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FEATURES OF INTERNATIONAL INVESTMENT ARBITRATION

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1. Overview. 1.1. Introduction. 1.2. Investment Arbitration: role of ICSID. 1.3. History of investment arbitration and ICSID. 1.4. Direct Sources of International Investment Law. 1.4.1. Bilateral Investment Treaty ("BIT"). 1.4.2. Energy Charter Treaty. 1.4.3. Foreign Investment Promotion and Protection Agreement ("FIPA"). 1.4.4. Free Trade Agreements ("FTAs"). 1.4.5. ICSID Convention, Regulations and Rules. 1.4.6. Agreements/Contracts. 1.5. Other Sources of International Investment Law. 2. Investment Arbitration Contrasted with Other Types of Arbitration. 2.1. Arbitration between Countries. 2.1.1. International Court of Justice. 2.1.2. Permanent Court of Justice. 2.2. Ad Hoc. 3. Characteristics of Investment Arbitration. Example of ICSID as the leading institution. 3.1. Consent to Jurisdiction. 3.1.1. Consent in the Agreement. 3.1.2. Consent in Foreign Investment Laws. 3.1.3. Consent in BITs. 3.1.4. Multilateral Treaties. 3.2. Personal jurisdiction of ICSID ("*ratione personae*"). 3.2.1. "Contracting State". 3.2.2. Constituent subdivision or agency of the Contracting State. 3.2.3. National of another contracting state. 3.3. Subject matter jurisdiction of ICSID ("*ratione materiae*"). 3.3.1. Legal Dispute. 3.3.2. "Arising directly out of". 3.3.3. Investment. 3.4.1. Most-Favored Nation (MFN) Treatment. 3.4. Causes of action in investment arbitration. 3.4.2. National Treatment (NT). 3.4.3. Impairment by Arbitrary, Unreasonable or Discriminatory Measures. 3.4.4. Fair and Equitable Treatment (FET). 3.4.5. Full Protection and Security. 3.4.6. Expropriation. 4. Arbitrators. 4.1. Number and Selection of Arbitrators. 5. Appropriate Forum. 5.1. ICSID Conciliation or Arbitration? Ambiguity. 5.2. ICSID Conciliation. 5.3. ICSID Arbitration. 5.4. ICSID Additional Facility. 5.5. Ad Hoc Arbitration. 5.6. Diplomatic Protection. 5.7. State-State Dispute Settlement. 6. The Award and National Courts. 7. Remedies. 7.4. Annulment. 7.3. Revision. 7.2. Interpretation. 7.1. Supplementation and rectification. 8. Recognition and Enforcement of ICSID Awards.

1. Overview

1.1. Introduction

Foreign direct investment ("FDI") opens new markets, brings new technology, skills, jobs, financing and products. The importance of FDI leads many states to search for the ways to attract it. A recent attraction has been the promise of certain rights and privileges to the investor, such as national treatment ("NT"), most favored nation treatment ("MFN"), fair and equitable treatment ("FET"), as well as mechanisms to ensure that the promises are fulfilled and that the remedy exists if they are violated (dispute settlement mechanisms). Such rights, privileges and dispute settlement mechanisms can be provided in the foreign investment law of the host state, a bilateral investment treaty ("BIT"), a free trade agreement with investment provisions ("FTA") or an agreement/contract signed between the investor and the host state.

It is important to understand which interests are at stake when the foreign investment is made in order to provide protection to those interests and find the ways for solving possible disputes.

FDI can benefit the investment host state in many ways: increase in the international trade, greater exposure in the international arena, job creation, technology transfer, balance of payments improvement, to name some. However, FDI can produce negative effects for the competitiveness of the host state's domestic industries, natural resources and political processes. To increase benefits or reduce negative effects, host states adopt legislation that modify or even eliminate the conditions present when the investor agreed to make the investment. However, investors may be more likely to invest in the states that make commitments to their investors at the international level through BITs and FTAs with investment protection provisions[1].

In the light of the possible instability on the side of the host state, the investor is not only interested in maximizing the returns from the investment, but also protecting the investment from the risks associated with the host state's changing legislation and governmental behavior. For such a protection, the investor can enter into contracts and agreements with the governmental agencies of the host state. Such agreements/contracts may also provide special privileges to the investor, allowing the latter to take the necessary steps for the maximization of benefits (access to natural resources, tax deductions etc.).

When the interests of the host state and the investor are in conflict, the disputes arise. Such disputes can be resolved through domestic courts of the host state, domestic courts of other states, diplomatic protection or arbitration.

If no agreement exists, the dispute will likely be considered by the domestic courts of the host state. However, investors may be concerned about possible partiality or prejudice of the host state's judicial system, as well as the fact that the domestic laws of the host state will be applied, which do not necessarily provide for investor's protections.[2] Moreover, domestic courts usually do not have experience resolving international investment disputes.[3]

[1] Eric Neumayer and Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, World Development Vol. 33, No. 10, pp. 1567–1585, 2005. http://www.lse.ac.uk/geographyandenvironment/whoswho/profiles/neumayer/pdf/article%20in%20world%20development%20(bits).pdf

[2] *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 425 (1964).

[3] UNCTAD Course on Dispute Settlement: Overview, p. 7., http://unctad.org/en/docs/edmmisc232overview_en.pdf

Domestic courts of the investor's state usually cannot meet the jurisdictional requirements to consider international investment disputes. Also, the host state is likely to oppose such an arrangement and invoke sovereign immunity to make resolution of the dispute in the domestic courts of the investor impossible.[4]

Diplomatic protection may be another option for the resolution of investment disputes. However, diplomatic protection is not without its disadvantages. Diplomatic protection requires preliminary exhaustion of the local remedies of the host state by the investor, and only the investor's state, not the investor, can invoke it. The process is typically lengthy and often political, leading to tension between the states and not always to resolution of the dispute. Where available, investment arbitration has largely replaced diplomatic protection[5], depoliticizing the dispute by eliminating the investor's state from the dispute settlement process.[6]

Arbitration between the investor and the host state is another and more recent option. The obligation to arbitrate can be included in the agreements/contracts between the investor and the host state/its agencies, BITs or FTAs, as well as foreign investment law of the host state. The instrument of consent may provide for arbitration administered by a variety of institutions, or ad hoc arbitration. Provided that the applicable jurisdictional requisites are satisfied, the International Centre for the Settlement of Investment Disputes (ICSID) may administer the dispute.[7] The International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) also administer investment arbitrations. Ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) is also a frequent option.[8]

Other ways to solve investor-state disputes effectively can be mediation, negotiations either between the states or investor and the state, conciliation and ombuds services. Moreover, international investment disputes can be prevented. This can be achieved through early neutral evaluation of the possible conflict between the investor and the

[4] Ibid.

[5] Ben Juratowitch, "The Relationship between Diplomatic Protection and Invest- ment Treaties", 23(1) *ICSID Review – Foreign Investment Law Journal* 10 (2008).

[6] Christoph Schreuer, "Investment Protection and International Relations", in August Reinisch and Ursula Kriebaum eds., *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, (The Hague: Eleven International Publishing, 2007): 345–358, at 347.

[7] See below, Section 1.2.

[8] Recent Developments in Investor-State Dispute Settlement, UNCTAD, # 1 May 2013. http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

host state and addressing their divergent views on application/interpretation of the BIT or FTA to agree on their differences.[9]

As arbitration has become a dominant method of solving international investment disputes, this paper shall focus on investment arbitration, including its history, nature, sources of investment law, causes of action, selection of the forum and the arbitrators, as well as recognition and enforcement of the investment awards. Emphasis is placed on the role of ICSID and the ISCID Convention in the resolution of investment disputes, but not at the expense of other option available and the general legal environment in which investment arbitration operates.

1.2. Investment Arbitration: role of ICSID

ICSID was established under the Convention on the Settlement of Disputes between the States and Nationals of Other States 1965 ("ICSID Convention"), which has been ratified by 149 states (as of May 20, 2013)[10]. 263 cases have already been resolved through ICSID mechanisms[11], whereas 166 are pending (as of May 31, 2013).[12] Generally, ISCID is available to settle disputes involving at least one contracting state of the ICSID Convention or an investor that is a national of a contracting state.

In addition to establishing ICSID, a center for administering arbitration, the ICSID Convention also implements a framework for the enforcement of awards issued by ICSID when the arbitration satisfies the requirements for application of the ICSID Convention.

ISCID administers arbitrations that fall under the jurisdiction of the ICSID Convention, when the investor is an enterprise or national of a contracting state of the Convention, as well as the host state and there is an independent source of consent to arbitrate. If out of the investor's state and the host state only one is a contracting state to the ICSID Convention, ICISD can administer the arbitration under its Additional Facility, but the protection of the Convention are not available to aid in enforcement of the award.

[9] Investor-State Disputes: Prevention and Alternatives to Arbitration II, UNCTAD, United Nations, New York and Geneva, 2011: http://unctad.org/en/Docs/webdiaeia20108_en.pdf.

[10] List of Contracting States and Other Signatories of the Convention, *ICSID*, 2012, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&reqFrom=Main.

[11] 'List of concluded cases', *ICSID*, 2011, (accessed 3 October 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestTypc=GenCaseDtlsRH&actionVal=ListConcluded.

[12] 'List of pending cases', *ICSID*, 2011, (accessed 3 October 2012), http://icsid.worldbank.org/ICSID/FrontServlet? requestType=GenCaseDtlsRH&actionVal=ListPending.

There are nearly 3000 investment treaties with the international investment arbitration provisions, mostly referring to either ICSID or UNCITRAL arbitration, or both.[13] 514 known treaty-based investment disputes were filed (as of 2013), out of which 314 were filed with the ICSID and its Additional Facility, 131 with UNCITRAL, 27 with SCC and 8 with the International Chamber of Commerce ICC.[14] The trends in IIAs dispute settlement confirm the leading role of ICSID today.

1.3. History of investment arbitration and ICSID

The history of international investment arbitration dates back to when there were divergent views between the capital-exporting and capital-importing countries.

The capital exporters believed that the minimal standards under the customary international law (effective and prompt compensation in the event of expropriation, observance of contracts) had to be provided to the foreign investors.

Capital importers, on the other hand, considered the national treatment doctrine as the only one applicable to foreign investors, regulating the foreign investments by national laws exclusively and establishing the national courts' jurisdiction in the event of disputes. Such an approach was reflected, for example, during the Russian Revolution when the foreign investors were provided with the national level of compensation, i.e. no compensation at all, and the uncompensated takings during and after World War II.[15]

In order to balance these divergent interests, the General Assembly of the United Nations approved Resolution 1803 (XVII) in 1962, confirming the sovereignty over the natural resources, but at the same time emphasizing that the foreign investments shall be governed by the Resolution itself, national laws and international law, and that investment contracts and agreements should be observed in the good faith.[16] However, subsequent UN Resolutions excluded the governance, and even the relevance, of the international law.[17]

Conflict between the developing and the developed world continued and led to the North/South dispute, which ended up with the Charter of Economic Rights and Duties of the States of 1974. This Charter excluded the international law from the treatment of

[13] The Increasing Appeal and Novel Use of Bilateral Investment Treaties, http://www.skadden.com/insights/increasing-appeal-and-novel-use-bilateral-investment-treaties

[14] 'Latest developments in Investor-State Dispute Settlement', UNCTAD, 2013, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

[15] p. 3 Schwebel A BIT about ICSID 23 ICSID Review FILJ 1 9 (2008)

[16] http://untreaty.un.org/cod/avl/ha/ga_1803/ga_1803.html

[17] p. 2 Schwebel A BIT about ICSID 23 ICSID Review FILJ 1 9 (2008)

investments and regulation of expropriations, leaving all of the issues relating to foreign investment to the national laws solely[18]. However, most of the industrialized democracies did not support the Charter.

Although in 1950s and 1960s there were attempts by OECD to solve the existing issues and create a framework for investment protection, it faced a problem identifying the proper level of compensation for the expropriation. In 1961, Aron Broches, General Counsel of the World Bank ("WB"),recognized the need to create a multilateral agreement on the process for the settlement of international investment disputes, rather then covering the substantive standards only. For that reason, Broches together with his team provided a series of regional conferences in Africa, Europe, Asia and the Americas and consulted states and their legal advisors on the issues of investment protection.[19] Based on the reports from such conferences, consultations with experts from 86 states, the first official draft of ICSID Convention was prepared[20]. On March 18, 1965 the final draft of the Convention was approved by the Executive Directors of the WB and the President of the WB circulated it to all of the WB members. Shortly 20 states ratified the Convention, fulfilling its mandatory minimum requirement. The Convention entered into force on October 14, 1966. The purpose of ICSID Convention is stated in its Preamble: "international cooperation for economic development". The drafters of the Convention emphasized the importance of investment in economic development, as well as the importance of the independent forum for the settlement of possible disputes in attraction of the investments[21].

In 1978, ICSID's Additional Facility was created. The Additional Facility allows for resolution of disputes where only one state (host or source) is the party to ICSID Convention, which is particularly important in the context of NAFTA and ECT, as well as disputes not directly arising out of investments and fact-finding proceedings[22].

Currently there are 158 states signatories to ICSID, 149 of which have exchanged their instruments of ratification, approval or acceptance. [23]

[18] Charter of Economic Rights and Duties of the States of 1974, Art. 2 http://www.un-documents.net/a29r3281.htm
[19] Schwebel A BIT about ICSID 23 ICSID Review FILJ 1 9 (2008)
[20] History of the ICSID Convention: Documents concerning the origin and formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Vols. I-IV (ICSID, Washington, D.C., 1970).
[21] UNCTAD course on dispute settlement: Overview, p. 11.
[22] UNCTAD course on dispute settlement: Overview, p. 10.
[23] ICSID website https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home

1.4. Direct Sources of International Investment Law

The sources of the International Investment Law divide into three main categories: international treaties and conventions, customary international law and the general principles of law.

Direct sources are international treaties, conventions and agreements. International conventions are binding agreements between and among the states. As a general rule an international convention binds only the states that consented to it. However, when the treaty becomes widely accepted, it becomes a part of the customary international law and the principles on which it is based can bind all states. Conventions such as NAFTA, the Energy Charter Treaty and the ICSID Convention are related to the field of international investment, but are not of such wide acceptance as to be sources of public international law.

Following are the types of the direct sources of international investment law:

1.4.1. Bilateral Investment Treaty ("BIT")

A BIT is an agreement entered into between states, which provides for the standards of treatment and protections of the foreign investments, as well as the mechanisms for solving the investment disputes. A BIT usually provides for the following guarantees from the establishment or acquisition of the investments:

- National Treatment - the investment of the national or company of one of the parties to the BIT shall be treated as favorably as the host state' treats the investments of its own nationals or companies;

- most-favored-nation treatment - the investment of the national or company of one of the parties to the BIT shall be treated as favorably as the investments from any third country;

- full protection and security of investments;

- fair and equitable treatment;

- protection from expropriation or the efficient and prompt compensation in the event of expropriation.

1.4.2. Energy Charter Treaty

It is a multilateral agreement aimed at creating a framework for cooperation in the energy sector. Art. 26 of the Treaty provides for investor-state arbitration under the ICSID, UNCITRAL or SCC Rules.

1.4.3. Foreign Investment Promotion and Protection Agreement ("FIPA")

FIPAs are part of the BITs network. One of the examples is Canada – China FIPA (Canada has 21 FIPAs signed).[24]

1.4.4. Free Trade Agreements ("FTAs")

The FTAs are bilateral or multilateral agreements on trade facilitation between the parties to such agreements. Many FTAs also contain investment protection and arbitration provisions, e.g. NAFTA Chapter 11, CAFTA-DR Chapter 10, New Zealand – China FTA Chapter 11 etc.

1.4.5. ICSID Convention, Regulations and Rules

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Arbitration and Conciliation Rules, Administrative and Financial Regulations form the framework of ICSID Convention, Regulations and Rules[25]. ICSID, as discussed in section 1.2, is the leading forum for investor-state dispute settlement.

1.4.6. Agreements/Contracts

Direct sources of international investment law also include agreements/contracts concluded between the investor and the host state, which can identify the scope of investor protection and agreed dispute settlement procedures.

1.5. Other Sources of International Investment Law

[24] Canada's FIPA Program: its Purpose, Objective and Content. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en.
[25] ICSID Convention, Regulations and Rules. https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

Other sources constitute the following:

Customary international law can be described as the general practices accepted by nations as the law. This category includes jus cogens – norms from which no derogation is permitted, and which are recognized by the international community as a whole.

General principles of international law apply to fill the "gaps" when there are no provisions of conventions, treaties, agreements or customary international law on certain issue. They represent common principles used by courts of different states.[26]

When it comes to the interpretation of the treaties, the Vienna Convention on the Law of Treaties shall apply. It determines the rules for treaty interpretation in its Art. 31, 32 and 33.[27]

In addition to the abovementioned sources, case law and scholarly articles, although should be considered as subsidiary, constitute sources of law that the tribunals regularly refer to in the argumentation of their decisions.[28]

Lastly, the UN ILC Draft Articles on State Responsibility, which codify customary international law relating to state responsibility, should be taken into consideration[29].

2. Investment Arbitration Contrasted with Other Types of Arbitration

A useful definition can often include a description of what the term does not include. This technique can be particularly useful in defining investment arbitration, since there are other types of arbitration with similar characteristics, but that are at the same time different. Here, we briefly contrast investment arbitration with arbitration between states and international commercial arbitration.

A defining characteristic of investment arbitration is the presence of a private person (natural or juridical) and a state as parties to the arbitration. This contrasts with arbitration between states and international commercial arbitration, which can but does not necessarily involve a state party. Arbitration between states can be administered by an institution such as the International Court of Justice or the Permanent Court of Arbitration, or

[26] What are General Principles of International Law, American Society of International Law and the International Judicial Academy Jul/Aug 2007, Volume 2, Issue 2, http://www.judicialmonitor.org/archive_0707/generalprinciples.html.
[27] Vienna Convention on the Law of Treaties 1969, United Nations http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[28] Sources of Investment Law, Moshe Hirsch, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564.
[29] Draft Articles on Responsibility of States for Internationally Wrongful Acts, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

be ad hoc. A dispute between states will be grounded in and governed by public international law. International Commercial arbitration can also be institutional or ad hoc, and it almost always has a private person as party, and sometimes a state party, although usually not. The causes of action in international commercial arbitration usually derive from private or commercial law.

2.1. Arbitration between Countries

The resolution of disputes between countries by resort to international arbitration has a long and distinguished history in international law. Here, we briefly discuss three modalities for conducting state-to-state arbitration: The International Court of Justice, the Permanent Court of Arbitration, and Ad Hoc Arbitration.

Generally, we note that as is the case for other types of arbitration, the sources of the authority to resolve a dispute through arbitration is consent. Consequently, the modalities shown below are only applicable if the parties to the dispute have consented to resolution of a claim through the particular modality.

2.1.1. International Court of Justice

In addition to hearing disputes between countries as a court, the International Court of Justice can also function as an arbitral institution. States sometimes place clauses in treaties in which they consent to the resolution of dispute arising out of the treaty by the International Court of Justice. Although possibly more in the nature of a forum selection clause, the compromissory clause found in a treaty functions also like an agreement to arbitrate.[30]

2.1.2. Permanent Court of Justice

The Permanent Court of Arbitration located in The Hague, The Netherlands, was established in order to hear disputes between states. The mandate of the court has expanded, and now also includes investment arbitrations. [31]

[30] International Court of Justice http://www.icj-cij.org/court/index.php?p1=1.
[31] Permanent Court of Arbitration http://www.pca-cpa.org/showpage.asp?pag_id=1027.

2.2. Ad Hoc

Historically, states have agreed to the arbitration of disputes through ad hoc tribunals. The constitution of the authority empowered to resolve a claim has ranged from a single arbitrator to a tribunal consisting of numerous arbitrators whose identity would vary from arbitration to arbitration. An example of an ad hoc tribunal is the United States-Iran Claims Commission, set up by an international agreement entered into between the United States and Iran to resolve commercial claims arising out of the Iranian Revolution of 197.

2.3. International Commercial Arbitration

International commercial arbitration is distinguishable from investment arbitration in some of the following respects.

First, although a state can be a party to an international commercial arbitration, a state party is not a required party to an international commercial arbitration. Commercial arbitration can take place between the private parties to the dispute.

Second, the claims raised in commercial arbitration are not generally derived from public international law, but the commercial contract between the parties.

Third, the only treaty which plays an important role in the commercial arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the investment arbitration, however, there is a large number of the Bilateral Investment Treaties, ICSID Convention, NAFTA, CAFTA, which regulate the resolution of the investment disputes.

Forth, in commercial arbitration the parties can select arbitrators unless the arbitration rules provide to the contrary. In investment arbitration there are less arbitrators than in commercial one, which can make the selection process more difficult and lead to the situations when the parties appoint arbitrators who do not have sufficient experience in certain particular disputes. Commercial and investment arbitration also differ with regard to the establishment of jurisdiction, case management, conflict rules, transparency issues, as well as predictability of the decisions. [32]

[32] Commercial and Investment Arbitration: How Different are they Today? http://www.arbitration-icca.org/media/1/13644853030910/bckstiegel_lalive_lecture_offprint.pdf

3. Characteristics of Investment Arbitration. Example of ICSID as the leading institution

3.1. Consent to Jurisdiction

For the establishment of ICSID jurisdiction, the requirements of Art. 25 (1) ICSID Convention have to be satisfied:

1. there should be a "legal dispute", "arising directly out of an investment";

2. the dispute should be between an ICSID Contracting Host State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and an investor from another Contracting State (cannot be a national or a dual national of the Host State; Art. 25 (2) (b) exception); and

3. the parties to the dispute should consent in writing to submit the dispute to ICSID.

The ratification of the Convention by itself does not oblige a state or a national to submit a dispute to ICSID[33]. The valid consent from both parties needs to be established in order for jurisdiction to exist.

Consent has to be in writing, explicit and not merely construed. It has to be established on the date of the filing of the dispute, otherwise the Secretary-General will not register the case[34].

The consent can be expressed in the following instruments:

1. Agreement between the parties;

2. Legislation of the Host State (which requires an acceptance by the investor, usually by instituting a proceeding);

3. BIT

4. Multilateral Treaties (NAFTA, CAFTA-DR, ECT, MERCOSUR).

3.1.1. Consent in the Agreement

[33] Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID Rev.-Foreign Inv. L.J. 462-483 (1991) – p. 464.
[34] Tradex v. Albania, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 178-180 (1999).

Consent can be expressed in the Agreement between the parties for the future or existing disputes.

ICSID provides for model clauses, which can be used in the direct Agreements between the parties to record their consent. [35] For example, the model clause for the submission of future disputes to ICSID is suggested to the following wording:

> The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").

The consent may be directly expressed in the agreement between the parties. Even if the name of ICSID is not indicated correctly in the agreement, but can be inferred that ICSID jurisdiction was intended by the parties, the tribunal will establish such a jurisdiction:

> ...any litigation, controversy or claim among the parties, in connection with the construction, performance, enforcement or validity (of this Agreement), shall be submitted to the International Centre for the Settlement of Investment-Related Discrepancies, to be solved through international de jure arbitration under the Conciliation and Arbitration Rules set forth in the Covenant for the Settlement of Investment-Related Discrepancies amongst States and Nationals from Other States.[36]

In the Agreement the consent can also be expressed through the reference to another document. In *CSOB v. Slovakia*, the parties agreed for their agreement to be governed by Czech and Slovak Republics BIT, which provided for consent to ICSID jurisdiction. The tribunal ruled that the parties intended to incorporate ICSID clause into their agreement. [37]

[35] ICSID Model Clauses http://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH
[36] *Aguaytia Energy LLC v. Republic of Peru, ICSID Case No. ARB/06/13, Award dated Dec. 11, 2008, para. 66*
[37] CSOB v. Slovakia, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251, 268-271 (1999).

The consent may also be recorded in the multiple documents, and should not necessarily be of "solemn, ritual and unique formulation" (*AMCO v. Indonesia*).[38] In *AMCO*, the state not only ratified ICSID Convention, but also referred to ICSID in the agreement with the investor, having full freedom not to do so. Therefore, the valid form of consent was established by the tribunal.[39]

It is also possible for the party which did not sign the arbitration agreement, but which signed the main contract, to be bound by the ICSID jurisdiction, depending on its level of participation in carrying out the contract.[40] Following this principle, the tribunal in *Holiday Inns v. Morocco* extended ICSID jurisdiction to the parent companies.

3.1.2. Consent in Foreign Investment Laws

Host State expresses its consent to investment arbitration through the provision in its investment law ("offer"), and the investor can accept this offer through submitting a request for arbitration to the arbitral institution,[41] by sending a letter to or entering into the agreement with the Host State, applying for an investment license etc.

The "offer" in the investment law can expressly refer to investment arbitration or to the BIT with the investment provision. Example of the former would be the Albanian Law on Foreign Investment:

> the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes.[42]

Often foreign investment laws provide for several methods of the dispute settlement. The validity of such a consent was confirmed in *SPP v. Egypt*, with the following wording of the investment law:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the frame work of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where it (*i.e.*, the Convention) applies. Disputes may be settled through arbitration. An Arbitration Board shall be constituted, comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the two said members.[43]

In *SPP v. Egypt*, the Host State objected to ICSID jurisdiction, stating that the text of the investment law did not contain the express consent, but rather provided a list if the possible methods to settle the disputes, and the separate ad hoc consent was required to establish the jurisdiction.[44] Egypt insisted that the ICSID Convention required a separate ad hoc agreement through the wording "within the framework of the Convention" and "where it [Convention] applies"[45] (Art. 25 ICSID Convention). The tribunal determined:

> jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.[46]

Looking at the fact that Egypt did not claim the additional form of consent with regard to its BITs (which provided the list of possible methods or resolving disputes), the tribunal ruled that the investment law should not be interpreted simply as a list of alternatives, but rather as a valid form of Egypt's consent.[47] Also, the tribunal confirmed its ruling by stating that the "legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text".[48]

However, there can also be foreign investment laws or investment licenses, which do require additional agreements between the parties. Without such additional agreements offer cannot be established, e.g. Egyptian law 1989:

> The parties concerned may also agree to settle such disputes within

[38] *Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 392., p. 400.*
[39] *Amco Asia v. Indonesia (Amco Asia Corp. et al v Republic of Indonesia (ICSID Case No. ARB/81/1), Decision on Jurisdiction dated Sept. 25,1983)para 23.*
[40] *Holiday Inns v. Morocco, Holiday Inns v. Morocco, ICSID Case No. ARB/72/1 (1972), Decision of Arbitral Tribunal dated July 1, 1973, para. 27, cited in Pierre Lalive, The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems, 51 Brit. Y.B. Int'l L. 1980, 123 (1982)*
[41] See *Tradex v. Albania*
[42] Albanian Law on Foreign Investment of 1993, Art. 8(2).
[43] *SPP v. Egypt, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Decision on Jurisdiction (II) dated Apr. 14, 1988, para. 71.*
[44] *SPP v. Egypt, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Decision on Jurisdiction (II) dated Apr. 14, 1988*, para. 73.
[45] Ibid, para. 91.
[46] Ibid, paras. 63-65.
[47] Ibid, para. 90.
[48] Ibid, para. 94

the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country or within the framework of the [ICSID] Convention.

It is also important to note that the scope of the acceptance of the offer can be narrower than the offer itself. As in *SPP v. Egypt*, the foreign investment law suggested several alternatives, however investor accepted only ICSID jurisdiction[49].

Moreover, the investment law may include time limits or other formalities for the investor's acceptance.

3.1.3. Consent in BITs

Host State's consent to investment arbitration can be expressed in the BIT, concluded between it and the state of the investor.

The BIT can contain the expressed consent itself or the promise to submit future disputes, requiring additional submission agreement.

The BIT can provide for alternatives: ICSID arbitration, domestic courts, ICC, UNCITRAL, SCC or other methods of dispute resolution. When there are alternatives, the BIT usually indicates that the investor, or the party initiating the dispute settlement, may choose the method. Example would be Germany-Philippines BIT, Article 9[50]:

> (1) All kinds of divergencies between a Contracting State and an investor of the other Contracting State concerning an investment shall be settled amicably through negotiations.
> (2) If such divergencies cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor concerned may submit the dispute to:
> (a) The competent court of the Contracting State for decision;
> (b) The International Centre for the Settlement of Investment Disputes through conciliation or arbitration, established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of March 19, 1965 done in Washington D.C.

[49] Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 119.
[50] *Fraport v. Philippines Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25), Award dated Aug. 16, 2007, para. 305.*

The BIT can also contain a "cooling off" period, i.e. the period of time after the dispute arose within which the parties cannot submit their dispute to arbitration, e.g. US Model BIT 2012, Art. 24(3):

> Provided that six months have elapsed since the events giving rise to the claim, a Claimant may submit a claim referred to in paragraph 1:
> (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
> (c)under the UNCITRAL Arbitration Rules; or
> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules."[51]

Sympathetic consideration to a request for ICSID/other dispute settlement method can also be contained in the BIT, as such providing no consent for the establishment of tribunal's jurisdiction.

Investor needs to accept the state's offer for the jurisdiction to be established. Such an acceptance can be expressed through initiation of the arbitral proceeding.

Some of the BITs require the expressed consent of the investor, after which any party can institute a proceeding. The BIT can also extend its benefits only to those investors that expressed consent for the dispute settlement proceeding provided in the treaty. Further, the Host State may choose not to accept investments upon its territory unless the investor consented to the state's dispute settlement proceeding.

3.1.4. Multilateral Treaties

Similarly to the BITs, multilateral treaties can contain Host State's consent to investment arbitration which needs to be accepted by the investor. Below some of the multilateral treaties shall be discussed.

North American Free Trade Agreement (NAFTA[52]) is the agreement between the US, Mexico and Canada on trade liberalization and investment promotion and protection. NAFTA Chapter 11 deals with the dispute settlement and provides that:

- investor must consent before any proceeding can be instituted;

[51] Art. 24(3), US Model BIT, 2012.
[52] NAFTA Secretariat website http://www.nafta-sec-alena.org/en/view.aspx?x=343.

- only investor can institute a proceeding;

- the disputes can be resolved by ICSID (if both the Host State and the Source State are parties to ICSID[53]), ICSID Additional Facility (if the Host or the Source State is a party to ICSID[54]) or UNCITRAL (the only option available for disputes between Canada and Mexico);

- there is a 6-month "cooling – off" period before the dispute settlement proceedings can be instituted.

MERCOSUR[55] is the agreement between Argentina, Brazil, Paraguay, Uruguay, Venezuela and Bolivia, which also provides for ICSID dispute settlement where applicable (when two conflicting states, or at least one of them, are parties to ICSID Convention).

CAFTA – DR[56] is the agreement between the US and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. CAFTA has a structure similar to NAFTA and US Model BIT, providing in its chapter 10 for ICSID, ICSID Additional Facility and UNCITRAL, and establishing "cooling off" period and institution of the proceedings by the investor.

Energy Charter Treaty (ECT)[57] is the agreement between the EU, CIS states (except Russia) and Japan in the field of energy cooperation. Art. 26 of ECT provides for ICSID, ICSID Additional Facility and UNCITRAL arbitration.

Conditions: Even if the valid consent is given, the institution of the proceeding can be subject to some conditions: local courts, mediation/conciliation, "cooling off" period etc.

Withdrawal of Consent: Art. 25 (1) ICSID Convention states: "when the parties have given their consent, no party may withdraw its consent unilaterally". This can be interpreted as even if the consent is provided in the BIT or foreign investment law the state can withdraw its consent (repealing the law or terminating the treaty) unless the investor declared its consent. However, if the consent is perfected (both parties consented), even denunciation of ICSID Convention shall not affect the jurisdictional requirements. Moreover, when the consent is provided in the investment agreement/contract between the investor and

[53] As of 24 May 2013, out of NAFTA members only the US is a party to ICSID. Therefore the disputes under NAFTA cannot be considered under ICSID Convention.
[54] Disputes between the US and Mexico or the US and Canada can be considered under ICSID Additional Facility Rules.
[55] MERCOSUR website http://www.mercosur.int/msweb/portal%20intermediario/.
[56] CAFTA website http://www.caftadr.net/countries.html.
[57] Energy Charter Treaty website http://www.encharter.org

the host state, the invalidity of the agreement itself does not lead to the invalidity of the dispute settlement clause (severability principle), but rather the tribunal makes the final determination on the jurisdiction under such an agreement.[58]

3.2. Personal jurisdiction of ICSID ("*ratione personae*")

Except for the requirement for the dispute to be legal and arise out of an investment, as well as the existence of the consent to ICSID jurisdiction, there is another requirement of Art. 25 (1) ICSID Convention: the dispute has to be 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".[59]

3.2.1. "Contracting State"

To determine whether the state is the contracting party to ICSID Convention, ICSID maintains the list of its member states on its website.[60] It is important that the state is a party to ICSID Convention on the date when the request for ICSID proceeding is accepted.[61]

3.2.2. Constituent subdivision or agency of the Contracting State

Investor can sign the investment agreement (e.g. concession agreement) not with the state itself, but with one of its entities, such as state, province, municipality or canton – state subdivisions or agencies.[62]

ICSID Convention does not provide a definition of the subdivision or agency of the state. However, the Convention provides that:

a) subdivision or agency should be designated by the state to the Centre;[63]

b) the consent by a subdivision or agency:

[58] UNCTAD Course on Dispute Settlement, Consent, p. 37.
[59] ICSID Convention, Regulations and Rules https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf
[60] List of contracting states and other signatories of the Convention (as of May 20, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.
[61] ICSID. Requirements Ratione Personae. http://unctad.org/en/docs/edmmisc232add3_en.pdf.
[62] C. Schreuer, The ICSID Convention: A Commentary, Article 25, paras. 145-149, pp. 150-152 (2001).
[63] Art. 25 (1) ICSID Convention. The Centre has the list of state designations at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measures=True&language=English.

- requires the approval of the state; or

- the state notifies ICSID that such approval is not necessary.[64]

3.2.3. National of another contracting state

Art. 25 (1) ICSID Convention refers to a national of another contracting state as one of the parties to the investment dispute which can be resolved by ICSID. Such a "national" can be a natural or a juridical person.

a) natural person:

For natural persons (individuals) ICSID Convention contains such requirements:

i. positive requirement

- they should be nationals of a Contracting State other than host state on the date when the parties consented to submit their dispute to ICSID; and

- on the date when the request was registered by ICSID; but

ii. negative requirement

- they cannot be also nationals of the host state.[65]

In order to determine the nationality of the individual, international and domestic laws usually refer to the nationality by descent or by the place of birth. However, "nationality of convenience" can be challenged by the host state.[66]

b) juridical person:

ICSID Convention contains the following requirements for juridical persons:

i. should have the nationality of the contracting state other than the host state on the date when the parties consented to submit disputes to ICSID; or

ii. juridical person with the foreign control.[67]

In the first scenario, a juridical person should hold the nationality of the ICSID Convention contracting state, except for the host state. The nationality of the juridical person can be confirmed by its place of incorporation or the head office.[68]

In the second scenario, it is possible that the investor is required by the laws of the host state to provide an investment through the local company, however, the parties may

[64] Art. 25 (3) ICSID Convention
[65] Art. 25 (2) (a) ICSID Convention.
[66] ICSID. Requirements Ratione Personae http://unctad.org/en/docs/edmmisc232add3_en.pdf.
[67] Art. 25 (2) (b) ICSID Convention.
[68] Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, ICSID Case No.ARB/82/1, (1994) *2 ICSID Reports,* cited in Schreuer, *supra* note 6, p. 280.

agree to treat such a company as foreign for the purpose of ICSID jurisdiction if foreign control is present.[69] Foreign control is not defined in ICSID Convention. The following aspects can be taken into consideration in determining whether there is foreign control: "equity participation, voting rights and management" of the company. [70]

3.3. Subject matter jurisdiction of ICSID ("*ratione materiae*")

One of the requirements of Art. 25 (1) ICSID Convention ("jurisdiction") is that the dispute has to be legal and arise directly out of an investment. ICSID Additional Facility, on the contrary, allows for consideration of the disputes, which do not directly arise out of an investment, if at least one of the state parties is the ICSID contracting state[71].

It is necessary to determine what "legal dispute", "arise out of" and "investment" mean to understand the *ratione materiae* requirements of ICSID jurisdiction.

ICSID Convention does not provide definitions of any of these terms.

3.3.1. Legal Dispute

Dispute can be defined as a disagreement between the parties on the law or fact.[72]

As for the legal dispute, it is a dispute on the scope or existence of a legal obligation or right, or on the reparation for the breach of obligation.[73] There should be a legal basis for the dispute for both ICSID arbitration and conciliation proceedings.

3.3.2. "Arising directly out of"

This phrase has been interpreted as meaning that when the dispute is indirectly related to the investment, it is outside the scope of ICSID Convention.

[69] ICSID. Requirements Ratione Personae http://unctad.org/en/docs/edmmisc232add3_en.pdf.
[70] Schreuer, supra note 13 at 126.
[71] ICSID Additional Facility Rules, Art. 2. https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf
[72] ICSID. Requirements ratione materiae. http://unctad.org/en/docs/edmmisc232add4_en.pdf, p. 9.
[73] Guide to ICSID Arbitration, second edition, p. 26.

The tribunals also clarified that "directly" does not refer to foreign direct investment, but only to the direct connection between the investment and the legal dispute submitted to ICSID. [74]

Another explanation is that "directly" means "reasonably closely related" to the investment.[75]

3.3.3. Investment

It is extremely important to establish that potential claimant made an "investment" because otherwise the arbitral tribunal, which operates under any procedural rules, will lack one of obligatory criteria (existence of investment) to establish its jurisdiction in order to rule on the case.[76] Consequently, it will preclude the mere possibility of arbitral proceedings to start.

There is no definition of "investment" in ICSID Convention[77]. From its history of negotiations it follows that, as the numerous attempts to agree on such a term failed, the absence of the definition was supposed to serve the possible agreements between the states on what they wanted to be considered as "investments" between them. The states can include the definition of "investment" in the investment contract negotiated with the investor, in the bilateral investment treaty ("BIT") or the multilateral investment treaty, as well as foreign investment laws of the states.

Nevertheless the situations arise when the tribunal is to make the determination on whether there is an investment in the case at hand. The most frequently involved rule is the one in *Salini*, applied in *AFT v. Slovak Republic* and *Romak SA v. Uzbekistan*. However, in the *Deutsche Bank v. Venezuela* (2012) only some of its criteria were used, as there is no *stare decisis* in ICSID jurisprudence. The existing cases can only assist in making the determination on investment, but cannot govern/establish mandatory principles.

In *Biwater v. Tanzania* (2008) it was established that there is no basis for strict application of *Salini* in every case, that these standards are not fixed or mandatory. This case

[74] Fedax N.V. v. Republic of Venezuela, Decision on Jurisdiction, 11 July 1997, 37 ILM 1378 (1998), at 1383, para. 24.
[75] Ceskoslovenska Obchodni Banka, A. S. v. Slovak Republic, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review – FILJ 251 (1999) at 275-76.
[76] Omar E. García-Bolívar, , *Special Report on ICSID Jurisdiction*, BG Consulting, p 1.
[77] No arbitral rules contain such a definition.

further declined the application of the four criteria of *Salini*[78], referring to the drafting history of the ICSID Convention, and determined that establishing fixed and inflexible criteria would create a risk of exclusion of certain types of transactions from the scope of ICSID Convention, could contradict the definitions expressly agreed upon in the investment agreements/contracts, as well as bilateral/multilateral agreements (BITs, IIAs).

3.4. Causes of action in investment arbitration

The most frequently invoked causes of action in investment arbitration are listed below. These are the typical rights of the investors include in most of the BITs and FTAs with investment provisions.

3.4.1. Most-Favored Nation (MFN) Treatment

MFN means that the investor and investment from the state-party to the BIT, FTA or investment agreement/contract shall be treated no less favorably than the investor or investment from any third country in the like situations.[79] This means that there should be no distinction/different treatment based of nationality in treatment under comparable regimes: investment treaties of the host state with other states or host state's foreign investment law.

US Model BIT provides the following MFN clause:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[80]

With regard to dispute settlement, the investor may invoke MFN violation with regard to procedural rules[81], e.g. if the investment agreement of the host state with the investor provides for 6 months cooling off period, whereas with the third state host state

[78] Salini test: there needs to be duration, contribution on the part of the investor, risk-taking and contribution to the development of the host state. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1191_En&caseId=C104
[79] Most-Favoured-Nation Treatment in International Investment Law, OECD 2004, http://www.oecd.org/daf/inv/investment-policy/33773085.pdf. - p. 2
[80] 2012 U.S. Model Bilateral Investment Treaty http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, Art. 4
[81] *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000) paras. 54, 60, 63.

agreed to have 4 months etc. However, MFN cannot be invoked to establish jurisdiction of ICSID if the parties in BIT, FTA, investment agreement/contract did not consent to it.[82]

3.4.2. National Treatment (NT)

NT means that the investor and investment from the state-party to the BIT, FTA or investment agreement/contract shall be treated no less favorably than the investor or investment from the host state in the like situations.[83]

Example of NT clause under NAFTA:

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [84]

3.4.3. Impairment by Arbitrary, Unreasonable or Discriminatory Measures

Example:

> [W]ith reference to the investments of investors of the other Contracting Party, each Contracting Party . . . shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."[85]

3.4.4. Fair and Equitable Treatment (FET)

There is no generally accepted definition of FET standard. Violation of FET was determined by the tribunals as lack of transparency, discrimination, bad faith and arbitrariness.[86]

3.4.5. Full Protection and Security

[82] *Plama Consortium Ltd . v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005) paras.195, 198.
[83] National Treatment for Foreign-Controlled Enterprises http://www.oecd.org/daf/inv/investment-policy/nti.htm.
[84] NAFTA, Art. 1102
[85] Netherlands-Czech Republic BIT, Art. 3.1. http://unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf
[86] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), 133–48.

There is no generally accepted interpretation of this standard.

In *AAPL v. Sri Lanka*, tribunal determined that this standard does not lead to absolute liability of the state, however, is an independent treaty standard.[87] Such an independent standard requires the state to exercise due diligence in the protection of investment.[88]

3.4.6. Expropriation

Expropriation can be defined as governmental taking of the private property. [89] Such a taking can be legal and not violate the rights of the investor, if it is done for the public purpose, in a non-discriminatory manner and is duly compensated for.

For example, US Model BIT contains the following expropriation clause:

> 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation; and
> 2. The compensation referred to in paragraph 1(c) shall:
> (a) be paid without delay;
> (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
> (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
> (d) be fully realizable and freely transferable. [90]

4. Arbitrators

The composition of the arbitral tribunal is determined by the characteristics agreed to by the parties either the parties or the states involved. This is a unique characteristic of investment arbitration. Two states consent to resolve matters by arbitration, but for one of the states the actor (normally the claimant) will be a private party authorized by the agreement

[87] Asian Agricultural Products v. Sri Lanka http://www.biicl.org/files/3937_1990_aapl_v_sri_lanka.pdf.
[88] The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration? http://www.iisd.org/pdf/2011/full_protection.pdf.
[89] http://www.investopedia.com/terms/e/expropriation.asp
[90] 2012 U.S. Model BIT http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

between the states to make a claim. The private party will also have to consent specifically to arbitrate the claims.

In the case of investment arbitrations where consent is found in a bilateral investment treaty or similar instrument, the states will agree to submit to arbitration in a limited range of arbitral forums. Where one of the states is also a party to the ICSID Convention, the treaty will often include two ICSID options: Full ICSID or Additional Facility ICSID. Since the availability of ICSID is limited to situations in which one of the state parties to the BIT is also a contracting state of the ICSID Convention, BITs also generally provide for another option where the only limitation to access is the consent of the two parties to the arbitration (i.e., the private party and the state). A typical additional forum is arbitration under the UNCITRAL Arbitration Rules. Other options also exist (e.g., arbitration under the Conciliation and Arbitration Rules of the International Chamber of Commerce - "ICC").

When institutional rules come into play, the rules of the institution regarding the selection of arbitrators and the criteria that the candidate must satisfy are applicable. Below, we excerpt from the rules mentioned above.

4.1. Number and Selection of Arbitrators

The number of arbitrators that will decide the dispute is determined by the agreement that the recipient state enters into when it decides to submit to investor arbitration. Normally, the number of arbitrators is three, although the number could be different.

5. Appropriate Forum

5.1. ICSID Conciliation or Arbitration? Ambiguity

If the investor-state dispute settlement clause refers the parties to ICSID without specifying if they refer to arbitration or conciliation, this can result in the dispute between the parties on the appropriate method for resolving the investment dispute.

Such ambiguity can also be interpreted as providing the party, which initiates the dispute settlement proceeding, the right to select the method, as stated in *SPP v. Egypt*:

> Once consent has been given "to the jurisdiction of the Centre", the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings.[91]

However, if to apply SPP v. Egypt approach, it is not clear if parties have the right to refer their dispute to arbitration after the conciliation failed. Therefore, the parties should draft the dispute settlement clause as specific as possible to prevent possible ambiguities.

5.2. ICSID Conciliation

ICSID Conciliation provides the parties with the opportunity to reach the non-binding settlement of the case with the assistance of the neutral third party – Conciliation Commission.

Although conciliation is generally less expensive than arbitration[92], it is not as popular with the disputing parties: as of December 31, 2012 there were only 7 conciliation cases registered with ICSID under ICSID Convention and 2 conciliation cases registered under ICSID Additional Facility Rules.[93] As for the outcomes of conciliation, in 25 % of cases the parties reached settlement.[94]

5.3. ICSID Arbitration

ICSID provides the framework for delocalized arbitration,[95] not dependent on the seat of arbitration and local arbitration laws. However, this framework is only available to the parties who satisfy the requirements of Art. 25 ICSID Convention (jurisdiction) or Art. 2 ICSID Additional Facility Rules.

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[91] SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 156.
[92] Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf
[93] The ICSID Caseload – Statistics https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics
[94] Ibid.
[95] ICSID Dispute Settlement Facilities https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities.

ICSID registers arbitration requests[96], provides model clauses for investor-state dispute settlement[97], manages fees for its dispute settlement proceedings[98], provides schedule and memorandum on the fees and expenses.[99] Although the fee arrangement by institution is straightforward, it can be hard to predict the exact costs of proceedings since the costs of arbitrators, lawyers and representatives depend on the length of the proceeding, which is not known in advance.[100] Further, ICSID proceedings are criticized as being expensive for low-income countries.[101] However, it should also be noted that third party funding can be possible to support the parties in the investment arbitration proceedings[102].

ICSID has the list of possible arbitrators and conciliators[103] and can appoint arbitrators on parties' behalf if they failed to do so on their own[104], preventing uncooperative party from frustrating the process[105]. However, ICSID appointment procedure is criticized as favoring arbitrators from the developed countries, which occurs largely due to the limited number of qualified candidates. [106]

ICSID awards are recognized as final judgments of the national courts[107]. There is no review of such awards, except for the ICSID remedial proceedings (interpretation, rectification, annulment and revision) conducted by *ad hoc* committee. [108] Although, this creates the integrity of the process, it is claimed that there is no uniformity and certainty in ICSID annulment decisions under Art. 52 ICSID Convention[109].

[96] Art. 36 ICSID Convention
[97] ICSID Model Clauses https://icsid.worldbank.org/ICSID/FrontServlet?actionVal=ModelClauses&requestType=ICSIDDocRH.
[98] Art. 59-61 ICSID Convention.
[99] ICSID Schedule of Fees https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=CaseScheduled; Memorandum on the Fees and Expenses of ICSID Arbitrators https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Memorandum
[100] The ICSID Under Siege http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf, p. 617.
[101] Ibid, p. 616.
[102] Third Party Funding in International Investment Arbitration http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078358.
[103] ICSID Members of the Panels if Conciliators and Arbitrators https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=MembersofPannel
[104] Art.38 ICSID Convention
[105] Guide to ICSID Arbitration, second edition, p. 132.
[106] The ICSID under Siege http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf, p. 612.
[107] Art. 53-54 ICSID Convention.
[108] Art. 50-52 ICSID Convention.
[109] The ICISD under Siege http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf, p.621; ICSID: Post-award remedies and procedures http://www.univie.ac.at/intlaw/wordpress/pdf/lape_010_02_211_225.pdf.

Moreover, once the dispute is submitted to ICSID, the Centre possesses exclusive jurisdiction over the dispute,[110] including the exclusive competence to rule on the tribunal's jurisdiction.[111]

However, there can be an exception: a resort to diplomatic protection can be available after submission of the dispute to ICSID, but only when one of the parties to arbitration refuses to comply with the award. [112] Also, although exclusive, ICSID jurisdiction can be conditioned upon the exhaustion of local administrative or judicial remedies.[113]

ICSID provides for a greater transparency than other arbitral institutions and rules, making information about the existence, status and disposition of ICSID cases publicly available[114]. Also ICSID permits non-disputing parties to observe the oral hearings and file written submissions.[115] ICSID can also publish its awards provided that both parties consent.[116] However, it is criticized that *ad hoc* ICSID proceedings are not sufficiently transparent and open to public. [117]

Another feature of ICSID is that it is the organ of the World Bank. This factor could positively affect the voluntary execution of the ICSID awards.[118] However, this factor is also criticized as making ICSID proceedings political.[119]

5.4. ICSID Additional Facility

ICSID Additional Facility arbitration and conciliation can be available in certain limited situations beyond the scope of ICSID Convention, namely:

- where either the host state or the state of the investor is not a party to ICSID Convention;

- where the legal disputes do not arise directly out of an investment, provided

[110] p. 14 Guide to ICSID Arbitration, 2nd edition
[111] Art. 41, para. 1.
[112] International Economic Disoute Settlement Mechanisms http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-13-Part-3.html#Heading20.
[113] Art. 26 ICSID Convention
[114] The counter-productivity of ICSID denunciation and proposals for change http://law.hofstra.edu/pdf/academics/journals/jibl/jibl_volxii_icsid_wick.pdf.
[115] ICSID Arbitration Rules Art. 32(2) and Art. 37(2).
[116] Art. 48 ICSID Convention.
[117] Jason W. Yackee & Jarrod Wong, The 2006 Procedural and Trans- parency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in Y.B. INT'L INVESTMENT L. & POL'Y 2009-2010 (Karl P. Sauvant ed., 2010); Cornel Marian, Balancing Transparency: The Value of Administrative Law and Mathews- Balancing to Investment Treaty Arbitrations, 10 PEPP. DISP. RESOL. L.J. 275 (2010) (dis- cussing transparency in international investment arbitration).
[118] Guide to ICSID Arbitration, Second Edition, Kluwer Law International, UK, 2011. - p. 17.
[119] The ICSID under Siege http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf, p. 612.

that host state or the state of the investor is the party to ICSID Convention;

- fact-finding proceedings.[120]

There were 41 ICSID Additional Facility arbitration cases and 2 ICSID Additional Facility conciliation cases registered as of December 31, 2012. [121]These cases were only where one of the states (host state or state of the investor) was not a party to ICSID Convention.[122]

Since ICSID Additional Facility awards are enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the proceedings should only be held in the state, which is party to the New York Convention[123].

ICSID Additional Facility is important for the BITs or FTAs where one of the states is not a party to ICSID, particularly in the context of NAFTA (only between the US and Canada or the US and Mexico; for disputes between Mexico and Canada only ad hoc arbitration is available[124]), Cartagena Free Trade Agreement (only between Colombia and Mexico or Colombia and Venezuela)[125] and Energy Charter Treaty.

5.5. Ad Hoc Arbitration

Ad hoc arbitration is more flexible than institutional, however, lacks institutional support. The parties can choose the arbitration rules, seat of arbitration, applicable law, language of the proceeding, select the number of arbitrators and appoint them.[126] Recognition and enforcement of ad hoc awards are governed by the New York Convention. [127]

In investment disputes second most frequently invoked arbitration is under UNCITRAL Rules, which is one of the rules for ad hoc arbitration.[128] The UNCITRAL provision can be seen in multiple BITs, as well as FTAs, such as NAFTA (between Mexico

[120] ICSID Additional Facility Rules, Art. 2 https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf

[121] The ICSID Caseload- Statistics https://icsid.worldbank.org/ICSID/FrontServlet? requestType=ICSIDDocRH &actionVal=ShowDocument&CaseLoadStatistics=True&language=English41.

[122] ICSID. Selecting the Appropriate Forum http://unctad.org/en/docs/edmmisc232add1_en.pdf (p. 19)

[123] Art. 19 Arbitration (Additional Facility) Rules https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf

[124] Art. 1120 NAFTA.

[125] Art. 17-18 Cartagena Free Trade Agreement

[126] Institutional v. Ad Hoc Arbitration http://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/

[127] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

[128] 'Latest developments in Investor-State Dispute Settlement', UNCTAD, 2013, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

and Canada), Cartagena Free Trade Agreement (between Venezuela and Mexico), ECT (when none of the states is a party to ICSID).

5.6. Diplomatic Protection

Diplomatic protection can be invoked for the settlement of investment disputes. However, diplomatic protection is at the sole discretion of the investor's home state. This means that the investor cannot submit the dispute to diplomatic protection and in this aspect is totally dependent upon the state which can decide not to resolve the dispute. Also, diplomatic protection can only be invoked after the investor exhausted the local remedies of the host state, which creates procedural delays and even obstacles for the investor.[129]

5.7. State-State Dispute Settlement

International investment disputes can also be resolved through state-state dispute settlement proceedings. e.g. Iran-US Claims Tribunal and International Court of Justice. [130]

6. The Award and National Courts

The arbitral tribunal or arbitrator issues an award at the conclusion of the investment arbitration. The award issued by ICSID where the ICSID Convention is applicable is subject to an internal procedure under which either party can seek annulment of the award. If the award has not been annulled either because the time period for requesting annulment has passed with no party seeking annulment, or if the annulment commission does not annul the award and if enforcement is sought in a country that is a contracting state of the ICSID Convention, the courts of the contracting state in which enforcement is sought should accord the award the status and effects of a final judgment in a civil action issued by a court of that state. If the award is not an ICSID Award, the award should be treated like any other award by the court considering enforcement, recognition or set aside of the award.

[129] Investment Protection and International Relations http://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf. - pp. 345-346.

[130] ICSID. Selecting the Appropriate Forum http://unctad.org/en/docs/edmmisc232add1_en.pdf.

7. Remedies

There are several remedies provided in the ICSID Convention:

7.1. Supplementation and rectification

Contained in Art. 49(2) ICSID Convention, supplementation and rectification allow the original tribunal to correct omissions and errors in the award.

7.2. Interpretation

Art. 50 ICSID Convention allows the parties to receive the explanations and interpretations of the award by the original tribunal or, if this is not possible, by the new tribunal.

7.3. Revision

If the newly discovered facts become available, the original award can be revised, according to Art. 51 ICSID Convention.

7.4. Annulment

Lastly, ICSID award can be annulled under Art. 51 ICSID Convention, i.e. legally destructed without replacing, which will lead to the new consideration of the case. This is the only way to set aside the award and can occur under the specified number of circumstances, namely:

- when the tribunal was improperly constituted;
- manifest excess of powers of the tribunal;
- corruption of an arbitrator;
- serious departure from a fundamental rule of procedure;
- failure to state reasons in the award.

It needs to be noted that annulment is only available for the final awards, not for the preliminary decisions, including decision on jurisdiction.[131] Also, annulment takes place before the ad hoc tribunal constituted specifically for the annulment proceeding.

If there is an award of the ICSID Additional Facility, it cannot be subjected to the remedies provided under the ICSID Convention. Additional Facility has the separate rules for correction, revision, supplementation. Contrary to the ICSID Convention, the awards of the Additional Facility can be reviewed and appealed through the national courts.

8. Recognition and Enforcement of ICSID Awards

Recognition and enforcement of ICSID awards are governed by Articles 53-55 of ICSID Convention.

Art. 53 ICSID Convention provides that the award[132] is binding and is final, e.i. not subject to any appeal except those under Art. 49-52 of ICSID Convention. This means that if the party is not satisfied with the award, he/she cannot seek recourse to any other forum for the same dispute. The parties have a legal obligation to comply with the award, unless it has been stayed under the relevant provision of ICSID Convention.

Recognition and enforcement under the ICSID Convention differs from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as from the enforcement of the awards of other arbitral institutions.

According to Art. 54 (1) of ICSID Convention, "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". Thus the award itself should be considered as a final and binding judgment of the courts in the country of enforcement. Moreover, only pecuniary obligations have to be enforced. Violating the ICSID obligation identified in Art. 54 would constitute the violation of the international law.

Art. 55 ICSID Convention specifies that the execution of the award has to be in accordance with the laws of the state where the award is sought to be executed, including the laws of state immunity. However, the laws of state immunity should apply to ICSID award same way as they would apply to the final judgments of the domestic courts. Usually this

[131] SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.
[132] Art. 53 (2) states that award includes any decision interpreting, revising or annulling the award under Art. 50-52 of ICSID Convention.

means that only state property, which serves commercial purposes, can be subject to enforcement.[133]

It should be noted, however, that the proceedings discussed in this section are not applicable to the ICSID Additional Facility awards, the recognition and enforcement of which are governed by ICSID Additional Facility Rules[134] and which can be appealed under the grounds of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[135]

[133] ICSID. Binding Force and Enforcement. http://unctad.org/en/docs/edmmisc232add8_en.pdf.
[134] ICSID Additional Facility https://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.
[135] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

EL CONSENTIMIENTO AL ARBITRAJE CIADI FUNDADO EN UNA LEY

Sébastien Manciaux[1]

1. La determinación de la naturaleza jurídica del artículo de la ley que estipula el recurso al arbitraje CIADI. 1.1. Un acto unilateral que produce un efecto internacional. 2. La interpretación del artículo de la ley que se refiere al arbitraje CIADI. 1.2. Una relación contractual sometida a las reglas de interpretación de los contratos? 2.1. Una regla de interpretación principal: análisis gramatical. 2.2. Las reglas de interpretación subsidiarias: el contexto de elaboración de la ley y su objetivo. Conclusión.

1. Al momento de su entrada en vigor el 14 de octubre de 1966, que pronto será cincuenta años, una de las más grandes originalidades de la Convención de Washington, que creó el Centro Internacional de Arreglo de Diferencias relativas a Inversiones (CIADI), pasa casi desapercibida: la posibilidad que el consentimiento al arbitraje CIADI sea expresado en dos actos por separado. Vale la pena destacar que esta posibilidad no surgía explícitamente – ni surge hoy en día – de la Convención de Washington, la cual en su artículo 25 se contenta de anunciar de manera clásica que el consentimiento de las partes debe ser dado por escrito.

2. De la misma manera, las primeras explicaciones dadas con respecto al sujeto del consentimiento al arbitraje por el párrafo 24 del informe de los Directores Ejecutivos del Banco Mundial acerca de la Convención, sólo otorga informaciones clásicas. Se hace referencia a instrumentos conocidos de recursos al arbitraje que son la cláusula compromisoria y el compromiso: "*el consentimiento puede darse, por ejemplo, en las cláusulas de un contrato de inversión, que disponga la sumisión al Centro de las diferencias futuras que puedan surgir de ese contrato, o en un compromiso entre las partes respecto a una diferencia que haya surgido*". Pero, el lector atento que insistió en su lectura encontrará luego un desarrollo revolucionario en 1966 y que sigue siéndolo hoy en día : " *El convenio tampoco exige que el consentimiento de ambas partes se haga constar en un mismo instrumento. Así, un Estado receptor podría ofrecer en su legislación sobre promoción de inversiones, que se someterán a la jurisdicción del Centro las diferencias producidas con motivo de ciertas clases de inversiones, y el inversionista puede prestar su consentimiento mediante aceptación por escrito de la oferta*".

[1] Esta es la versión mejorada y actualizada de una ponencia presentada en el *VIII° Encuentro Internacional: Comercio Exterior y Inversión Extranjera*, organizado por la Unión Nacional de Juristas de Cuba, La Habana, 17 al 19 de octubre de 2011. El autor agradece a Esteban Perrotti, por la ayuda prestada en la preparación de esta publicación.