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INVESTMENT DISPUTES AND JURISDICTION OF THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

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by

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TO MY FAMILY WHOM I OWE MY ALL

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CHAPTER I INTRODUCTION

This thesis will analyze on one of the ways in which disputes arising from developed countries' investment activities in the developing countries are decided. The issues of investment and disputes are of great importance to the developed countries as well as to developing countries. The scope of the issues gives rise to a multitude of questions of national and international law in an interdependent world economy.[1]

International investment attracts the close attention of international law because it brings the movement of people and financial resources from one country to another and such movement gives rise to a potential risk for conflict between the countries.[2] Whereas disputes arising from trade and financial transactions are mainly settled by

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[1] ARON BROCHES, *Settlement of Disputes Arising out of Investment in Developing Countries, in* SELECTED ESSAYS WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 458 (1995).

[2] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 7-8 (1994).

means of domestic courts, the tools of international law are often required in case of the foreign investment disputes.[3]

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States[4] has unique dispute settlement mechanism. The jurisdiction of the Convention is limited to disputes between Contracting States and nationals of other Contracting States. Therefore, the increasing number of the States that have ratified the Convention expand this limitation of the ICSID's jurisdiction and clearly contribute to the growth of ICSID as an investment disputes settlement institution.[5]

The jurisdiction of the Convention is also limited by the consent of the parties to submit a dispute to ICSID conciliation and arbitration and the subject matter of a dispute. The experience of ICSID in the settlement of

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[3] *Id.* at 8.

[4] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, I.E.L. VIII-A (1989). [hereinafter ICSID Convention].

[5] *How many countries are members of ICSID?* IN QUESTIONS ABOUT THE WORLD BANK GROUP (visited July 15, 1997) <http://www.worldbank.org/html/extdr/faq/extqa025.htm>. The Convention has been signed by 139 States, of which 126 have ratified the Convention.

disputes involving the issues of the jurisdiction of the Convention is particularly important part of this thesis.

CHAPTER II FOREIGN INVESTMENT

A. Definitions: Nature and Structure.

It is clear that international investments have become a very powerful source of economic development for many countries. Private international investments activity has had different stages in its history, from certain decades of total rejection to other decades of being a very attractive instrument in the international arena. Improvements on communication and transportation have made the world more interdependent, a place where the international investment wields enormous power.[6]

There are as many definitions of a foreign investment as the authors who research on this topic. The definition of the foreign investment may be broad or narrow depending on the purpose in which it is used. Commonly the definition of the foreign investment is given in the context of foreign direct investment because it is the most common of the types

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[6] SEYMOUR J. RUBIN, *Introduction, in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 1 (1985).

of investments and because of its qualitative influence on the economy of the recipient country. Foreign investment may be defined as "the transfer of tangible or intangible assets from one country to another for the purpose ... of generating the wealth under the total or partial control of the owner of the assets."[7] One should distinguish the content of the foreign direct investment from portfolio investment. The principal feature of portfolio investment is an absence of management and control of the enterprise. The difference is necessary in defining the limits of protection of these two kinds of foreign investment. An investor usually carries his own responsibility in portfolio investments, while the foreign direct investment has been traditionally double protected.[8] The host government protects it by erecting protecting legislation and the home state gives diplomatic protection to its national investor. The distinction of the extent of protection afforded to the two types of investment is drawn from the theory that a portfolio investments may be pulled out in a dangerous

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[7] SORNARAJAH, *supra* note 2, at 4.
[8] *Id.* at 4-5.

situation, whereas the direct investment does not have such flexibility of movements.[9]

B. The Recent History of Foreign Investment.

The law of foreign investments, in these circumstances, has become one of the most intriguing and controversial areas of international law. As old the history of direct international investments may be so are the number of problems with respect to them still arise. These problems re-surfaced in massive numbers at the end of the Second World War with the division of the world into two totally different economic and social systems. The end of colonialism signaled a further growth in the number of issues involving foreign investments.[10] Being colonized for a part of their history, these countries rejected any kind of cooperation with Western countries. The newly independent countries agitated not only for the ending of economic colonialism but also for a new economic order that could permit them to lead their own economies and to an

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[9] M.M. Boguslavskiy, Pravovoe Polojenie Inostrannyh Investiziy [Legal Status of Foreign Investments], Vneshneeconomicheskiy Centre "SOVINTERYUR", Moscow, at 36 (1993).

[10] SORNARAJAH, *supra* note 2, at 1.

access to the world market.[11] The cold war between super-powers, and non-aligned movement also made their controversial impact to the development of international investments. The collective actions of oil-producing countries during the oil crisis of 1970s illustrated the power and weakness of natural resources possession.[12]

However, the trend was not one-sided. With strengthening of an economy of developing countries, the transnational companies had become tremendously powerful. The transnational companies had already been not only economic power but they could influence political and social development of a country. As a result many developing countries considered the transnational corporation as a threat to their sovereignty. With the collapse of communism in Eastern European countries and countries such as Soviet Union as well as opening up of the remaining communist countries namely China, Vietnam, to the world economy, the competition for foreign investments highly increased.[13] One can define the above mentioned facts as macro-challenges of foreign investment law.

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[11] *Id.*
[12] *Id.* at 1.
[13] *Id.* at 2.

On the micro level, corporate investors have tried to reduce their overall risk, or "variability of projected outcomes", while maintaining the total profits of their investments.[14] "According to the capital asset pricing model, the total variability of any single investment is composed of both systematic market risk and unsystematic or diversifiable risk."[15] The ability to control market risk is insignificant. However, the investor can control unsystematic risk.[16] For those who invest in a foreign country's economy, the unsystematic risks consist of political and legal challenges.[17] These challenges may vary from creation of law hostile to foreign investments to the extreme acts of the host governments such as an expropriation or confiscation of a property. The uncertainty in a foreign country may prevent investors from investing in this country. It leads to losses for both the investor and the host country. The investor may lose his current or future profits and the host country loses financial resources that are significant for the economy of

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[14] David A. Lopina, *The international Centre for settlement of investment disputes: investment arbitration for the 1990s*, 4 Ohio St. J. of Disp. Resol. 107, 108 (1988).
[15] See *id.*
[16] *Id.*
[17] *Id.*

the developing country. If this scenario happens in more global measures, the entire world economy might be unfavorably influenced.[18]

[18] *Id.* at 107,108.

CHAPTER III THE NATURE OF INVESTMENT DISPUTES

A. International Investment Disputes.

International investment disputes come along with foreign investments. In the world of different stages of social, economic, political and legal development, the rise of large number of disputes are particularly apparent. International investment disputes have been with us in one or the other form since the movement of people and financial assets has started, with the result that people, their activity and assets have become subjected to the territorial jurisdiction of the host country.[19]

The debate on how to determine when a legal dispute exists have never been settled.[20] One of the most clearest definitions was given by the Permanent Court of

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[19] ARON BROCHES, *International Investment Disputes, in* SELECTED ESSAYS WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 1, 495 (1995).

[20] Gerhard Wegen, *Dispute Settlement and Arbitration, in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT, *supra* note 6, at 59, 62.

point of law or fact, a conflict of legal views or of interests between two persons."[21]

An international nature of the dispute does not necessarily mean that it is a subject to public international law. Indeed, governments of investor countries have sought and protected investments abroad by their nationals through boycott, embargo and even military sanctions.[22] In the context of this thesis, the term "international" means a relationship between a state or a state agency and a national of another country. The term "investment dispute" consists of the disputes defined by their subject matter and the area where they arise.[23] "In practice, however, this term is used more particularly to refer to disputes between a state and a foreign investor arising out of investments by the latter in the territories of the former."[24]

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[21] *Id.* from Mavrommatis Palestine Concessions, PCIJ Series A, No. 2, II.

[22] *Id.* at 62, 63.

[23] *Id.*

[24] *Id. See* also Aron Broches, *Arbitration in Investment Disputes, in* INTERNATIONAL COMMERCIAL ARBITRATION 292 (Schmitthoff ed. 1967); Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in* THE ART OF ARBITRATION 63 (Schultsz and van der Berg eds. 1982).

In the most of the cases, investment dispute involves the property of the investor which is located in the country of investment. However, it must be noted that in the last 10 - 20 years an increased number of investment disputes has not involved property. Nevertheless, management contracts, concession agreements, licenses, give rise to very similar issues to those that involve real property.[25] These issues are in a way related to the sovereignty of the country. "Investment as a subject becomes a field for battle over the validity of general principles of international law or the Calvo doctrine,"[26] which denies the interference of the investor state on his behalf in the affairs of the host country. Countries are apparently very sensitive when the delicate issue of possession of natural resources comes into the discussion.[27] The ownership of the natural resources by the foreign person located in the host country is the most typical example of the classical investment dispute.[28]

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[25] SEYMOUR J. RUBIN, *Overview, in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 2 (1985).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 2, 3.

Defining the nationality of the investor is often a problem in an international investment dispute. It happens when for example, transnational corporation incorporated in the U.S. owns the shares in companies of Germany, France or Switzerland and one of these European-based companies invest in the developing country. The experience of ICSID shows many examples of how difficult it is sometimes to discover the nationality of the investor.

The concern of the investor over the applicability and implementation of the host country laws may cause a dispute to arise.[29] Sometimes the future investor and the host country establish stabilization clauses which restrict the right of the host government to change its national laws. A major source of investment disputes is the change of national law of the host country which curtails the benefits of the foreign investor previously enjoyed.[30] When such a dispute arises, neither foreign investor nor his home government will normally accept the changes in host country law or the actions of the host country's judicial

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[29] BROCHES, *supra* note 1, at 497.

[30] *Id.*

authorities.[31] The disputing parties may support their arguments by using one of the following documents: the United Nations resolutions on permanent sovereignty over natural resources (1962) and economic rights and duties of States (1974), the 1967 OECD Draft Convention of the Protection of Foreign Property, the 1976 OECD Guidelines for Multinational Enterprises, the draft United Nations Code of Conduct of Transnational Corporations and the Helsinki Final Act of 1975 and its follow - up.[32]

B. Avoidance and Settlement of Disputes Arising Out of Investment in Developing Countries.

There are several methods by which the investment disputes might be settled. However, it would be desirable for an investor and a host country before accepting the decision on the investment activities, to set up and spell out a mutual investment agreement in the way that prevents disputes in a deal. The best way is to set up the ideal transaction where there will not be any irritating

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[31] *Id.*

[32] *Id.*

circumstances.[33] As previously mentioned, there is a point of sensitivity towards the host country with respect to foreign ownership of the natural resources of that country.[34] Therefore, both parties should avoid an infringement of the principle of "permanent sovereignty."[35]

Generally the ownership benefits for the investor and the investment benefits for the host country have a dissuasive role with respect to disputes. However, where the host country's policy over natural resources is hostile to foreign ownership, the investor might choose to use different methods of investment in order to avoid conflict with the principle of "permanent sovereignty" over natural resources. A concession agreement is nearly equivalent to the possession of the natural resources.[36] It is based on contractual rights to exploit the natural resources of the host country.[37]

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[33] RUBIN, *supra* note 25, at 1, 5.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

Another method of decreasing the negative impact of an investment dispute is to include, in the agreement between the parties, provisions recognizing that changes in circumstances may occur, particularly during the long-term investment agreement.[38] Two kinds of situations may arise. One is expressed in the Latin maxim: *rebus sic stantibus,* or approximately, changes in circumstances may change agreements established under different conditions.[39] The second is *pacta sunt servanda* - agreements have to be complied with.[40] The reasonable agreement will anticipate the possibility that disputes may arise no matter how perfect the investment agreement is created. In this case the renegotiation clause might help to avert certain disputes.

One of the other methods to lessen the occurrence of investment dispute is to agree on general conduct of parties to international investment, particularly the conduct of transnational corporations. This can be accomplished by

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[38] *Id.* at 1, 6.

[39] *Id.*

[40] *Id.*

establishment of the multilateral code or adopting bilateral investment treaties.[41]

The issue of settlement of investment disputes arises when avoidance has not been made appropriately or when it could not prevent the dispute. Submission of the dispute between the foreign investor and the host country to the national court more likely will not be acceptable to either side. The principle of national jurisdiction will refrain the investor to submitting the dispute to the courts of the host country, the same argument is relevant or even more important for the host government.[42]

Where the local jurisdiction is not acceptable, the parties will look for another mean of settlement of their dispute. Often it is an arbitration. If it is an arbitration, the disputing parties should choose either the institutional arbitration or *ad hoc* arbitration. When selecting the arbitration institution each party will look at the advantages that the arbitration institution can give. The fact that ICSID is likely the most appropriate institution of arbitration in investment disputes between

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[41] *Id.*

[42] BROCHES, *supra* note 1, at 459.

foreign investors and host countries will be discussed in the next chapters. A developed country probably would choose the Stockholm Chamber of Commerce or International Chamber of Commerce as Western oriented arbitration institutions, while a developing country would prefer the regional arbitration centres of Asian African Legal Consultative Committee such as Cairo Regional Centre for Arbitration or Kuala Lumpur Regional Centre for Arbitration.[43] There are many criteria why one or the other arbitration Centre is preferred. They include "the nature of the rules of the institutions, their procedures for the selection of arbitrators and the likely place of arbitration" as well as the question of cost.[44]

If the parties cannot agree on institutional arbitration, they will have to use one of the existing set of arbitration rules such as the UNCITRAL Rules or to create their own rules.[45] This choice creates its own problems of administration of arbitration.

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[43] *Id. See* also ARON BROCHES, *Foreign Investment and the Settlement of Disputes with Particular Reference to ICSID, in* SELECTED ESSAYS WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 1, 257 (1995).

[44] *Id.* at 459-460.

[45] *Id.* at 460.

There are several cases of investment disputes such as *British Petroleum v. Libya, Aramco v. Saudi Arabia*, where the issues of delocalised procedure and the award without nationality have arisen.[46] Delocalized procedure means that choice of law and the place of arbitration should be different. The international character of the award permits the award in the dispute be out of the scrutiny of national arbitration laws.[47] Developing countries have a tendency to select the delocalized arbitration, to avoid submitting to the jurisdiction of the foreign court.[48] There are other reasons, applicable to both investor and the host country why parties prefer delocalized arbitration. They include predictability and consistency of the arbitration rules compared to the procedural rules of the other state in which the arbitration will be said to be localized.[49]

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 461.

CHAPTER IV THE UTILITY OF ICSID AS AN INSTRUMENT IN SETTLEMENT OF INVESTMENT DISPUTES

A. Establishment of ICSID.

The idea of creating an international organization which would regulate and promote the international investments was under active consideration in the early 1960s.[50] The cause of the emergence of this idea was the contradiction between developed and developing countries in settling the appearing investment disputes. The lack of trust in each other' s national judicial systems was the main ground of controversy which was created by the epoch of colonialism. When there is no belief in justice of the local jurisdiction, the dispute requires the participation of an independent third party.

The first efforts to establish an international body to regulate foreign investment were accomplished by the

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[50] Lopina, supra note 14,at 108-109. *See* also Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: the Cases of ICSID and MIGA*, 33 Harv. Int'l L.J. 103, 105 (1992).

Organization for Economic Cooperation and Development ("OECD").[51] The OECD's idea was to create a multilateral convention on protection of foreign property and to develop a multilateral investment insurance organization that would protect investment from expropriation and other risks.[52] The OECD abandoned its unsuccessful efforts in 1967, mainly because the developing world was not ready to accept in a multilateral context the rules of law set by the OECD Convention.[53]

The International Bank for Reconstruction and Development (World Bank) also started its efforts of creation an organization with the objective of promoting private foreign investments in the 1960s.[54] First, the draft of the Convention on establishment of the organization promoting foreign investment was created.[55] Then, the legal experts from 86 countries meet each other to discuss the Convention in 4 different cities of the world.[56] The

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[51] Rowat, *supra* note 50, at 105.
[52] *Id.* at 103, 105-106.
[53] *Id.* at 103, 106. *See* also Aron Broches, *The Experience of the International Centre for Settlement of Investment Disputes, in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT, *supra* note 6 at 75, 76.
[54] Lopina, *supra* note 14 at 107, 108-109.
[55] *Id.* at 107, 109.
[56] *Id.*

questions and concerns of these four meetings led to the draft of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[57] The Convention is commonly known as the ICSID Convention or the Washington Convention. The Executive Directors of the World Bank, on March 18, 1965, approved the draft of the Convention for submission to the governments of countries for the further process of signature and ratification.[58] The twentieth instrument of ratification was deposited on September 14, 1966 and the Convention, as per Section 2 of Article 68 accordingly entered into force on October 14, 1966.[59]

The International Centre for Settlement of Investment Disputes, which the 1965 Washington Convention created, is an unique institution among the many institutions dealing with arbitration and conciliation. The special nature of ICSID comes from the fact that it is an international

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[57] *Id.*

[58] ARON BROCHES, *The Convention on the Settlement of Investment Disputes: Some Observation on Jurisdiction, in* SELECTED ESSAYS WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 1, at 164.

[59] ICSID Convention, *supra* note 4, Art. 68. The Convention was opened for signature on March 18, 1985, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, (entered into force Oct. 14, 1966). The text of the Convention has also been published in 4 I.L.M. 532 (1965).

organization whose framework covers the particular area of international investment disputes between the authorities of the host country, which is a Contracting State to the ICSID Convention, and the foreign private investor who is from a State which is also a party to the Convention.[60] In other words, ICSID operates outside of the scope of domestic law in issues necessarily involving a government entity on the one hand and an entity under created national law (whether it is a public law entity or private law entity) on the other in their relationship with respect to an investment.[61]

In the case of ICSID, most of member states consist of developing countries. Quantitative dominance of developing countries among member countries appears to be understandable if one takes into consideration the economic and political power of developed countries, their intention to invest and gain profit in developing countries and from the other hand, having those resources and the lack of financial means and skills to utilize them by developing countries. From an economic point of view, the governments of developing countries usually have no alternatives but to

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[60] Ahmed Sadek El-Kosheri, *ICSID Arbitration and Developing Countries,* ICSID Review Foreign Investment Law Journal Volume 8 Number 1 at 104 (1993).
[61] Id.

create as many incentives as they can offer to attract foreign investment. ICSID as an international forum of settlement of investment disputes, not subject to any intervention of local courts, is considered to be one of the incentives given by developing countries to foreign investors to look more favorably towards investing in developing countries. Obviously the purpose of establishment of ICSID was not encouragement of foreign investments in developed countries. In the sixties, the developed countries already had reached economic and political stability. What was aimed at by the drafters of the ICSID Convention is some protection from "non-commercial risks" associated with less economically developed countries which were struggling to gain political control and to utilize their economic resources to accelerate economic and social development. In other words the purpose of ICSID was to "depoliticize" the settlement of politically sensitive economic matters.[62]

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[62] *See* BROCHES, *supra* note 53, at 75, 77.

B. Organizational Structure.

ICSID is essentially secretariat and governed by the Administrative Council.[63] Each Contracting State sends one representative to the Administrative Council and each representative casts one vote.[64] All issues which are before the Council are decided by majority vote.[65] The President of the World Bank is an ex-officio Chairman of the Administrative Council but does not have a vote.[66] The principal functions of the Administrative Council consist of the adoption of the administrative and financial regulations, the rules of procedure for the institution of proceedings, rules of conciliation and arbitration.[67] The Conciliation and Arbitration Rules govern the proceedings unless the parties agree otherwise.[68] The Administrative Council by a majority of two-thirds of its members elects

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[63] ARON BROCHES, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in* SELECTED ESSAYS WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW, *supra* note 1, at 188, 189.
[64] ICSID Convention, *supra* note 4, Art. 4(1) and Art. 7(2).
[65] *Id.* Art. 7(2).
[66] *Id.* Art. 5.
[67] BROCHES, *supra* note 63, at 188, 189. *See* also ICSID Convention, *supra* note 4, Art. 6 (1)(a), (b) and (c).
[68] *Id.* at 188, 189-190.

the Secretary-General who is a principal officer of ICSID and its registrar.[69]

The Convention clearly states that the purpose of ICSID is to be a Centre to administer conciliation and arbitration of investment disputes and more generally guarantee the practical implementation of the Convention. However, ICSID does not directly conduct the settlement of the disputes. The accomplishment of this task is left to the Arbitral Tribunals and Conciliation Commissions which are set up under the ICSID Convention. Their membership consists of persons selected from among the list of Panels of Conciliators and Arbitrators maintained by ICSID.[70] Article 13 of the Convention provides: "Each Contracting State may designate four persons to each panel who may but need not to be its nationals. The Chairman may also designate ten persons to each panel."[71] Arbitrators and conciliators are appointed in accordance with the Convention, by the parties to the dispute which gives the parties great latitude in constituting the Tribunal or Commission. However, ICSID will not stop the process of establishment of the

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[69] *Id.* at 188, 190. *See* also ICSID Convention, *supra* note 4, Art. 10(1).
[70] Lopina, *supra* note 14, at 107, 109.
[71] ICSID Convention, *supra* note 4, Art. 13.

Conciliation Commission or the Arbitral Tribunal even if the parties fail to reach a mutual agreement.[72] With respect to conciliation proceedings the only requirement is that the Conciliation Commission should consist of a sole conciliator or any uneven number of conciliators.[73] If the parties cannot agree on a number or method of appointment of conciliators, the Convention states that the Commission should be of three conciliators, one conciliator appointed by each party and the third one appointed by agreement of the parties.[74] In case of arbitration there is an additional requirement that arbitrators shall not be the same nationality neither with the Contracting State which is a party to a dispute nor with a national of the other Contracting State who is also a party to a dispute.[75] This requirement looses its mandatory character when the arbitrators are appointed by the parties to a dispute.[76]

If the parties have failed to constitute the Commission or Tribunal within ninety days after notice of registration of the request for conciliation or arbitration by the

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[72] BROCHES, *supra* note 63, at 188, 190.
[73] *Id*. *See* also ICSID Convention, *supra* note 4, Art. 29(2).
[74] ICSID Convention, *supra* note 4, Art. 29(3).
[75] *Id*. Art. 38. See also BROCHES, *supra* note 63,at 188, 190.
[76] *Id*. Art. 39.

Secretary-General, the Chairman of the Administrative Council appoints the missing candidates for the Commission or Tribunal.[77] The parties to a dispute may appoint conciliators or arbitrators from outside the Panels but the Chairman is restricted to appoint arbitrators or conciliators only from the Panels.[78]

Once an award is rendered, it is binding on the parties and must be recognized by the Contracting States as if it were a final judgment of a court in that State.[79] However, the parties by applying in writing to the Secretary-General may request interpretation,[80] revision,[81] or annulment.[82] These procedures are designed to ensure self-contained operation of ICSID and its autonomy.[83]

Since the effective date of the Convention, only 41 disputes, of which 10 disputes are currently pending, were brought before ICSID, a number that barely outnumbers the years of ICSID's existence.[84] The main reasons for the low

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[77] *Id.* Art. 30 and 38.
[78] *Id.* Art. 31(1) and 40(1).
[79] *Id.* at Art. 54(1).
[80] *Id.* at Art. 50(1).
[81] *Id.* at Art. 51(1).
[82] *Id.* at Art. 52(1).
[83] Lopina, *supra* note 14, at 107, 110-111.
[84] The International Center for Settlement of Investment Disputes, 1 (visited July 15, 1997) <http://www.worldbank.org/html/extdr/icsid.html>.

number of cases before ICSID are its relatively recent establishment, a lack of publicity and amicable settlement by the parties to the dispute.[85] The 1980s and the 1990s have witnessed a high increase in the case load of ICSID. Thirty cases were submitted after 1981.[86] The first explanation of this increase is a growing number of State Parties to the Convention, which was 126 in the middle of 1997, plus 13 more signatory States.[87] The second explanation is that the growing number of cases has created a guide for new cases.

However, the reasons commonly attributed to the fact that there are still a limited number of cases before ICSID is the existence of the annulment procedure set forth in Article 52 of the Convention and the annulment proceedings that have occurred under it.[88]

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[85] *Id.*
[86] *Id.*
[87] *See supra* note 5.
[88] Kenneth S. Jacob, *Reinvigorating ICSID with a New Mission and With Renewed Respect for Party Autonomy*, 33 Va. J. Int'l L. 123, 125 (1992).

C. ICSID Procedure for the Annulment of Arbitration Awards.

One of the most positive features of arbitration is that it provides a final binding decision within a reasonable period of time. Recently some decisions of ICSID involving the annulment procedure have caused great concern regarding ICSID's future.[89] This tendency in ICSID jeopardizes the finality of the award of an arbitral tribunal and may cause legal counsels to the parties to hesitate to advise their clients to include arbitration under the provisions of ICSID in their contracts.[90] Given that too often the cycle of award and annulment has occurred, may well sap the vitality of ICSID.

The Convention established ICSID as in the words of Georges Delaume "self -contained machinery functioning in total independence from domestic laws, including the law prevailing at the seat of arbitration."[91] The role of municipal courts in award enforcement is very limited. Each Contracting State has agreed to enforce the award of ICSID

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[89] *Id.* at 123, 146.
[90] *Id.*
[91] GEORGES R. DELAUME, *The Convention for Settlement of Investment Disputes Between States and Nationals of Other States, in* 2 TRANSN'L CONT., booklet 17 at 37 (1990).

"as if it were a final judgment of a in that State," subject only to the local law of sovereign immunity from execution.[92] In order to have some control over the self-contained machinery of ICSID, the drafters included the provisions on annulment based on several narrow grounds.[93] Article 52(1) consist of five grounds applicable to the annulment process:

> (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.[94]

The language of Article 52(1) also causes confusion regarding annulment and appeal in the ICSID proceedings.[95] The last ground appears to be the most difficult for the *ad hoc* Committee to avoid the interpretation of the award as an appeal instead of reviewing it as an annulment.[96] This

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[92] ICSID Convention, *supra* note 4, Arts. 54, 55.
[93] Jacob, *supra* note 88, at 123, 147.
[94] ICSID Convention, *supra* note 4, Art. 52.
[95] David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal,* ICSID Review Foreign Investment Law Journal Volume 7 Number 1 at 37 (1992).
[96] Id. p. 38.

confusion caused by the vague definition of the word "failed." The consequence of the inquiry whether there was a failure to state the reasons on which the award is based is that the inquiry might easily be transferred into an examination of the substantive correctness of the award, thereby passing the limits of annulment inquiry and extending its authorities to the areas of inquiry reserved solely to appeal proceedings.[97] Nevertheless, annulment remedy is not an appeal. Therefore, under the Convention neither a mistake in the application of the law nor a mistake of fact can be a ground to review an award.[98]

The annulment remedy has intended to be applied only in extraordinary and narrow categories cases.[99] The terminology of the Article, such as "manifestly exceeded" and "serious departure" suggests that drafters of the Convention intended to use the annulment procedure in unusual circumstances.[100] For example, in the words of Kenneth Jacob a departure from a fundamental rule of procedure must breach a principle of "natural justice, e.g. that both parties must be heard and that there must be an

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[97] Id.
[98] Jacob, *supra* note 88, at 123, 147.
[99] *Id.*
[100] Rowat, *supra* note 50, at 103, 114.

adequate opportunity for rebuttal"[101] in order to support an annulment. The Convention drafters also emphasized that the requirement for a reasoned award did not mean that an award can be annulled because the arbitrators had failed to give an answer on every issue raised by the parties.[102] The history of annulment proceedings clearly indicates that annulment should only be used in situations where there was a major procedural fault on the part of an arbitral tribunal.[103]

Kenneth Jacob states that another problem related to the annulment proceeding in ICSID is the denial of the rights of the parties to choose the arbitrators who will deal with requests for annulment.[104] If award is requested to be annulled by the parties, the Chairman of the Administrative Council has the power to appoint an *ad hoc* Committee from the Panel of Arbitrators, e.g. the annulment procedure jeopardizes the party autonomy feature of international arbitration.[105]

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[101] Jacob, *supra* note 88, at 123, 148.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 123, 125-126.
[105] ICSID Convention, *supra* note 4, Art. 52 (3).

No annulment proceeding has occurred until 1983, when a request was made to annul the award in *Klockner v. Republic of Cameroon*.[106] To date, three more annulment proceedings have been requested, a considerable number given that there has been annually only one ICSID award.[107] In Klockner v. Republic of Cameroon and Amco Asia v. Republic of Indonesia awards were subsequently rendered in resubmitted proceedings.[108] The applications by Klockner and Cameroon for annulment of the second award were rejected.[109] In two other annulment proceedings, the parties have reached an amicable settlement of their disputes.[110]

Despite concerns from the international arbitration bar, it appears that ICSID has taken action to circumscribe and redirect the use of annulment procedures. For example, the Secretary-General has successfully provided his good offices to facilitate amicable settlement and cautioned parties to use the procedure only within the parameters

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[106] Jacob, *supra* note 88, at 123, 149.
[107] Caron, *supra* note 95, at 21, 28-29.
[108] *Id.*
[109] Aron Broches, *Observations on the Finality of ICSID Awards, in* SELECTED ESSAYS World Bank, ICSID, and Other Subjects of Public and Private International Law, *supra* note 1, at 309.
[110] Caron, *supra* note 95, at 21, 28-29.

envisioned by the drafters of the Convention.[111] Moreover, all the annulment decisions have been based on two of the five grounds: the manifest excess of powers and the failure to state the reasons on which award is based.[112] If parties could waive their rights to annul an award based on those grounds in an agreement, the finality and legitimacy of ICSID arbitration mechanism would be preserved.[113]

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[111] *International Centre for the Settlement of Investment Disputes*, IN INTERNATIONAL ARBITRATION FORA, Legal Aspects of International Trade and Investment USDOS Office of the General Counsel, GC Legal INTLARB Section III(F)(5) (12/20/96).

[112] Jacob, *supra* note 88, at 123, 152.

[113] *Id.*

CHAPTER V THE JURISDICTION OF ICSID

The International Centre for Settlement of Investment Disputes, as it was mentioned in the third Chapter of the thesis, does not itself arbitrate or conciliate investment disputes. It does not have jurisdictional powers in the generally accepted meaning of this term.[114] The drafters nevertheless decided to use the word "jurisdiction" to indicate the scope of the Convention. The use of this term shows the extent of ICSID activities, as the administrative organ of the Convention implementation.[115]

The mere fact that a party ratifies the Convention does not constitute consent to arbitration of a dispute.[116]

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[114] BROCHES, *supra* note 63, at 188, 199.

[115] *Id.*

[116] ICSID Convention, *supra* note 6, Preamble. The Convention Preamble emphasizes the importance of the mutual consent of the parties:

> 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

According to principal Article 25(1) the parties to an investment dispute should fulfill three basic conditions that constitute the necessary requirements for parties to be eligible to use ICSID's facilities of arbitration and conciliation:

> 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.[117] (emphasis added).

The fundamental condition is consent. Consent is the "cornerstone of the jurisdiction of the Centre."[118] The jurisdiction of ICSID is further limited by the prerequisites of the character of the parties and by the nature of the dispute.[119]

Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.

[117] *Id.* Art. 25(1).

[118] Report of the Executive Directors of the IBRD on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 23, 4 I.L.M. 524 (1965) [hereinafter Report].

[119] ICSID Convention, *supra* note 4, Art. 25(1).

This Chapter discusses the essential significance of the parties' consent to submit a dispute to the Center. The consensual character of the Convention will then serve as a guide to interpret the two other conditions, first subject matter jurisdiction and, second, the identities of the parties.

A. Consent.

1. Binding Character.

Article 25(1), in its formulation of the definition of consent, stipulates that the consent must be in written form and must be given by both parties to the dispute.[120] The decision of a State to consent to ICSID arbitration or conciliation is a matter of pure policy of the parties.[121] Any Contracting State may, at the time of ratification or any time later, notify ICSID of the class or the classes of disputes which it would not consider submitting to ICSID.[122]

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[120] Article 25(1) states: "The jurisdiction of the Centre shall extend to any legal dispute … which the parties to the dispute consent in writing to submit to the Centre."
[121] DELAUME, *supra* note 91, at 5.
[122] ICSID Convention, *supra* note 4, Art. 25(4).

However, when both parties have given their consent to submit a dispute to ICSID arbitration or conciliation, no party can withdraw its consent unilaterally.[123] Refusal or abstention of one of the parties cannot prevent ICSID from the initiation, conduct or conclusion of the proceedings, and the recognition and enforcement of the award.[124] The guiding principle of the ICSID rulings is that once ICSID is satisfied that it has jurisdiction over an investment dispute, it will process the dispute until its completion.[125] This is the case even if the Contracting State party to a dispute attempts *ex post facto* to exclude from the jurisdiction of ICSID classes of investment disputes or denounces the Convention and ceases to be a Contracting State.[126]

The strength of this principle was tested in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*.[127] The

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[123] *Id.* Art. 25(1).
[124] DELAUME, *supra* note 91, at 8.
[125] William Rand et al., *ICSID's Emerging Jurisprudence: the Scope of ICSID's Jurisdiction*, 19 N.Y.U. J. Int'l L. & Pol. 33, 53 (1986)
[126] DELAUME, *supra* note 91, at 8.
[127] Discussed in John T. Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 Harv. Int'l L.J. 90 (1976). The

dispute arose out of a long term agreement between Alcoa Minerals of Jamaica, Inc. (Alcoa), an American corporation and the Government of Jamaica (Jamaica). In 1968, Alcoa undertook to construct an aluminum refining plant in Jamaica in return of tax concessions and long-term leases for the mining of bauxite.[128]. The agreement contained an ICSID arbitration clause. In 1974, Jamaica imposed a new tax on bauxite mining. Considering a new tax a violation of the 1968 investment agreement, Alcoa initiated ICSID arbitration. Jamaica refused to appear at the arbitration proceeding, relying on a reservation to ICSID's jurisdiction under Article 25 that Jamaica notified ICSID that "[l]egal dispute arising directly out of an investment relating to minerals or other natural resources" "…at any time…" could not be submitted to ICSID arbitration.[129] This notification

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footnote 8 of John T. Schmidt article states that *Alcoa v. Jamaica* case is:
Unpublished Decision on Jurisdiction and Competence of Arbitral Tribunal, International Centre for Settlement of Investment Disputes (ICSID) ARB 74/2 (1975) [hereinafter Decision]. Under art. 48(5) of the Convention and reg. 21(1) of the ICSID Administrative and Financial Regulations, ICSID cannot publish the text of an arbitral award unless both parties to the arbitration agree thereto.

[128] *Id.* at 91.

[129] Id. at 95 and 102.

was made shortly before enactment of the law increasing the tax on bauxite mining.

The Tribunal applied Article 45 of the Convention empowering the Tribunal to render an enforceable award on the merits of an investment dispute.[130] The tribunal enforced the prohibition on unilateral withdrawal of consent by Jamaica and held Jamaica to the original investment agreement, ruling that:

> In the present case the written consent was contained in the arbitration clause between the Government and Alcoa…. [T]his consent having been given could not be withdrawn. The notification under Article 25 only operates for the future by way of information to the Centre and potential future investors in undertakings concerning minerals and other natural resources of Jamaica.[131]

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[130] *Id.* at 95. *See* also ICSID Convention, *supra* note 4, Art. 45. It provides:

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertion.

(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.

[131] Rand, *supra* note 125, at 33, 53. *See* also Schmidt, *supra* note 127, at 90, 103.

2. The Forms of Consent.

The Convention does not specify the manner in which the consent should be given. In most of the cases consent is expressed in the conciliation/arbitration clause of an investment agreement.[132] Comments on the forms of party consent was given in the Report:

> Consent might 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 *compromis* 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.[133]

The Arbitral Tribunal in its decision in *Amco-Asia et al. v. the Republic of Indonesia*[134] dealt with an issue of the form in which consent should be given. The Republic of Indonesia objected to ICSID's jurisdiction and requested the

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[132] DELAUME, *supra* note 91, at 6.

[133] Report, *supra* note 118, para. 24.

[134] International Center for the Settlement of Investment Disputes Arbitral Tribunal: Award on Jurisdiction in the Matter of the Arbitration between Amco Asia Corporation et al. and Indonesia September 25, 1983, 23 I.L.M. 351, 359 (1984) [hereinafter Amco].

Tribunal to determine whether article 9 of the investment application constituted a valid and effective consent to treat P.T. Amco, as a United States national for the purposes of the Convention.[135] The Tribunal dealt with Indonesia's argument that article 9 did not contain the words of express agreement required by the article 25 of the Convention. The Tribunal concluded that, "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 … to find out and to respect the common will of the parties" with "application of the principle *pacta sunt servanda*."[136] Article 25 does not have any formal requisite of an express clause, the Tribunal declaredargued., and at the date on which the parties consented to submit possible future disputes to arbitration, the Republic of Indonesia had knowledge that P.T. Amco was under the foreign control. Consequently, the Tribunal held that Indonesia had consented to ICSID arbitration and the Tribunal had jurisdiction over the dispute.[137]

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 360.

The United States Government, in order to avoid ambiguity in the notion of consent, included an express clause in its 1994 U.S. prototype bilateral investment treaty (BIT) which satisfies the United States' principal objectives in bilateral investment treaty negotiations.[138] The BIT between the U.S. and Uzbekistan, for instance, specifies that:

> Each party hereby consents to the submission of any investment dispute for settlement by binding arbitration…. [T]his consent and the submission of the dispute by a national or company under paragraph 3(a) shall satisfy the requirement of:
> (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre)…"[139]

In an increasing number of instances, bilateral treaties regarding the promotion and the protection of investments represent one of the forms of investment laws that make reference to ICSID facilities for the settlement of investment disputes between the Contracting State and the national of another Contracting State.[140]

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[138] Investment Treaty with Uzbekistan, 1994 WL 896767 (Treaty) at 2.
[139] Treaty between the Government of the United States of America and the Government of the Republic of Uzbekistan Concerning the Encouragement and Reciprocal Protection of Investment, in Investment Treaty with Uzbekistan, *supra* note 22, Art. IX (4) [hereinafter Treaty].
[140] DELAUME, *supra* note 91, at 12.

Such reference may take the form of exclusive choice by an investor, among the options of dispute-resolution institutions, including a primary recourse to ICSID facilities.[141] This treaty presents an original feature of willingness of the host country to accept the choice of an investor as to whether an investment dispute will be submitted to ICSID arbitration.

Some bilateral treaties include provisions that upon the request of the investor, an investment agreement between an investor who is a national of one of the Contracting States and another Contracting State will include provisions referring to arbitration and conciliation under ICSID.[142] Such provisions give assurance to an investor that arising investment disputes can be submitted to ICSID.

In order to improve the investment climate and accordingly to attract private foreign investments, some countries include ICSID arbitration/conciliation procedures in their investment laws as a possible means of dispute settlement with foreign investor.[143] In connection to the consent in national investment laws, the Report provided

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[141] Treaty, *supra* note 139, Art. IX(3).
[142] Treaty between France and Malaysia, April 24, 1975 Art. 5, *Investment Treaties*, Year 1975, p. 9.
[143] Id. at 10.

that the host state might unilaterally offer to submit certain types of investment disputes to the arbitration/conciliation of ICSID, and the investor might give his consent by accepting the offer in writing either in an investment agreement or in a statement that he agrees to submit particular disputes to ICSID.[144] The issue of when the moment of acceptance has occurred, continues to give rise to controversy. According to Georges Delaume, the investor might accept the host state's offer "…at the time of the investment or at any time thereafter, including at the time that the investor would file a request for conciliation/arbitration with the ICSID Secretariat."[145] Another view is represented by Aron Broches.[146] He emphasizes the differences in the language of the host state offer as expressed in its investment law. In some cases, the language of investment law might require that acceptance is to be given by the investor before the approval of the investment.[147] This situation obliges the investor to accept the offer of the host state in order to acquire an approval of the host country for fulfillment of investment project

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[144] Report, *supra* note 118, para. 24.
[145] DELAUME, *supra* note 91, at 10.
[146] BROCHES, *supra* note 58, at 164, 169.
[147] *Id.*

and also to be eligible for the ICSID dispute settlement mechanism.

In other cases, the language of the investment law does not specify an acceptance time at all. This might raise the question of whether the requirements of Article 25(1) are satisfied in the absence of the written consent of the investor. [148] However, in this situation the investor may rely on two other forms to express consent. First, reliance on provisions of a bilateral treaty between the investor's country and the host country. Second, the investor may include an ICSID arbitration clause in the investment agreement. The latter approach seems to be the most reliable choice to express consent to ICSID. Regardless of the form in which the consent might be given, it would be beneficial from the point of view of the Host State as well as of that of the investor to avoid ambiguity and to spell out clearly the provisions of their mutual consent.

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[148] *Id.*

B. Subject Matter Jurisdiction.

In order to submit the dispute to the jurisdiction of ICSID, the dispute should be of legal origin and arise from an investment.[149] The drafters of the Convention did not provide a definition of either legal dispute or of investment. This subchapter will discuss the rationale behind the decision of the Convention drafters, and will also analyze the range of the expression "legal dispute" and the term "investment".

1. Legal Dispute.

According to the Report of the Executive Directors of EBRD on the Convention, the purpose of the expression "legal dispute" was to limit the scope of ICSID to disputes involving the existence or scope of a legal right or duty.[150] The Report states that the expression "legal dispute" clarifies that the disputes of "…conflicts of rights…"[151] are within the jurisdictional limits of ICSID while "…mere

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[149] ICSID Convention, *supra* note 4, Art. 25(1).
[150] Rand, *supra* note 125, at 33, 35.
[151] Report, *supra* note 118, para. 26.

conflicts of interests are not."[152] The Report adds that "[t]he 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."[153] The legal dispute limits the scope of ICSID to disputes that concern the corresponding rights and obligations of the parties, as those presented in an investment agreement and the relevant laws regulating an investment agreement.[154] It includes allegations of non-performance, violation of "stabilization clauses" and nationalization and expropriation.[155] For example, in *Amco-Asia et al. v. the Republic of Indonesia*, the legal dispute consisted of claims of Amco-Asia such as unlawful expropriation, ouster by Indonesian army and police, of their right to operate and manage the hotel for thirty years, breach of contract, and unjust enrichment.[156]

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[152] *Id.*
[153] *Id.*
[154] DELAUME, *supra* note 91, at 29.
[155] Christopher M. Koa, *The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China through the International Centre for Settlement of Investment Disputes*, 24 N.Y.U. J. Int'l L. & Pol. 439, 451 (1991).
[156] International Centre for the Settlement of Investment Disputes In the Matter of the Arbitration between Amco Asia Corp. and Others and the Republic of Indonesia Award on the Merits, 24 I.L.M. 1022, 1024 (1985).

2. The Notion of Investment.

Neither the history of the Convention, nor Article 25(1) provides a precise definition of the term "investment", even if the term has a significant importance for implementation of the Convention.[157]

The reasons for the lack of a precise definition of investment in the Convention is based on three practical considerations.[158] A detailed definition of the term "investment" as it is given in investment codes or BITs would be too broad to be useful.[159] On the other hand a precise and short definition would have been difficult, if not impossible, considering the different definition of the term "investment" given by one country or group of countries.[160] It could also restrict the jurisdiction of ICSID by giving a strict definition of the investment which would limit the access of disputes to the jurisdiction of

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[157] DELAUME, *supra* note 91, at 30.
[158] *Id.*
[159] Treaty, *supra* note 139, Art. 1(d) gives a comprehensive definition of the forms of economic activity covered by the term "investment".
[160] BROCHES, *supra* note 63, at 188, 208. *See* also DELAUME, *supra* note 91, at 30.

ICSID even if the parties would consider a dispute as a genuine "investment" dispute.[161] Finally, in view of the requirement that the mutual consent of the parties should be given to submit a dispute to ICSID proceedings, the drafters decided that the best solution was to leave the characterization of the nature of their relationship and of relating disputes to the parties.[162]

The lack of a definition of investment was beneficial for the implementation of the Convention in view of the changes that have happened in international investment activities since the time of establishment of ICSID. The Convention was drafted at a time when most investments took the form of concessions, loans or joint ventures, while nowadays investments are taking new forms, such as; service and management contracts, and agreements for the transfer of know-how and of technology.[163] By granting parties the

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[161] DELAUME, *supra* note 91, at 30.

[162] *Id.* *See* also Report, *supra* note 118, para. 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)).

[163] Treaty, *supra* note 139, Art. 1(d) includes investment in the form of contractual rights, such as under turnkey, construction of management contracts; intellectual property, including copyrights, patents, trade secrets, including

freedom to characterize the term "investment", the Convention has become more flexible to encompass new forms of investment activity.

The concepts of "legal dispute" and "investment" were designed to be rarely challenged and easily satisfy the subject matter requirements. So far, the disputes that have been raised before the ICSID tribunal concerning an issue of the ICSID jurisdiction have been limited to those based on claims of lack of consent and/or the failure to meet the nationality requirement.[164]

However, the ICSID Tribunal *sua sponte* raised the issue of subject matter jurisdiction in *Alcoa v. Jamaica*.[165] The Tribunal first concluded that the dispute between Alcoa and Jamaica is legal because it concerned the extent of the parties' legal rights and obligations under their 1968 investment agreement.[166] The Tribunal also relied on arbitral precedents involving claims that by passage of legislation a state violated contractual obligations owed to an alien, necessarily stand for the proposition that such

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know-how and confidential business information; as well as established forms of investment.

[164] DELAUME, *supra* note 91, at 35.

[165] Schmidt, *supra* note 127, at 90, 95-96.

[166] *Id.* at 90, 98-99.

cases are justiciable legal disputes.[167] Next, the Tribunal discussed the question whether the dispute involved an investment issue. The Tribunal found that the economic activities of Alcoa in Jamaica were in the ordinary meaning of the term "investment". It stated that a case "… in which a mining company invested substantial amounts in a foreign state in reliance upon an agreement with that State, is among those contemplated by the Convention."[168] It further noted that the parties consent to ICSID arbitration itself indicated that the economic relationship of the host State and an investor was investment related.[169]

The changes in investment codes, bilateral investment treaties and the precedents of ICSID arbitration permit the conclusion that generally in the context of contemporary thinking, an economic concept of investment is progressively substituting itself for the traditional notion of investment of capital.[170] Today the notion of investment is directly related to the expected contribution to the economy of the State concerned by the association of the resources of an

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[167] *Id.* at 90, 99.
[168] *Id.*
[169] *Id.* at 90, 100.
[170] DELAUME, *supra* note 91, at 31.

investor and the host State.[171] It gives a new meaning to the Convention and widen its jurisdiction.[172]

C. The Identity of the Parties.

The machinery of the ICSID Convention was created with the purpose of establishing a specialized international forum particularly well suited to take into consideration the respective rights of investors as nationals of a Contracting State and other Contracting States.[173] The limitation of the scope of the Convention to disputes between nationals of a Contracting State on the one hand and the Contracting State on the other hand excludes from the scope of the Convention disputes between international persons, i.e. both states and international organizations, for which there exists traditional methods of settlement under international law. Disputes between private law persons can be solved through recourse to the national courts or commercial arbitration.[174] Subject to the limitation of juridical persons such as corporations, the

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[171] *Id.*
[172] *Id.*
[173] *Id.* at 14.
[174] BROCHES, *supra* note 63, at 188, 201.

scope of the Convention also excludes disputes between a Contracting State and its own nationals.

I. The Identity of the Investor.

Article 25(1) of the Convention requires that one of the parties be "a national of another Contracting State.[175] The Convention clearly states that national of another Contracting State can be juridical or natural person which has "the nationality of a Contracting State other than the State party to the dispute."[176]

In regard to natural persons, Article 25(2)(a) provides that the nationality requirement must be met both at the time when the parties consented to submit a dispute to conciliation or arbitration as well as on the date on which the request for conciliation or arbitration was registered.[177] Further, Article 25(2)(a) excludes from the definition of "national of another Contracting State" the situation when a person, on either of the relevant dates, is

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[175] ICSID Convention, *supra* note 4, Art. 25(1).
[176] *Id.* Art. 25(2).
[177] *Id.* Art. 25(2)(a).

a national of both Contracting States party to the dispute.[178]

With respect to juridical persons, Article 25(2)(b) defines the "national of another Contracting State" as:

> "any juridical 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…"[179]

Generally the nationality test of juridical persons is based on the notion of the place of incorporation *or "siege social."*[180] Authority for the nationality test can be found in the award in the arbitration between *Amco-Asia v. Republic of Indonesia* in which the Tribunal decided the issue of Amco-Asia's nationality on the grounds of the place of incorporation.[181]

Although a test of nationality based on the place of incorporation is a principle, the principle is qualified by the final clause of Article 25(2)(a). According to this provision, the juridical person incorporated in the host

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[178] *Id.*
[179] *Id.* Art. 25 (2)(b).
[180] DELAUME, *supra* note 91, at 15.
[181] Amco, *supra* note 134, at 351, 361.

Contracting State might be considered as the national of another Contracting State if:

> … because of foreign control, the parties have agreed [juridical person] should be treated as a national of another Contracting State for the purposes of the Convention.[182]

Article 25(2)(b) was designed to allow the implementation of jurisdiction over all necessary parties to a dispute in situations where foreign investments had been transferred through a locally-incorporated entity.[183] It is quite usual for the host State, especially in case of a developing country, to require that the foreign entity operate its business within the territory of the host State, through an entity organized under the laws of the host State.[184] This clause is a necessary exception to the general rule that ICSID will not have jurisdiction over the disputes between a Contracting State and its own nationals.[185] If no exceptions were made for foreign-controlled but locally-incorporated entities, a significant

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[182] ICSID Convention, *supra* note 4, Art. 25 (2)(b).
[183] Rand, *supra* note 125, at 33, 46.
[184] BROCHES, *supra* note 63, at 188, 205.
[185] *Id.*

and important sector of foreign investments would be outside the jurisdiction of the Convention.[186]

In certain cases, an investor or investors controlling a local company will have the nationality of only one Contracting State. This makes the test on nationality simple. All that needs to be done is to identify the Contracting State of which the investors are nationals.[187] In some cases, the situation is more complex, such as when the local entity is controlled not by a single investor, or investors of the same nationality, but by a group of companies of different nationalities with the goal to combine the financial resources for the joint ventures.[188] This situation requires additional precision from the parties in their investment agreement.

The exception to the nationality requirement and multiple participants in the joint venture were the subject of extensive attention in the first "World Bank" arbitration in *Holiday Inns. v. Morocco*.[189] This arbitration arose out of a 1966 joint venture agreement between the Government of

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[186] *Id.*
[187] DELAUME, *supra* note 91, at 16.
[188] *Id.* at 17.
[189] Pierre Lalive, *The first 'World Bank' arbitration (Holiday Inns. v. Morocco)--some legal problems*, Brit. Y.B. Int'l L. 123 (1980).

Morocco, on the one side, and two U.S. companies, Occidental Petroleum Corporation and Holiday Inns, on the other, for the construction of four hotels in Morocco. The problem was that these two companies were not signatories of the joint venture. Instead, the signatories were the Swiss subsidiary of Holiday Inns and the subsidiary of Occidental Petroleum Corporation. Neither of signatories was in existence on the date of execution of the agreement.

The Government of Morocco objected to the arbitral tribunal's jurisdiction over the locally-incorporated H.I.S.A. companies on the ground that Morocco had never agreed in writing to treat these companies as nationals of another Contracting State within the Article 25(2)(b) exception.[190] The tribunal stated that an exception should normally be explicitly included in an agreement. However, the tribunal specified that: "[A]n implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here."[191] The tribunal concluded that the Government of Morocco itself had requested the foreign companies to form the companies in

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[190] *Id.* at 123, 138-139.
[191] *Id.* at 123, 141.

question and at all times treated the H.I.S.A. companies as alter egos of their foreign parent companies.[192]

The tribunal's decision appears to be the confirmation of the notion that exception under the Article 25(2)(b) constitutes a departure from the traditional rules of international law preventing nationals from suing their own state internationally.[193] The tribunal obviously considered that the creation of locally-incorporated entities is frequently a necessary to foreign investments and that the Article 25(2)(b) exception was designed to permit the jurisdiction of ICSID over disputes arising in connection with the activities of these entities.[194]

2. The Identity of the Contracting State.

Article 25(1) of the Convention requires that one party be a Contracting State or a "constituent subdivision or agency" of a Contracting State. The issue of a Contracting State's membership date was also discussed in *Holiday Inns v. Morocco*.[195] The Government of Morocco objected to ICSID's

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[192] *Id.* at 123,140-141.
[193] Rand, supra note 125, at 33, 47.
[194] *Id.*
[195] Lalive, *supra* note 189, at 123.

jurisdiction over Swiss subsidiary of Holiday Inns that had signed the investment agreement containing recourse to ICSID arbitration and conciliation.[196] One of the reasons for the objection was that Switzerland was not yet a Contracting State at the time of the execution of the agreement.[197] The tribunal disposed of Morocco's objection by ruling that parties can reserve the effectiveness of their arbitration clause to the occurrence of certain events, including the adherence of relevant states to the Convention.[198] Although the tribunal's decision concerned the foreign investor rather than the host country, it provided the principle that the status of Contracting State is determined by the date of submission of the dispute to ICSID, rather than the date when the parties concluded an investment agreement.[199]

Under Article 25(1) of the Convention, each Contracting State has a right to designate to ICSID its particular public entities of which it considers eligible to be parties to arbitration or conciliation proceedings.[200] The designation only, however, is not enough for a subdivision

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[196] *Id.*
[197] Lalive, *supra* note 189, at 123, 142.
[198] *Id.* at 123, 144.
[199] *Id.*
[200] DELAUME, *supra* note 91, at 22.

or agency to consent and accordingly to be a party to the ICSID proceedings. Article 25(3) provides that such a consent requires the approval of a Contracting State that designates its public entities, unless such a Contracting State waives its right of approval.[201]

It will normally not be difficult to define the status of a subdivision or agency of a Contracting State, since the Convention requires that they should be designated to ICSID. Moreover their consent is subject to a Contracting State's approval unless that State notifies ICSID that approval is not required. Such notification will presumably be accepted as proof of the status as a subdivision or agency.

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[201] ICSID Convention, *supra* note 4, Art. 25(3).

CHAPTER VI CONCLUSION

Today, international investment is universally recognized as a factor of crucial importance in the development of developing countries' economy. International investment activities have become one of the essential features fostering cooperation between developed and developing countries and its promotion a matter of strong concern for both parties.

In this regard, ICSID is to some extent a balanced international forum that promotes adequate protection for foreign investors as well as regulates their conduct and their responsibilities to the public interest.

The beneficial features of the Convention such as the international dispute settlement mechanism, binding on both parties award, and perhaps most important, impartial character of institutional arbitration and conciliation, have made the Convention and the Centre acceptable to a growing number of countries. The use of ICSID clauses has

become widespread in BITs, national investment laws and codes, and individual agreements.

However, ICSID has its constraints too. The annulment issue poses a serious threat to ICSID's viability because of the expansive readings of Article 52 given by several *ad hoc* committees. Solving this problem will require creative efforts by ICSID administration and understanding by the Contracting States of the necessity to exclude some of their annulment rights.

ICSID fills a niche not stressed by other international dispute resolution institutions by requiring a consent to be given by the parties to submit a dispute to ICSID and by limiting the class of participants and the subject matter jurisdiction.

With regard to consent, arbitration decisions in *Alcoa v. Jamaica and Amco-Asia v. Indonesia* stressed out that counsels to the parties should clearly spell out the provisions of mutual consent of the parties. This will greatly help to avoid the future disputes between the parties.

The Convention left a definition of the term investment open to the discretion of the parties. By so doing, ICSID

expands its jurisdiction over new forms of investment disputes. However, the notification of a party that it will not submit a class or classes of the disputes to the ICSID jurisdiction, impedes this open construction. This provision is an insurance to both parties of investment agreement and therefore will likely remain.

The jurisdiction of ICSID applies to investment disputes when the Contracting State, constituent subdivision, or constituent agency is an actual partner in an investment project. The jurisdiction does not apply when the state's involvement is limited to the exercise of regulatory controls or other power as an approval authority. With regard to the investor's legal status, the most controversial point is an exception that the juridical person incorporated in the host Contracting State might be considered as the national of another Contracting State. ICSID considers this provision as a necessary exception to the general rule that ICSID will not have jurisdiction over the disputes involving the Contracting State and its own nationals.

The jurisprudence developed by ICSID with respect to its own jurisdiction had thus far evolved exclusively in

cases where the investment agreement contained an ICSID arbitration clause. However, the parties reasonable reliance on a promise of ICSID arbitration stated in bilateral investment treaty or national legislation, should not be frustrated. By affirming the power of ICSID to resolve the disputes when parties legitimately relied on ICSID arbitration, the Centre will realize its goal as a forum promoting an atmosphere of mutual confidence between investors and host countries and thus encourage international investment to the mutual benefit of investors and host states.