place, the effectiveness, tidiness, and efficacy with which ICSID's administrative staff and arbitrators have worked so far (that resulting in trust, the key factor in business and investment matters). Secondly, the flood of BITs which set ICSID as the "chosen forum", either exclusively or leaving the option to the investor, has been determinant for its present situation. Not only does the quantity of the cases assigned to it speak volumes about ICSID's relevance, but also the amounts of money at stake. Some of them are of such an importance that they are truly able to jeopardise some developing countries' budgets.

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[47] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1996); ICSID also serves as a potential arbitration forum for non-signatory states. See ICSID Additional Facility Rules, available at: <http://www.worldbank.org/icsid/facility/AFR_English-final.pdf>..

Taking into account the aforementioned considerations, it is noteworthy to note that today ICSID arbitration generally arises in one of two ways.[48]

First, an investor who has contracted with another private party in the host country claims that the host country has breached substantive provisions of the BIT. For example, the investor may claim that the host country expropriated an investment without compensation or did not afford the investor fair and equitable treatment. Thus, an investor may bring BIT claims against the host government under the BIT‘s substantive provisions in addition to any private cause of action.

Second, a dispute arises after the investor signs a contract with the host country itself or with an agency of the host country. Just as in the case involving a private contract, the investor is able to bring BIT claims against the host government under the BIT's substantive provisions. In addition, the investor may sue in contract against the host country.

3 *EMERGING ISSUES ABOUT THE JURISDICTION OF ICSID*

Article 25 is the first of the three articles in Chapter II of the ICSID Convention, which is headed "Jurisdiction of the Centre". [49] It lays down the general

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48 Wendlandt, M., "SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*",* 2008, *43 Texas International Law Journal*, 556.

49 Article 25 of the Convention reads:

"Jurisdiction of the Centre

(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

parameters for the ICSID's activity. The two other articles deal with the much narrower questions of excluding other remedies (Art. 26) and diplomatic protection (Art. 27). Unlike Articles 26 and 27, Art. 25 is not restricted to arbitration but refers to "[t]he jurisdiction of the Centre" thereby also encompassing conciliation.

Article 25 sets out the preconditions for the operation of the conciliation and arbitration proceedings. It conveys the jurisdictional requirements that parties must meet in order to submit a claim to it. Thus, the three main requirements to be met are: jurisdiction *Ratione Personae*, jurisdiction *Ratione Materiae* (consisting in two elements) and, lastly, the written consent of the parties to submit legal disputes to ICSID arbitration.

With reference with the element of the written consent of the parties to the jurisdiction of the Centre, it has to be remembered that parties can express their consent in a contractual way or in a non contractual way. When they choose the former one, parties can freely include in their main agreement, contract or even in a separate document, a dispute clause resorting eventual disputes to the ICSID Convention. In the case of foreign investment contracts, it is usual to include in the original contract, an arbitration clause indicating that disputes will be settled by arbitration.

As to which is the ideal clause to draft, it would mainly depend on the kind of the investment and the extension the parties are willing to give to the said clause. The Centre has designed 22 Model clauses. Each clause is designed for a different purpose. However, as each agreement or contract between them is different, parties are highly advised to carefully consider each of the options given by the Centre and to adapt their drafting and content to their agreement.

On the other hand, parties can express their consent in a non-contractual way in two steps, each in turn. First, the host State consents by including a standing offer to submit to ICSID jurisdiction in its national legislation or in a bilateral or multilateral investment treaty, such us the Energy Charter or Mercosur. Secondly, the investor – which may not have been an investor at the time of the State's offer – consents by accepting that offer later, either in writing to the host State at any time or by filling a request to arbitrate with ICSID. In this way, the parties' consent to arbitrate is perfected.

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)."

Second and third elements come under the Jurisdiction *Ratione Materiae*: a) the dispute in question needs to be a legal dispute; b) the dispute must arise out of an investment.

3.1 JURISDICTION RATIONE MATERIAE

There must be a dispute between the parties in order to submit the claim to the ICSID Arbitration. This dispute must also bear a legal character. Thus, we will first deal with the interpretation of the term dispute and then with the issue of when a dispute is legal or not. The International Court of Justice has defined a dispute as "a disagreement on a point of law or fact, a conflict view of interests between parties."[50] It is submitted that the disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical.

The dispute must relate to clearly identified issues between the parties and must not be merely academic. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.[51]

Article 25 requires that the dispute must be legal in character. The word "legal' seem to exclude any other type of disputes (moral, commercial or political) that may arise between the parties. The dispute in order to be of a legal character has to challenge legal rights or obligations.

> The fact that a dispute has to challenge legal rights to be of legal character was also addressed in *El Paso Energy International Company v. The Argentine Republic*, the Respondent cited a statement made by the President and General Counsel of the IBRD according to which the formula "any legal dispute" found in Article 25.1 was intended to encompass: [*t]hose cases involving […] differences in opinion with respect to a legal right. This would exclude cases like, for example, if a company wanted to challenge a system of price control, this implying issue of equity and not of legal rights.*

It may be may concluded that is the prescription or policy that is invoked, is what decides whether a dispute is legal or not. The dispute will only qualify as legal if legal remedies such as restitution of damages are sought and if legal rights based on, for example, treaties or legislation are claimed. The dispute not only needs to be of a legal character, but also needs to arise "directly" out of an investment.

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50 See Case concerning East Timor, 1995, ICJ Reports 89-99.

51 Reed, L., Paulsson, J., and Blackaby, N., *Guide to ICSID Arbitration*, 2004, Kluwer International Law, The Hague, at p. 109-110.

According to the tribunal in *Suez v. The Argentine Republic*, the legal dispute would "directly" arise out of an investment when there is a direct connection between the investment and the dispute. It stated: "[a]rt. 25 requires a connection of a sufficient degree of directness between a dispute submitted to ICSID and a claimant's investment."

The directness relates to the dispute in relation to the investment. The requirement of directness is one of the objective criteria for jurisdiction and is, therefore, independent of the parties' consent. This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected.[52] The tribunal in *Fedax v. Venezuela* pointed out that: "Jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction."[53]

Hence, the legal dispute would arise directly out of an investment when there would be a direct connection between what is brought under the jurisdiction of the Centre (the dispute) and the investment itself.

The concept of "investment" is central to the Convention. Yet, the Convention does not offer any definition or even description of this basic term.

Parties may also consent to the meaning of "investment" under Art. 25. They might consent through a direct agreement, a provision in a treaty (e.g. BIT) or a provision contained in the host State's investment legislation.

In practice, the problem arises when the parties have not agreed on the definition of "investment". The Convention's commentators agree on a certain criteria to determine its meaning. The Jurisprudence of ICSID cases have used in several occasions these criteria to define the world "investment". For instance, in *Salini v. Morocco*, the Tribunal indicated that to determine its meaning when parties have not agreed upon, these criteria applied.

These criteria consist in considering: the existence of contribution, the duration over which the project is implemented and, finally, its risk participation in to determine the meaning of investment. It also added that the operation should contribute to the development of the host State as stated by the Convention's

52 *Supra* fn 51, at p.113-114.

53 The issue in this case was that the disputed transaction, debt instruments issued by the Republic of Venezuela, was not a "direct foreign investment" and therefore could not qualify as an investment under the Convention.

preamble.[54] These criteria, known as the Salini test, has been used in several cases to determine the existence of investment under the ICSID system.

Thus, it will all depend in how the claim is presented to the tribunal. Counsel should prove that the investment reunites the requisites contained in the Salini test, especially that the operation contributes to the development of the host State.

3.2 JURISDICTION RATIONE PERSONAE

This requirement is related to the parties; one party must be a "Contracting State" (or one of its constituent subdivisions or agencies), while other party must be a foreign "National of another Contracting State". Therefore, ICSID does not have jurisdiction over disputes between states. One of the parties must be a natural or juridical person of another Contracting State.[55]

Identification of a State party is not difficult; the list of Contracting States is registered at the ICSID Secretariat continuously. Art. 67 of the Convention states that the Convention shall be opened for signature of States members of the Bank. It shall also be open for signature to any other State which is party to the Statute of the host States can act on their behalf or through “constituent subdivisions” or name “agencies” to act on their behalf.

In both cases, their designation must be formal. The term “constituent subdivision” covers a broad range of entities, such as municipalities (in unitary Sates) or provinces (in federal States). As regards “agencies”, the U.K, for instance, named (among others): Bermuda, Falkland Islands, Gibraltar, St. Helena and Isle of Man as “agencies” capable to act on its behalf.

With reference to the part of Article 25 dealing with “a national of another Contracting State”, it refers to private investors. They can be either a natural or a juridical person.

As regards investors claiming as a natural person, the only requisite that has to be met is this person must have the nationality of a Contracting State other than the State party to the dispute on two same dates, i.e. on the date on which the party consented to submit such dispute to conciliation or arbitration as well as o the date on which the request was registered. If the investor does not meet these requirements, the Centre will not have jurisdiction over his case and his claim will be dismissed on jurisdictional grounds. However, in practice the significance of the question of nationality regarding natural persons has been minimal, since most cases that have reached ICSID have involved juridical persons. Only a minority of investors were

54 Reisman, W.M., “Systems of Control in International Adjudication and Arbitration: Breakdown and Repair” in Bishop, D., Crawford, J., Reisman, W.M. (eds), *Foreign Investment Disputes: Cases, Materials and Commentary*, 2005, Kluwer International law 2005

55 Objections on the jurisdiction of the arbitral Tribunals are, inter alia, an usual cause of delays of proceedings between investors and host States handled by ICSID.

natural persons.[56] The term 'juridical persons' is not defined by the Convention because it is desirable to leave a broad range of definition since each country has a different perception on the issue. Art. 25(2)(b) has two parts.

Art. 25(2)(b), first part, states that the juridical person must be 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.

Despite its clear wording, an interesting discussion regarding the nationality of the investor was raised in *Tokios Tokeles v. Ukraine*. In this case, a Lithuanian company owned and controlled by Ukrainian nationals initiated arbitration against Ukraine alleging it breached the BIT signed between the said countries Ukraine objected on jurisdictional grounds. It alleged that Tokios Tokeles was not a genuine investor of Lithuania, rather it was a Ukraine investor. Ukraine argued that to find jurisdiction would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their government. The Ukraine-Lithuania BIT defined "investor" as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."[57]

The Tribunal determined that the state of incorporation is what determined the nationality of the investor, it stated: "Under the well established presumption {…}, the state of incorporation, not the nationality of the controlling shareholders or siege social, defines "investors" of Lithuania under Article 1 (2) (b) of the BIT."[58]

Art. 25 (2) (b) second part states that the investor party can also be a juridical person with the nationality of the Contracting State on the date on which the parties consented to submit the dispute to arbitration, but because of foreign control, the parties agreed to treat it as a national of another Contracting State for the purposes of the Convention.[59]

This means that all that is required for the purposes of Article 25(2)(b) second part is the objective fact of foreign control, i.e. the host State's awareness of the latter and a valid consent to ICSID jurisdiction. This part of the article applies to cases where host States require investors to form a company with a local partner (e.g. joint venture) and carry out the investment through the locally incorporated company. Equity gives foreign investors the right to refer disputes to ICSID, even when the company is not a national of the home State. The agreement mentioned in the article must be performed

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56 See Gaith R. Pharon v. Republic of Tunisia, Case No. ARB/86/1; Antoine Goetz et al. v. Republic of Burundi, in Scheurer, C. H., The ICSID Convention: A Commentary (Cambridge, Cambridge University Press, 2001), p. 266, para. 428.

57 Tokios Tokeles v. Ukraine, Decision on jurisdiction, Case No. ARB/02/18, p. 216, para. 28.

58 See *Ibid*.

59 The best way to express the agreement on foreign nationality is to lay down that the investor, although being a National of the host State, is controlled by nationals of other State. However, there is a growing tendency to accept implicit agreement, too. See *Holiday Inns v. Morocco*, (ICSID Case No. ARB/72/1).

in writing and it is not enough, for example, if the parties to the agreement solely lay down that "the nationality requirement is fulfilled."[60]

Although the Convention states the requirements for jurisdiction, the lack of definition of many terms has left many issues open. The ICSID Tribunals have addressed some of them.

3.3 ICSID'S DECISIONS ON DISPUTES BETWEEN INVESTOR AND STATE

ICSID handles disputes between investors and States, neither disputes between investors nor disputes between States. In the CSOB case,[61] the arbitral Tribunal analysed the issue of a dispute submitted by a State owned company. The Slovak Republic alleged that CSOB was acting as an agent of the Czech Republic and the claim had to be dismissed because the dispute was between States.

The Tribunal determined that *per se* a mixed economy company or government owned corporations are not disqualified as a national of another Contracting State unless it is acting as agent of its government or performing governmental functions.

In the Maffezini case,[62] the Tribunal analysed the issue from a different point of view. In this case Spain alleged that ICSID lacked jurisdiction because the dispute was not between an individual (Maffezini) and a State (Spain) but between an individual and a Corporation (SODIGA). The Tribunal stated that to determine if an entity was a State's organ and its doings attributable to the latter two tests were required: structural and functional. If on analysing the structure of an entity it seems that it is not a State's organ because the State has used a corporate veil, the analysis needs to be turned to the function of the entity. If the entity is in charge of State's functions, then the entity will be considered an organ of the State.

3.4 ICSID'S DECISIONS ON DISPUTES ABOUT INVESTMENT

Having stated that disputes that do not arise directly out of an investment are outside the authority of ICSID, it is noteworthy to point out that in the CSOB case the Slovak Republic argued that the dispute did not arise directly out of an investment but of an agreement that guaranteed obligations of another entity named Slovak Collection Company.

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60 Vincze, A., "Jurisdiction Ratione Personae in ICSID Arbitration, 2004, published by the University of Miskolc on the European Integration Studies, Vol. 3, n. 1, at para. 5.2.1 and 5.2.1.2.

61 *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic,* No. ARB/97/4, award of May 24, 1999.

62 See *Emilio Agustín Maffezini v. Kingdom of Spain,* No. ARB/97/7, award of January 25, 2000.

In this regard, the Tribunal stated that investments are usually operations composed of various interrelated transactions.

The transactions by themselves might not qualify as an investment. However when a dispute is brought before ICSID the Tribunal needs to look at the overall operation and not solely at the particular transaction. If the whole operation can be qualified as an investment, even if it is not a direct investment, and the dispute arises directly out of that operation through the particular transaction, ICSID will have jurisdiction.

In the second decision on objection to jurisdiction of that case, the Tribunal pointed out that although it had jurisdiction over a dispute that arose directly out of an investment through a specific transaction, the jurisdiction extended only to the dispute as per the terms of the consent of the parties. Therefore, the Tribunal did not acquire jurisdiction with regard to each agreement concluded to implement the wider investment operation.

3.5 ICSID'S DECISIONS ON THE RATIONE TEMPORIS REQUIREMENT

For ICSID jurisdiction the claim has to be submitted after the date the other party consented, provided the dispute arose after the date the parties consented to be the critical date.

In the decision on objection to jurisdiction of the Feldman case,[63] the Tribunal of ICSID additional facility[64] stated that its jurisdiction was extended to that dispute as per the consent of the parties. The North America Free Trade Agreement (NAFTA) governed that case. Accordingly, ICSID or its additional facility had jurisdiction only to acts or omissions that had occurred after NAFTA entered into force, not to previous acts or omissions. But if the acts or omissions are a continuation of previous acts or omissions, the Tribunal might have jurisdiction on the part of it that occurred after NAFTA's date of entry into force.

In the Maffezini case the Tribunal established a difference between dispute and claim. The Tribunal quoted the International Court of Justice on the Eastern Timor Case and concluded that a dispute is a disagreement over a legal or factual point able to be submitted as a specific claim. Subsequently, the Tribunal stated that as per the terms of the BIT governing that investment, i.e., Argentina-Spain, disputes and claims that arose before its entry into force will not be subject to ICSID. The Tribunal then

63 See *Marvin Roy Feldman v. United Mexican\States*, No. ARB(AF)99/1, award of December 6, 2000.

64 Mexico is not a signatory of the ICSID Convention. Thus it is not bound but the Convention but can agree to settle disputes as per the additional facility rules of ICSID.

pointed out that the critical date separated the dispute from previous events that were not a dispute of legal content or of interests.

In the first decision of the CSOB case the Tribunal stated that

> *it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.*

In Tradex,[65] the decision on objection to jurisdiction addressed the issue of timing of the dispute. The Tribunal decided that disputes usually arise before a claim. If the date of the claim filing is previous to the date of the consent, the Tribunal did not have jurisdiction.

3.6 ICSID'S DECISIONS ON THE NATIONALITY REQUIREMENT

For ICSID to have jurisdiction the legal investment dispute needs to be between a Contracting State and a national of another Contracting State. If the dispute is between a national of the Contracting State involved in the dispute and that State ICSID will not have jurisdiction.

That is why the criteria to determine when a person or a juridical person is a national of a State are crucial. Furthermore, according to the ICSID Convention any juridical person with the nationality of the Contracting State party to the dispute can have the treatment of a national of another Contracting State if it is under foreign control and the parties have agreed to such treatment.

However, the ICSID Convention does not provide for definition of foreign control.

(a) When an individual had nationality from one State and residence from another State

In the Feldman case the Tribunal mentioned that nationality and residence were different concepts. Nationality was the main connecting factor between a State and an individual. It also stated that nationality prevailed over permanent residence in matters of standing.

(b) Nationality of an entity when there is foreign control

65 See *Tradex Hellas, S.A. v. Republic of Albania*, No. ARB/94/2, award of December 24, 1996.

In the AUCOVEN case (),[66] the Tribunal was asked to address the issue of foreign control of a company with the nationality of the Host State. The Tribunal emphasized the role of the consent of the parties and their ability to condition jurisdiction to the acquisition of the majority of the shares by a national of a Contracting State.

The nationality of the company that acquired the majority of the shares was determined as per the most common criterion, i.e., place of incorporation.

(c) Nationality when there is a group of companies.

In the Banro case,[67] the company with the nationality of the other Contracting State and the company giving the consent and in connection with whom the host State gave consent to arbitrate disputes involving them were not the same. The Tribunal established that a company could transfer to a subsidiary the consent it had granted to submit a dispute to ICSID as per the terms of the agreement where consent was originally granted. However, for the consent to be transferable the consent had to be previously granted. In the case in point the consent could not have been granted nor transferred because the parent company did not have the nationality of a Contracting State. Thus, if a claimant lacked the nationality of a Contracting State, ICSID could not have jurisdiction. The Tribunal also considered the possibility of the claimant having the nationality of a Contracting State but not having granted consent and the possibility of the host State granting consent but not including disputes involving the claimant. In both cases the Tribunal stated that it lacked jurisdiction.

On reaching a conclusion, the Tribunal established differences with two previous cases: a) where request to submit a dispute to ICSID was submitted by a member company of a group of companies while the consent was expressed by another company of the group and b) when following the transfer of shares the request to submit the dispute to ICSID came from the transferee company while the consent had been given by the company making the transfer. The Tribunal stressed that in general it tends to be less formalistic and that ICSID is more willing to work its way from the subsidiary to the parent company rather than the other way around.

> *Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality.*

66 *Autopista Concesionada de Venezuela, C.A. (AUCOVEN) v. Bolivarian Republic of Venezuela*, No ARB/00/5, award of September 27, 2001

67 *Banro American Resources, Inc and Societé Aurifére du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, No. ARB/98/7, award of September 1, 2000.

3.7 ICSID'S DECISIONS ON CONSENT

Consent is the cornerstone of the jurisdiction of the Centre.[68]

The consent needs to be provided in writing, but there is no indication that there is one way preferred over another. The consent can be given in a treaty, a contract or local law. In the Olguin,[69] CSOB, and Tradex cases, the Tribunals have referred to the possibility of the consent being granted by the State in a BIT. That will not grant jurisdiction *per se* to ICSID, for the consent of the investor will be lacking. But once the investor files a claim with the Center, it is considered that the two parties have consented to submit the dispute to arbitration before ICSID.

In the first decision on objection to jurisdiction in the CSOB case, the Tribunal also referred to the possibility of the consent being granted in a local investment law. It mentioned that under some laws that consent is deemed an offer to be accepted as soon as the foreign investor files an investment application.

The Tribunal concluded that in that case consent had been given in a contract by incorporating by reference the provisions of a BIT although the treaty might not have been in force on the international plane. It stated that the will of the parties should be honored. Thus by referring to a BIT, the parties intended to incorporate its provisions to their agreement, in order to provide international arbitration as their chosen dispute settlement method.

In the Tradex case the Tribunal also stated that consent could be given unilaterally by a Contracting State in its national laws. The consent will become effective at the latest if and when the foreign investor files its claim with ICSID.

In the second CSOB case decision on objections to jurisdiction, the Tribunal confirmed its jurisdiction regarding the dispute submitted by claimant to the extent that the same arises under a second-tier obligation agreement. Therefore the jurisdiction of the Center could not extend beyond the consent of the parties and consequently could not reach the principal agreement.

The Tribunal based its decision on the principle of the relative effects of a contract, on the fact that there was no provision for arbitration in the principal contract and on the principle of effectiveness and finality of jurisdiction.

The consent needs to be expressed by the parties to the dispute. In the case of group of companies, for example when a subsidiary has granted consent and a parent company

68 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention, March 18, 1965

69 *Eudoro Armando Olguin v. Republic of Paraguay*, No ARB/98/5, award of August 8, 2000.

files a claim, the Tribunals have considered those two happenings as made by a group of companies, provided that the consent was given in writing, timely and by a national of another Contracting State or an entity considered so.

As the BANRO case pointed out, Tribunals do not accept the view that their competence is limited by formalities, but rather base their decisions on a realistic assessment. However, the Tribunals take that approach when consent has been granted in compliance with the requirements of the Convention and when the nature and logic of the ICSID system is not affected.

A Most Favoured Nation (MFN) clause of a BIT can be used to extend ICSID jurisdiction. In Maffezini, the Tribunal analyzed the MFN clause of the Argentina-Spain BIT in connection with the provisions of the Chile- Spain BIT, which did not require exhausting certain period of time before filing a claim.

The Tribunal noticed two principles: *res inter alios acta* and *ejusdem generis*. According to the first one the treaties are valid among the parties. According to the second one, the effect of a treaty can be extended via MFN clause to treaties of the same nature. The Tribunal ruled that in the absence of express provisions to the contrary, the provisions of investment disputes of another treaty of the same nature can be extended to an investor of a third country because the purpose of the BITs is to protect foreign investors and their rights, and because the provisions of investment disputes settlement are inextricably related to investment protection. The Tribunal also stated some exceptions to the ruling such as when consent to arbitration is conditioned to exhaustion of local remedies, when the parties have the option to choose between local remedies or international arbitration or when the parties have chosen an institutional arbitration. The Tribunals have also addressed the conditional consent. In the AUCOVEN case ICSID did not have jurisdiction until a condition subsequent had been satisfied. The parties, through agreement established the condition and the criteria to determine its fulfillment.

The Tribunal decided in favor of the parties granting consent to submit a dispute to the jurisdiction of ICSID upon condition of the investor being subject to foreign control. The parties defined foreign control as the holding of majority of shares of the investor's local company by nationals of a Contracting State.

The parties can bring additional or ancillary claims to ICSID provided they have not consented otherwise and the additional or ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre. In the Feldman case, the arbitral Tribunal stated that for an ancillary claim to be within the jurisdiction of ICSID, it should be within the scope of the arbitration agreement of the parties and should be presented in principle not later than in the reply. In sum, through their consent expressed in writing the parties to the dispute set the terms of the jurisdiction of ICSID.[70]

3.8 THE AWARD IN EMPRESA ELÉCTRICA DEL ECUADOR, INC. V. REPUBLIC OF ECUADOR

A tribunal of ICSID has accepted Ecuador's objections to jurisdiction in an arbitration commenced by Empresa Eléctrica del Ecuador, Inc (EMELEC). In a ruling handed down on June 2, 2009, the tribunal held that the claimant Mr. Miguel Lluco was not authorized to commence the claim on behalf of EMELEC.

EMELEC, an electricity company incorporated in the state of Maine, signed a 60-year concession contract in 1925 to produce, transmit and distribute electricity to Guayaquil, Ecuador's second largest city. When the contract ended in 1985 EMELEC continued to operate in Ecuador under provisional permits.

According to the claimants, on 23 March 2000 the company's assets were frozen by an order of Ecuador's National Council for Electricity (CONELEC). CONELEC claimed to have taken this action in response to, among other things, EMELEC's failure to finalize a new concession contract in the time frame provided under the Electric Sector Law.

Mr. Lluco responded by lodging a claim against Ecuador in 2004, alleging that EMELEC's assets had been expropriated in violation of the Ecuador-United States bilateral investment treaty.

Before the Tribunal examined the alleged expropriation, Ecuador challenged its jurisdiction on several grounds. Ecuador's principle argument was that Mr. Lluco was not authorized to launch the claim because EMELEC was owned by trust to which he was not a party.

Mr. Lluco, however, claimed to be the trustee of a trust allegedly set up by EMELEC's previous owner, Fernando Aspiazu, which held EMELEC as an asset.

The tribunal was presented with complex and conflicting accounts of the history of the ownership of EMELEC. According to the tribunal neither side disputed the fact that in January of 1993 Fernando Aspiazu bought EMELEC through the Bahamian company NEPEC. Six years later a bank owned by Mr. Aspiazu, Banco del Progreso S.A., was taken over by Ecuador, and Mr. Aspiazu was charged with embezzlement and ordered to pay back all depositors.

70 García-Bolívar, O.E., *Special Report on ICSID Jurisdiction,* available at: <http//bg-consulting.com>.

In response, Mr. Aspiazu set up the Progreso Repatriation Trust (PRT I), a revocable trust whose beneficiaries were to be first the depositors at the failed bank, followed by himself and his wife.

What happened next is disputed. According to Ecuador, Mr. Aspiazu and his wife dissolved this first trust in February of 2000 and created the Progreso Depositors Trust (PDT) with the same assets. This second trust is irrevocable for at least 6 years, and therefore still owns EMELEC.

The claimant, however, argues that this second trust was never formed with the proper consent of Mr. and Mrs. Azpiazu and that instead a third trust was formed with the relevant assets in 2003. As the appointed trustee of this alleged third trust, Mr. Lluco contends he is empowered to commence the current arbitration.

Ultimately the tribunal sided with Ecuador, holding that Mr. and Mrs. Aspiazu did authorize the creation of the irrevocable second trust in 2000 and that their consent was evident in several letters written to instruct the trustee of that trust.

Based on this finding the tribunal determined that the third trust could not have been created in 2003 as the claimant contends, given that the assets in question already belonged to the second trust which was irrevocable at the time. As such, the tribunal determined that Mr. Lluco lacked authority to represent EMELEC as claimant in the arbitration, concluded the tribunal.

The decision represents a rare victory for Ecuador at ICSID, and comes as the country has moved to exit the World Bank's arbitration facility citing a perceived bias in that body on behalf of foreign investors.[71]

Analysing the present case, it seems apparent that the core of the question is that the Convention gives the parties a great deal of freedom in providing for the elements of jurisdiction and such flexibility is a very important overall feature of the Convention. The parties are restricted only in places where the agreement of the parties is manifestly outside the scope of the Convention.

The Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador case constitutes an exception which confirms the rule, i.e. the principle in *favorem jurisdictionis.* Even where there are unclear or ambiguous issues in a certain case, the purpose of the Convention is to apply the principle in *favorem jurisdictionis* meaning that the parties' original intent to submit the dispute to ICSID arbitration shall be respected during the course of interpretation.

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[71] The award in *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9.

4 CONCLUSIONS

It is undeniable that the existence of ICSID has contributed to the promotion of foreign private investment particularly in developing economies.

However, the ICSID case law demonstrates two significant issues regarding jurisdiction. First of all, an eagerness to take the cases, on the part of ICSID, is observed. ICSID's approach is generally based on a broad interpretation of its jurisdiction. Secondly, the cases examined in this paper reveal that in all cases related to jurisdiction the awards have disfavored the States that are parties to the Convention. In order for an arbitration tribunal to be credible there needs to be consistency in the decisions, provision of clear guidance, predictability and certainty. It appears from case law that ICSID decisions do not always satisfy these objectives. ICSID, in certain cases, has tried to enlarge its jurisdiction by further limiting the sovereignty of member States. This has been reflected in some inconsistent decisions concerning corporate nationality and consent.

The case law also reveals that the balance between parties is missing and impartiality of ICSID is questionable. This has naturally caused hesitations among member States, thus endangering the objective of ICSID in three areas: first, it may restrict further acceptance of the ICSID arbitration by new States. Second, it may result in enforcement problems as seen in the SPP v. Egypt case. Third, this may lengthen the arbitration process.

These issues have to be addressed properly in order to have ICSID contribute to a healthier flow of investments across the borders in the years.