

**THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT
DISPUTE: JURISDICTION AND RELEVANCE TO AFRICA**

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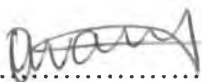
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DECLARATION

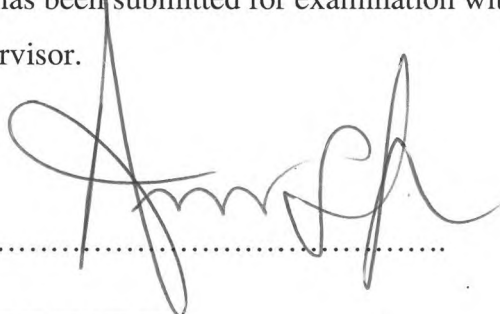
I, **Mary Anyango Oganga**, declare that the work presented in this thesis is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LLM Degree in Public International Law.

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DATED This ¹⁵ 30.....Day of June, 2007

This Project has been submitted for examination with my approval as University of Nairobi Supervisor.

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DATED This ^{7/k}.....Day of June, 2007

DEDICATION

This project is dedicated to my parents, without whom I would never have started on this journey.

ACKNOWLEDGEMENT

To God Almighty be the glory forever, through it all, I have learned to depend on and trust in Him and He has never failed me.

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ABBREVIATIONS

AAA	:	American Arbitration Association
AALCC	:	African-Asian Legal Consultative Committee
ADR	:	Alternative Dispute Resolution
BITs	:	Bilateral Investment Treaties
ICSID	:	International Centre for Settlement of Investment Disputes
IIA	:	International Investment Agreement
ISDS	:	Investor-State dispute settlement
MFN	:	Most Favoured Nation Treatment
MAI	:	Multilateral Agreement on Investment
MIGA	:	Multilateral Investment Guarantee Agency
MITs	:	Multilateral Investment Treaties
NAFTA	:	North American Free Trade Agreement
OECD	:	Organisation for Economic Co-operation and Development
UNCITRAL	:	United Nations Commission on International Trade Law
UNCTAD	:	United Nations Conference on Trade and Development
VBTA	:	Vietnam Bilateral Treaty Agreement
WTO	:	World Trade Organisation

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CHAPTER ONE: INTRODUCTION

1.0 Background to the Study

The International Centre for Settlement of Investment Disputes (ICSID) is a public international organisation established by a multilateral treaty, the 1966 Washington Convention on the Settlement of Investment Disputes between states and Nationals of Other States (the Convention), to provide a dispute resolution mechanism separate from the national laws of states for disputes between States and non-State entities. The World Bank Group created ICSID with “... the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment”.¹

The framework of ICSID conciliation and arbitration proceedings are governed by the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Administrative and Financial Regulations, the Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) and the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), as amended effective January 1, 2003 adopted by the Administrative Council of ICSID pursuant to Article 6(1) (c) of the ICSID convention.

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the ICSID has an Additional Facility Rules authorizing the ICSID Secretariat to administer conciliation and arbitration proceedings where one of the parties is not a Contracting State or a national of such a State. The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the ICSID Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry “to examine and report on facts”. The Additional Facility rules require that the arbitration be held only in countries that are party to the New York Convention.

¹ ICSID Annual Report 2005 at page 3

ICSID's role extends beyond its caseload. Like the other arms of the World Bank Group, ICSID also plays an advisory role, conducts research, and produces publications. Its advisory role is especially significant in the context of the Multilateral Agreement on Investment (MAI) negotiations.²

The ICSID Convention has over 150 parties, including most of the major capital importing and exporting nations. During the year 2005 membership of the Centre rose to 142 states following the ratification of ICSID Convention by Cambodia and Yemen. In addition, the Convention was signed by Syria. With the latest signature and two ratifications, there were 155 signatories and 142 Contracting States of the ICSID Convention at the end of year 2005³. (There are some key exceptions, including Canada, Mexico, Poland, Brazil and, of course, Vietnam). ICSID claims to be an 'autonomous international organisation' but is in fact part of the World Bank Group. All of its country members are also members of the Bank and unless a government objects, its World Bank governor sits *ex officio* on ICSID's administrative council. The Council is chaired by the World Bank's president. Annual meetings of the Council are held in conjunction with the Bank/Fund annual meetings. There is also an ICSID Secretariat, the expenses of which are financed by the Bank. The Convention is largely but not entirely procedural and jurisdictional; it and the ICSID Arbitration Rules govern investor-host state arbitrations held under its umbrella. Issues covered include: Requests for arbitration, constitution of the tribunal, powers and functions of the tribunal, limitations on ICSID jurisdiction (nationality, scope of 'investment'), role of the Secretary General in registering actions, the award, interpretation, revision and annulment of the award and mandatory recognition and enforcement of the award.

The investor-host arbitration has become a common occurrence in the last 40 years since the ICSID Convention was concluded, particularly, during the past ten years. (The first case was not decided until 1974). During the year 2005 ICSID registered twenty-five

²Chamberlain, Christopher, *The Role of the World Bank Group in Multilateral Agreement on Investment Negotiations and Administration*: Bank Information Centre, January 12, 1998.

³ ICSID Annual Report 2005 at page 5.

new cases bringing to 184 the total number of cases registered since its inception. With these new registrations, ICSID administered a record 103 cases during a single year.⁴ There have been decisions in more than a dozen cases under North American Free Trade Agreement (“NAFTA”), the majority under the ICSID Additional Facility rules which was created to facilitate the use of the extensive ICSID facilities in situations where either the host state or the foreign investor’s state is not an ICSID party. Since one or the other will not be an ICSID party, the Convention itself is inapplicable, and more than 30 notices of arbitration, about 60% of which are between the United States and Canada (the remainder with Mexico).

To encourage investment, states try to offer effective, enforceable assurance to foreign investors as to how they will treat investments. One mechanism for achieving this is to enter a ‘Bilateral Investment Treaty’ (BIT) with another state, whereby each undertakes obligations with respect to investments made by the other’s nationals. A typical BIT requires the host state to treat foreign investment no less favourably than that of its own, or any third country’s, nationals, requires investments to be treated ‘fairly and equitably’, to enjoy ‘full protection and security’ and to not to be treated to a lesser standard than required by international law. There are now more than 2100 BITs in force, the majority (but not all) between OECD countries and developing nations; most of these BITs provide for binding international arbitration of disputes between investors and host states.⁵

It is impossible to deal with all of the issues relevant to investor-host state arbitration in a single day. In fact, there is no uniform set of rules. Most such arbitrations are conducted under the ICSID Rules, the ICSID Additional Facility Rules, or the UNCITRAL Rules. These rules have been interpreted by tribunals (and by the ICSID Secretariat), but many questions remain. Four other factors reduce the precedential value of tribunal decisions. First, there is no equivalent of the World Trade Organisation (WTO) Appellate Body to

⁴ ICSID Annual Report 2005 at page 4

⁵ Gantz, David A., *Investor-State Arbitration Under ICSID, The ICSID Additional Facility and the UNCTAD Arbitral Rules*

establish consistency of interpretation of investment rules. Secondly, the basic arbitral rules are often modified by the provisions of particular BITs, or as in Chapter 11 of NAFTA or Chapter IV of the VBTA. Thirdly, these disputes tend to be decided on a case-by-case basis, after careful analysis of particular facts, especially when issues of a fair and equitable treatment or indirect expropriation have arisen. Fourth, a significant number of decisions do not become public.⁶ Some recent cases appear to treat investors very favorably; others appear to be more deferential to the host state. Thus, predicting that a tribunal will do in a specific fact situation is very inexact science. The writings of highly qualified publicists are regarded as subsidiary sources of law. Who is a highly qualified publicist is, is nowhere defined. In an area of controversy, there will be much subjectivity in the choice of such a person.

In the recent past, many issues have been raised with intent to move disputes from ICSID to local courts. These issues will keep appearing and solutions might differ, since previous decisions do not create precedent in the field. However, the hope lies that on widely advising on the jurisdiction criteria used by ICSID tribunals, uniform awards would be issued. That would provide certainty and would be in tone with the purpose of the ICSID Convention, i.e., foster economic development through an international legal framework of foreign investment.

The jurisdiction of ICSID is established by Article 25 (1) of the Convention. The jurisdiction of ICSID arbitration tribunals extends to (1) any legal dispute (2) arising directly out of an investment, (3) between a Contracting State (or any constituent subdivision or agency of a Contracting State that has been designated to ICSID by that State) and (4) a national of another Contracting State, (5) which the parties to the dispute consent in writing to submit to the Centre. Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in their respective investment laws and in BITs.

⁶ *ibid* note 2

The ICSID Convention in contrast to the Multilateral Investment Guarantee Agency (MIGA) Convention also sponsored by the World Bank and also offers non-commercial risk coverage for foreign investment, two decades later says nothing directly about encouraging the flow of foreign investment to developing countries. The preamble speaks only of ‘the possibility that from time to time disputes may arise in connection with private international investment between Contracting States and nationals of other Contracting States’ and of recognition that ‘international methods of settlement may be appropriate in certain cases’.⁷

ICSID Convention was the first major arbitration treaty in whose creation African states participated. The ICSID Convention was promoted in the 1960s as vital to a central policy objective of the newly independent African states- that of stimulating private international capital for economic development. As a result, during its elaboration, the Convention received warmer support in Africa than in Latin America or Asia. That support, and some of the disputes involving African states, revealed early on the practical relevance of the Convention.⁸

Since the mid-1980s, Africa has entered into a new era of relationship with international investors. Nearly all African countries have taken steps to reform and liberalise their economic management system, governments have accepted the imperative of market forces and the indispensable role that private sector plays in economic development. As part of the structural adjustment process, they have also deregulated their investment regime in the following:

- As a matter of policy, foreign investment has been actively promoted. This is clearly reflected in African governments’ policy statements, development strategies, speeches of senior officials, and the direction of public investments, which has,

⁷ International Economic Law (2001), pg 457.

⁸ Asouzu, Amazu A., *International Commercial Arbitration and African States*, Practice, Participation and Institutional Development, (2001): Cambridge, Cambridge University Press.

among others, the objective of creating necessary infrastructure for private investment.

- The legal and regulatory framework for Foreign Direct Investment has been significantly improved. A majority of African countries have revised or promulgated new investment regulations. For example, Kenya passed the Investment Promotion Act in 2004 which came into force from 3rd October 2005, by virtue of Legal Notice 123/2005, Namibia passed the Foreign Investment Act in 1990; Uganda published an Investment Code in 1991; Ethiopia has revised its 1992 Investment Code twice; Ghana adopted an Investment Promotion Centre Act in 1994; Tunisia put in place the Investment Act in 1997; Egypt enacted a new Investment Incentives and Guarantees Law in 1997; and Sudan introduced an Investment Act in 1999.⁹ These legislations simplify investment procedures and provide incentives and good conditions to foreign investors. They also guarantee the repatriation of profits and dividends, assure legal stability and prohibit nationalization and expropriation without compensation. In addition, many countries have revised their company law, commercial law and banking; insurance and capital market laws, which also help to improve the general environment for foreign investment.

International regulation of investments has been strengthened. In addition to national regulation, African countries have signed several kinds of international agreements, which serve to limit the actions of state vis-à-vis, the investors from other economies. The first kind of such agreement is bilateral investment treaties (BITs). According to the data of United Nations Conference on Trade and Development (UNCTAD), African countries had concluded 428 BITs by the end of the 1980s, doubling the number at the end of the 1990s. This is almost one quarter of all BITs in the world, which reached a record figure of 1857 by the end of 1999. Not surprisingly, the bulk of African agreements are signed with European countries, and lately, with developing Asia (China, Malaysia, Japan) and the more advanced African countries (Egypt, Tunisia, South

⁹See Lai, Jinchang. 2001 *“International Investment in Africa: Trends and Opportunities”* African Development Bank’s Private Sector Working Paper Series No. 1

Africa). These agreements provide for investment protection and guarantees, national and most-favoured nation treatments, fair and equitable treatment, prohibition on performance requirements, transparency of national laws, etc. They are strong signals to investors, conveying the governments' desire to maintain a stable and predictable legal framework for encouraging Foreign Direct Investment. The second kind of instrument is bilateral treaties for avoidance of double taxation. African countries have entered into more than 250 such agreements, mainly with European countries. The third kind is the international instruments dealing with disputes involving state and foreign investors. As of August 2005, 42 African countries had joined the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is administered by the ICSID. More than half of the countries have also participated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Additionally, 42 African countries are members of the Multilateral Investment Guarantee Agency (MIGA).

1.1 STATEMENT OF THE PROBLEM

While some African states are parties to Bilateral Investment Treaties and Multilateral Investment Treaties on arbitration and have enacted specific laws dealing with international commercial arbitration and foreign investment, these same states have misgivings about the international commercial arbitral process. They feel that arbitration runs counter to their interests, undermining national judicial sovereignty and generating considerable expense. Often, cities in these states are not chosen as venues for international arbitral proceedings, nor are their nationals frequently appointed as international arbitrators.¹⁰

A cursory look at the statistics reveals that African States in the ICSID arbitration are conspicuous by their absence. A study of the sixty one disputes submitted to ICSID by mid-2005 reveals that only fourteen involved governments of developed countries. Almost all of the other thirty seven disputes (including two conciliation cases) related to

¹⁰ *ibid* note 8

disputes in which the government of a developing country (African states included) or an agency thereof was the defendant. There has been only one case in which the government of an African country was the claimant, Government of *Gabon v. Societe Serete S.A.*¹¹ From ICSID awards, most cases appear to be between multinationals from developed states against developing countries as respondents. However, there is a tendency among the defendant African states to try and avoid the jurisdiction of the ICSID system by using whatever argument is available, by trying to thwart the proceedings, by refusing to appear or by withdrawing from proceedings.

Transnational companies are so much better treated by ICSID that 70 per cent of cases – according to a report recently published by the Institute for Policy Studies – have had rulings or settlements in favour of them. In some cases the mere threat to file a claim against the government of a poor country before ICSID is enough to obtain compensations from it. And that is the least that could happen given the fact that 19 per cent of the cases have been brought against countries with an annual per capita income of less than US\$700. To defend themselves, these governments must hire specialised law firms where each lawyer will charge them US\$800 per hour... and lawsuits could take years to be resolved! On the other hand, less than 2 per cent of cases have been brought against G-8 member countries (the world's most powerful countries).

It is clear that ICSID still requires far much reaching reforms if it is to meet the expectations of African Developing Countries, which form the majority of ICSID membership.

Reforms can be addressed at two levels. On the one hand there is need for structural reform that will address some of the inadequacies of the system that keep African developing countries marginalized. On the other hand ICSID needs to evolve a development friendly jurisprudence that would be consistent. Whereas reforms aimed at resolving both the structural issues and the legal issues are being addressed, a

¹¹ www.worldbank.org.

developmental jurisprudence that gives life to the ICSID Convention provisions and the interests of developing countries, Africa included appears elusive and yet remains a critical component of any significant development of the dispute resolution process of ICSID if the same is to have increased relevance for African countries.

1.2 FOCUS AND OBJECTIVES OF THE STUDY

This project proposes to explore, by way of historical review and examination of specific aspects of the ICSID Convention and whether the institution of ICSID constitutes a development in international investment law jurisprudence. In this regard the study will highlight the following:-

- 1) Examine the jurisprudence of the tribunal and identify any common trends with regard to jurisdiction.
- 2) Examine the relevance of ICSID to African State.
- 3) Recommend appropriate action points for African states to benefit more from participation in order to shape the jurisprudence of ICSID.
- 4) Recommend for reforms

1.3 JUSTIFICATION OF THE STUDY

Foreign direct investment is a large and generally growing component of economic activity around the globe. And as governments liberalise and invite more foreign investment, and investors increasingly commit to operations and business abroad, the opportunities for friction and disputes multiply, so does the need for international arbitration. ICSID provides the ideal mechanism for private parties to participate in international procedures for the settlement of investment disputes with governments.

African states are also keen to exploit the ICSID mechanism, as it guarantees a continuous flow of private investment into their country.

Further given the proliferation of investment treaties, and foreign direct investment, there has been an increase in a number of disputes in which investors look to such treaties, and hence make use of the dispute settlement mechanisms available under them, hence this has seen the growth in the number of investor-state arbitrations. ICSID has become the leading arbitration institution for resolution of investor-state disputes, especially as ICSID may administer arbitrations initiated under such MITs as NAFTA and the growing BITs. Accordingly, familiarity with the regime and jurisprudence of ICSID arbitration is an essential component of any international investment venture.

As a forum, ICSID offers investors various benefits:-

Awards are not challenged in national courts; any request for annulment is determined by another ICSID tribunal set up for that purpose;

ICSID awards are perhaps more readily enforceable than standard arbitration awards. In states, which are signatories to the Convention, they can be enforced as equivalent to final decisions of national courts. They can also be enforced under the 1958 New York Convention;

ICSID is part of the World Bank Group. Host states may comply with awards or settle cases, rather than risk their relationship with the Bank;

ICSID charges a minimal administration fee and does not charge venue costs. Compensation for arbitrators is fixed at a flat rate (presently US\$.2,400/day, plus expenses), which compares well to other institutions, which calculate fees based on the amount in issue.¹²

¹² International Arbitration and Dispute Resolution Newsletter, September 2006 at pg 4

Tribunals have been generous when considering whether acts complained of qualify as acts attributable to the 'host state'. This has allowed investors to seek for redress under BITs before ICSID tribunals for acts of local or regional government and quasi-governmental organizations.

ICSID's recognition and effective protection of substantive and procedural individual rights of investors offers a unique model for strengthening international law and dispute settlement procedures for the benefit of individuals, without the many disadvantages of the classical international law rules on diplomatic protection. Empowering private investors to defend and protect their property rights through international arbitration, rather than merely through national and diplomatic remedies, reflects the constitutional insight that the effectiveness of substantive individual rights depends on complementary procedural rights and on individual access to national and international dispute settlement mechanisms.

While it is true that any judicial bodies have inherent powers arising out of the authority bestowed on them, it is also true, however, that such inherent powers are inevitably affected by the actual scope of the judicial bodies' jurisdiction. It follows that the inherent powers of ICSID tribunals may be different from the inherent powers of other judicial entities, such as the International Court of Justice (ICJ), the case law of which is frequently used by ICSID tribunals for the identification of the substantive rules of international law. Without entering into the thorny debate as to whether ICSID tribunals can be regarded as genuine "international" tribunals, it seems at least possible to observe that there is a difference between the purpose of ICSID tribunals and that of other international judicial entities such as the ICJ.

- ICSID tribunals were indeed conceived to provide foreign investors with some form of redress against discriminatory conduct of Contracting States.

- The interests protected by the ICSID Convention have a predominant economic nature, which can normally be restored through the payment of a sum of money.
- The parties to ICSID arbitration have different nature and belong to different juridical spheres.

The purpose or *raison d'être* of the ICJ, is quite different. The ICJ's role is to settle in accordance with international law the legal disputes between States. It follows that the inherent powers of the ICJ might be different from those of ICSID tribunals.

This study is particularly significant as it seeks to explore and to outline, by drawing from experience elsewhere, how jurisdiction cases properly placed within the African context should be decided especially where the ICSID purports to extinguish protected investment rights. It is believed that this study will contribute to the development of African jurisprudence on this seemingly gray area of international investment law especially from African perspective.

1.4 HYPOTHESIS

The thesis will center around:

1. Evolving jurisprudence is still discordant on issue of jurisdiction and the concepts are not fully developed yet and jurisprudence is inconsistent so one has the feeling each case is dependent on its tribunal.
2. A reform of Dispute Settlement System will increase the relevance of ICSID to African developing states hence enable them achieve their development objectives within the ICSID.

1.5 RESEARCH QUESTIONS

In order to fill this gap the thesis will present the study, which attempts to address the following questions:

- 1) Is there jurisprudence of the tribunal and any common trends with regard to jurisdiction?
- 2) What Impact has ICSID had on African States and how have these countries reacted to the ICSID system?
- 3) How can African states benefit more from participation in order to shape the jurisprudence of ICSID?

1.6 LITERATURE REVIEW

The subject of ICSID has evoked a considerable amount of comment in academic literature since its inception. A number of books and articles have been written on the broad subject of ICSID adopting various approaches – historical, descriptive or analytical. In spite of this, it is not easy to find literature that addresses the precise issue raised by this project. The utility of the existing literature, in terms of books, articles and Internet sources can however not be gainsaid.

The book edited by *Sornarajah*¹³ and *Asouzu*¹⁴ are the major works on the subject. All these works do not however address the specific issues of jurisprudence of ICSID with specific reference to jurisdiction and relevance to African States, which is the subject of consideration in this thesis. The book written by *Sornarajah* focuses on the protection of

¹³ Sornarajah, M. *The International Law on Foreign Investment* (Second Edition), (2004): Cambridge, Cambridge University Press

¹⁴ Asouzu, Amazu A., *International Commercial Arbitration and African States* (2001) Cambridge: Cambridge University Press

foreign investment and the problems associated with such protection. It explores treaty-based methods, and examines several bilateral regional investment treaties. It takes into account not only of the law in this area, but also of the relevant literature in economics, political science and other associated disciplines. While on the other hand, the book written by *Asouzu* focuses on whether arbitration and the Alternative Dispute Resolution methods, as opposed to litigation in national courts in Africa, can contribute to the aspirations and needs of African states and their nationals, whilst at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice to both parties.

Our concern, therefore, is clearly different.

I have also had the opportunity to look at the publication of Schreuer's *Commentary on the ICSID Convention*¹⁵. This book is a detailed, article-by-article discussion of the provisions of the ICSID Convention. It carefully considers how these have been interpreted in the literature and applied in the cases and provides judicious and well-informed views on the issues raised. In addition, it examines ICSID's non-Convention activities such as its operation of the ICSID Additional Facility.

1.7 THEORETICAL FRAMEWORK

With regard to theoretical perspective, I have relied on the classical economic theory on foreign investment, which takes the position that foreign investment is wholly beneficial to the host economy. There are several factors, which are relied on to support this view. The fact that foreign capital is brought into the host state ensures that domestic capital available for use could be diverted to other uses of public benefit i.e. technology, new employment created, new skills associated with the technology, skills in the management

¹⁵ Schreuer, Christoph, *The ICSID Convention: A Commentary*, Cambridge UP 2001

¹⁵ Sornarajah, M., *The International Law on Foreign Investment* (2nd Edition), (2004): Cambridge, Cambridge University Press pg 51-57

of large projects, infrastructure facilities will be built either by the foreign investor or by the state and the upgrading of facilities such as transport, health or education for the benefit of the foreign investor will also benefit society as a whole. Focus on these beneficial aspects of the foreign investment flows enables the making of the policy-oriented argument that foreign investment must be protected by international law. Such protection will facilitate the flow of foreign investment and lead to the economic development of less developed countries.¹⁶

Classical theory of foreign investment has had a strong hold on the policy underlying the international law on foreign investment. It finds expression in many international instruments. The preambles to bilateral investment treaties state the belief that the foreign investment flows between the parties will benefit the development of the host parties. The documents sponsored by the World Bank are clearly based on the classical theory. The Convention on the Settlement of Investment Disputes between States and National of Others (the ICSID Convention) begins with the statement of the belief that provision for the settlement of disputes arising from foreign investments will increase flows of foreign investment. The Multilateral Investment Guarantee Agreement, which provides for the insurance of foreign investment against political risks, was promoted on the basis that it would have 'considerable potential to remove barriers to international investment and give new vigour to the development process.'¹⁷

Classical theory has also influenced the thinking of arbitral tribunals.¹⁸ Further the classical theory also spawned the theory relating to 'economic development agreements'. This theory was that foreign investment contracts made in developing countries, unlike

¹⁶ Sornarajah, M., *The International Law on Foreign Investment* (2nd Edition), (2004): Cambridge, Cambridge University Press pg 51-57

¹⁷ Sihata, I., *The MIGA and Foreign Investment* (1998)

¹⁸ Thus, for example, an arbitration tribunal asserted in *Amco v. Indonesia* (1984) 23 ILM 351 at 369 (para.23) that 'to protect investments is to protect the general interests of development and developing countries'.

1.10 SUMMARY OF THE CHAPTERS

The study is divided into four chapters.

Chapter One: Introduction

This is the introductory chapter and provides the context in which the study is set, the focus and the objectives of the study, its significance and other preliminary issues including the statement to the problem, the theoretical framework, literature review, hypothesis, research question and limitation to the study.

Chapter Two: Outline of the Jurisdiction under the ICSID Convention

This chapter deals with the jurisdiction of the Centre as well as the competence of the tribunals; Competence Ratione Personae; Competence Ratione Materiae and Competence Ratione Temporis.

Chapter Three: ICSID's Evolving Jurisprudence on its jurisdiction and Relevance to African States

Focuses on major developments in the ICSID jurisprudence on its jurisdiction during the period and also deals with the experiences of African states with arbitration under the ICSID Convention.

Chapter Four: Conclusions and Recommendations

It is the final chapter of the study and seeks to draw some conclusions and give recommendations on the way forward.

CHAPTER TWO: OUTLINE OF THE JURISDICTION UNDER THE ICSID CONVENTION

2.0 INTRODUCTION

2.1 Overview of ICSID Administration and Procedure

The Convention is very flexible with regard to the choice of law. It does not contain any substantive rules it merely offers a procedure for the settlement of investment disputes. But the Convention does contain a rule on applicable law. In other words, it directs tribunals how to find the rules to be applied to particular disputes. Tribunals are to follow any agreed choice of law by the parties. In the absence of an agreed choice of law, the Tribunal is to apply the law of the host State and international law.¹ In applying international law, tribunals have applied treaties, especially BITs, as well as customary international law. General principles of law and judicial practice, especially of previous ICSID tribunals, have also played a prominent role. A tribunal may decide *ex aequo et bono*, that is on the basis of equity rather than law, only if it has been so authorised by the parties.

2.1.1 *Parties to the Proceedings*

Proceedings under the Convention are always mixed. One party (the host State) must be a Contracting State to the Convention. The other party (the investor) must be a national of another Contracting State.² Either party may initiate the proceedings. States may also authorize constituent subdivisions or agencies to become parties in ICSID proceedings on their behalf. The investor can be an individual (natural person) or a company or similar entity (juridical person). Both types of persons must meet the nationality requirements under the Convention.

¹ Article 42 of the Convention.

² Article 25(1) of the Convention.

(a) *Participation in Convention*

Both the host State and the investor's State of nationality must be Contracting Parties, that is, they must have ratified the Convention. The decisive date for participation in the Convention is the time of the institution of proceedings. If either State is not a party to the Convention, ICSID is not available but it may be possible to proceed under the Additional Facility. For a locally incorporated Company, an additional requirement is that the investor must not be a national of the host State. But if a foreign investor operates through a company that is registered in the host State, it is possible for the investor and the host State to agree that the company will be treated as a foreign investor because of foreign control.³

(b) *Self-Contained and Automatic Nature of Proceedings*

Proceedings under the Convention are self-contained. This means that they are independent of the intervention of any outside bodies. In particular, domestic courts have no power to stay, to compel or to otherwise influence ICSID proceedings. Domestic courts would have the power to order provisional measures only in the unlikely case that the parties agree thereto.⁴ An ICSID tribunal has to obtain evidence without the legal assistance of domestic courts. An annulment or other form of review of an ICSID award by a domestic court is not permitted.⁵ It follows that the place of proceedings has no practical legal consequences under the Convention

(c) *Non-frustration of proceedings*

ICSID proceedings are not threatened by the non-cooperation of a party. The parties have much flexibility in shaping and influencing the proceedings. But if one of them

³ Article 25(2)(b) of the Convention.

⁴ Under Article 47 of the Convention a tribunal has the power to recommend provisional measures.

⁵ Article 52 of the Convention provides for an autonomous system for the annulment of awards under narrowly defined circumstances.

should fail to act, the proceedings will not be stalled. The Convention provides a watertight system against the frustration of proceedings by a recalcitrant party. Arbitrators not appointed by the parties will be appointed by the Centre.⁶ The decision on whether there is jurisdiction in a particular case is with the tribunal.⁷ Non-submission of the memorials or non-appearance at hearings by a party will not stall the proceedings.⁸ Non-cooperation by a party will not affect the award's binding force and enforceability.

(d) *Effectiveness Of The System*

The system of arbitration is highly effective. This effectiveness is the result of several factors. Submission to ICSID's jurisdiction is voluntary but once it has been given it may not be withdrawn unilaterally. The principle of non-frustration means that a case will proceed even if one party fails to cooperate. This circumstance alone will be a strong incentive to cooperate.

(e) *Binding Nature of Awards*

Awards are binding and final and not subject to review except under the narrow conditions provided by the Convention itself.⁹ Non-compliance with an award by a State would be a breach of the Convention¹⁰ and would lead to a revival of the right to diplomatic protection by the investor's State of nationality.¹¹

(f) *Enforcement of Awards*

The Convention provides an effective system of enforcement. Awards are recognized as final in all States parties to the Convention. The pecuniary obligations arising from

⁶ Article 38 of the Convention.

⁷ Article 41 of the Convention.

⁸ Article 45 of the Convention.

⁹ Articles 49-52 of the Convention.

¹⁰ Article 53 of the Convention.

¹¹ Article 27 of the Convention.

awards are to be enforced like final judgments of the local court in all States parties to the Convention.¹² Domestic courts have no power to review ICSID awards in the course of their enforcement. However, in the case of an award against a State the normal rules of immunity from execution will apply. In actual practice this will usually mean that execution is not possible against assets that serve the State's public functions.¹³

2.2 Examination Of Jurisdiction

Jurisdiction is determined in the ICSID system by the Secretary General, even though only in a limited manner. This is performed upon the submission to him of an arbitration request.¹⁴ If the request is registered by the Secretary General and a tribunal is constituted, the tribunal may consider jurisdiction at any time. Under Article 36(3) the Secretary General shall not register a request for arbitration if he discovers through the information contained in the request that 'the dispute is manifestly outside the jurisdiction of the Centre.'

Objections can be made to jurisdiction. Arbitration rule 41 states that jurisdiction objections must 'be made as early as possible'. Generally, objections must be filed with the Secretary General 'no later than the expiration of the time limit fixed for the filing of the counter-memorial or of the rejoinder.'¹⁵ Finally, an ICSID tribunal may consider at any stage of the proceedings whether a dispute or ancillary claim before is within the jurisdiction of the Centre and within its competence.¹⁶

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

¹² Article 54 of the Convention.

¹³ Article 55 of the Convention.

¹⁴ ICSID Convention Art. 36.

¹⁵ ICSID Arbitration Rule 41.

¹⁶ ICSID Convention Art. 41(1).

The jurisdiction of ICSID, as well as of the competence of tribunals, must be established under both the Convention (or the ICSID Additional Facility Rules), and the BIT or MIT concerned. The jurisdiction may be contested by objections to jurisdiction *ratione personae*, objections to jurisdiction *ratione materiae* and objections related to the parties' consent.

2.2.1 *Institutional Jurisdiction its scope and Limitations*

The basic requirements for ICSID jurisdiction are set forth in Article 25 of the Convention. To find jurisdiction, an ICSID tribunal must determine that (1) there is a legal dispute arising directly out of an investment, between (2) a national of a Contracting State (an investor), and (3) another Contracting State, (4) which the parties have consented in writing to submit to ICSID for resolution.

Provisions on ICSID jurisdiction are set out in Articles 25 to 27.

Article 25(1) states that:-

Therefore, three requirements have to be satisfied in order for ICSID to have suitable jurisdiction. These requirements are consent of the parties, personal jurisdiction, and subject matter jurisdiction.

2.2.2 *Jurisdiction Ratione Materiae*

A provision in a contract or BIT, in terms of which investment disputes may or must be submitted to ICSID for arbitration, normally provides the necessary consent that ICSID requires. However, this does not mean that the ICSID tribunal will automatically have jurisdiction; the jurisdictional requirements of ICSID must still be met.¹⁷

¹⁷ See Schreuer, *The ICSID Convention: A Commentary*, paras 80 ff or a discussion of the drafting history of the Convention with specific reference to the issue of including a definition for "investment" or not.

Article 25(1) of the Convention provides as follows:

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.

The encouragement of economic development of states through private cross-border investment is the *raison d'être* of the Convention. Indeed under Article 25(1) the jurisdiction of ICSID over disputes depends on the existence of such an “investment”.

The Convention does not contain the definition of the term “investment”. However, the omission did not result from an oversight. In fact, definitions were proposed and considered but rejected by the drafters of the Convention. The prevailing wisdom was that any definition would only serve to artificially limit the scope of the Convention and result in unnecessary jurisdictional disputes. Thus, except for in the most obvious cases, which may be screened out by the ICSID Secretary General, the question of whether an investment was made is normally left to be answered by ICSID tribunals.

The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States¹⁸ states that:

“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))”.

¹⁸ In para 27; The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, IBRD 18 March 1965.

The absence of a definition makes it possible to have a fairly liberal interpretation when it comes to deciding what an investment would be.

Until relatively recently only a few jurisdictional challenges addressed the question of whether or not an investment had been made. It appears that parties correctly concluded that the expression of consent to ICSID arbitration in a particular contract or project, effectively disposed of the question. However, the rise of BITs and investment encouragement legislation signaled a change. These treaties tend to contain blanket consent to ICSID jurisdiction over any foreign investment related dispute. As the direct relationship between the expression of consent and a particular transaction diminished, the question of whether the disputed transaction amounts to an investment for the purposes of Article 25(1) has in some cases come to the fore.

An ICSID 'dispute' may include the complete range of issues between the parties relating to an investment. The Convention allows for the assertion of additional claims or counterclaims if they 'arise directly out of the subject matter of the dispute.'¹⁹

2.2.3 *Jurisdiction Ratione Personae*

Very closely related to the element of investment, is the identity of the investor. If the investor is not a person entitled to the protection provided by the BIT, he cannot rely on the BIT and this forms the second element of the determination of ICSID's jurisdiction. All BITs and other international instruments dealing with investment, as well as ICSID provide definitions of which they consider to be investors. The determination of an investor is a less cumbersome and complicated process than that used in the determination of an investment. The criteria to be used are universal and in essence limited to the determination of nationality on the side of both natural and juridical persons.

¹⁹ ICSID Convention Art. 46.

The Convention sets forth the following provisions concerning jurisdiction *ratione personae*:

Article 25

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

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Based on the latter provisions, the following elements of jurisdiction *ratione personae* can be derived. Firstly, a Contracting State or any constituent subdivision or agency of a Contracting State designated to the Centre by that State shall stand on one side. On the

other side, there must be an investor being the national of another Contracting State. The investor party to the dispute can be either a natural or a juridical person.

The only requirement of the Convention with regard to natural persons is that on certain dates²⁰ they must bear the nationality of a Contracting State other than the State party to the dispute. The case is not so simple as to juridical persons, which, on the one hand, are eligible for ICSID jurisdiction if it 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. On the other hand, there is a special opportunity for juridical persons having the same nationality as the State party on the date on which the parties consented to submit such dispute to conciliation or arbitration. If such a juridical person is involved in the dispute and the parties have agreed that because of foreign control that juridical person shall be treated as a national of another Contracting State for the purposes of the Convention, the jurisdictional requirements are also met.

So much is provided for in the Convention. The exact meaning of those provisions, i.e. the identity of the State party, constituent subdivisions and agencies, the identity of the investor party, natural and juridical persons, will be dealt with separately hereinafter.

(a) *Identity of the State Party*

Identification of a State party is not difficult, the list of Contracting States is registered at the ICSID Secretariat continuously²¹. It is important to mention at this point which states can become ICSID Contracting States. Pursuant to Article 67 of the Convention, the Convention shall be open for signature on behalf of States members of the Bank. It shall

²⁰ On the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36.

²¹ As of 3 November 2003 (status displayed on <http://www.worldbank.org/icsid/constate/c-states-en.htm> on 26 October 2004), there are 154 signatories to the Convention 140 of which have deposited the instruments of ratification.

also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

(b) *Identity of the Investor Party*

As shown above, the investor party can be:

- a) A natural person having a nationality of a Contracting State other than that of the State party on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered;
- b) a juridical person having 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 arbitration; or
- c) a juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention.

Article 25(2) of the convention requires that the individual or private investor that has the advantage of making use of this dispute settlement facility must be a 'national of another Contracting State'. Article 25(2)(a) reads as follows:

“National of another Contracting State” means”:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3)

of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;

The personal jurisdiction of ICSID restricts the parties eligible for dispute resolution to a Contracting State and a foreign investor. As well as consenting to ICSID arbitration, both parties must qualify as proper persons. Article 25 (1) requires that the dispute be 'between a Contracting State and a national of another Contracting State...' this however is not as straightforward as it seems. The home and host states of the investor must each be a Contracting State, that is a state that had, at least thirty days earlier, deposited an instrument of ratification, acceptance or approval with the World Bank.²² It is not essential that the governmental party or the foreign national's state be members of the Centre on the day of the agreement which the parties agree to ICSID arbitration, but they have to be members of the Centre on the date of the submission of the dispute to the Centre.²³

The Convention also allows Contracting States to assign designated constituent subdivisions or agencies the power to include ICSID dispute settlement clauses in negotiated contracts. In addition any agreement by a designated subdivision or agency to submit disputes to ICSID must, under Article 25(3) of the Convention, be approved by the state or subdivision or agency unless that state notifies ICSID that no such approval is required.

The non-governmental disputant must be a 'national of another Contracting State'.²⁴ A foreign national can be either a natural or a juridical person. In either case, the person must be of 'the nationality of a Contracting State other than the State Party to the dispute

²² ICSID Convention, Arts. 68 and 70.

²³ Amerasinghe, P., *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, British Yearbook of International Law 231 (1974).

²⁴ ICSID Convention, Art.. 25(1).

on the date on which the parties consented to submit such dispute to conciliation or arbitration.²⁵ A natural person has to satisfy two further requirements:

- (a) The natural person must be a national of another Contracting State on the date the request for arbitration is submitted.
- (b) The natural person may not be a national of the Contracting State that is a party to the dispute on either the date of the consent or on the date on which the request was registered.²⁶

In the case of the Convention, however, all that is required to ascertain the nationality of a natural person is a relationship with a Contracting State, irrespective of whether that state claims him to be its national for other purposes, and there is no requirement that the natural person prove that the Contracting State in fact makes this claim.

Article 25(2)(b) of the Convention provides an exception. It allows juridical persons who are nationals of the state party to the dispute to become parties to ICSID proceedings if the parties agreed to treat the juridical persons as national of another Contracting State where the juridical person is under foreign control.

The requirement that the investor must be a national of the Contracting State is also found in every BIT as well as the MIT. The reason for this requirement is obvious. The individual's nationality accords him a particular position in international law. Nationality bestows on the individual the benefit of the protection provided by his state in particular circumstances, or as in these cases, the additional right or privilege to be able to refer an investment dispute to an international tribunal without having to rely on the State for protection or intervention.

²⁵ ICSID Convention, Art. 25(2)(a) and (b).

²⁶ ICSID Convention, Art. 25(2)(a).

Whether a particular individual has the nationality of a particular state, depends on the national legislation of that state²⁷. International law leaves it entirely up to individual states to decide whether they will afford nationality to a particular individual. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides the following:

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

2.2.4 *Competence Ratione Temporis*

The dramatic increase in BITs entering into force over the past several years has also given rise to increased discussion and interpretation of ICSID's tribunal's jurisdiction *ratione temporis*.

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

Under customary international law, treaties do not as a general matter apply retroactively. This rule of customary international law is embodied in Article 28 of the Vienna Convention on the Law of Treaties, which states:

'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any

²⁷ Subject to small variations, BITs define "nationality" with reference to the Parties' national laws on citizenship. See Dolzer and Stevens, *Bilateral Investment Treaties*, 31-33; Schreuer, *The ICSID Convention: A Commentary*, 267 ff.

situation which ceased to exist before the date of the entry into force of the treaty with respect to that party’.²⁸

At the same time, Paragraph (3) of the official Commentary to the Vienna Convention clarifies that when ‘an act or fact or situation which took place or arose prior to the entry into force of a treaty continue to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty.’²⁹ It further states that ‘[t]he non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.’³⁰ Additionally, Paragraph (2) of the Commentary provides that jurisdictional clauses that refer ‘disputes’ to international tribunals, where such disputes do not include any qualifications as to when the ‘disputes’ arose, do not violate the non-retroactivity principle. It states that ‘[b]y using the word ‘disputes’ without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement.’³¹

Thus pursuant to Article 28, a treaty will not apply retroactively to acts or facts which occur or cease to exist before it enters into force, but will be deemed applicable to acts, omissions, facts or conduct which take place or continue to exist after it enters into force. When a claim submitted to ICSID enters around an ‘existing’ dispute, even if that dispute were deemed to have originally arisen prior to the BIT’s entry into force, the ICSID tribunal would not violate the principle of non-retroactivity by assuming jurisdiction over it³²

²⁸ The Vienna Convention on the Law of Treaties, 23 May 1969, Article 28, 1155 U.N.T.S.331 (entered into force on 27 January 1980).

²⁹ The Vienna Convention on the Law of Treaties: Travaux Préparatoires 220, para. 3 (compiled by Dr. Ralf Gunter Wetzel; Prof. Dr. Dietrich Rauschning ed. 1978).

³⁰ The Vienna Convention on the Law of Treaties: Travaux Préparatoires 220, para.3.

³¹ The Vienna Convention on the Law of Treaties: Travaux Préparatoires 220, para.3.

³² A number of cases i.e. *Marvin Roy Feldman Karpa v. United Mexican States*³², *Mondev International Ltd and United States of America*³², *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*³² and *SGS v. Philippines* follow the principle of Article 28 of the Vienna Convention that treaties do not

The proper application of the non-retroactivity principle is of particular significance when an ICSID tribunal has to deal with a systematic and continuous pattern of conduct, attributable to the respondent state, that has resulted, subsequent to the BIT's entry into force, in current and continuing breaches of the BIT. In such situations, the fact that some of the governmental conduct took place prior to the BIT's entry into force cannot be the basis for excluding such conduct from the tribunal's consideration. According to Article 14(2) of the Articles for *State Responsibility*, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.'³³ As stated by Special Rapporteur Roberto Ago in his Fifth Report on State Responsibility:

'There will be a breach of the international obligation with which the conduct of the State is in conflict in so far as, for a certain time at least, the continuance of the act of the State and the existence of the obligation incumbent on it are simultaneous. If the conduct began before the obligation came into force for the State and continues thereafter, there will be a breach of the obligation from the moment when it began to exist for the State.'³⁴

The tribunal in *SGS v. Philippines* adhered to this precise rule when it stated that 'it is clear that [the BIT] applies to breaches which are continuing at [the date of the BIT's entry into force], and the failure to pay sums due under a contract is an example of a continuing breach.'³⁵

apply retroactively, but nevertheless, do apply to measures and disputes that continue to exist after the treaty's entry into force.

³³ Articles on Responsibility of States for Internationally Wrongful Acts, 2 Y.B. *Int'l L. Comm'n* 14, Article 14(2) (2001).

³⁴ Roberto Ago, *State Responsibility: Fifth Report on State Responsibility*, Document A/CN.4/291 and ADD.1-2, 2 Y.B. *Int'l L. Comm'n*, Part One, para. 62 (22 March, 14 April, and 4 My, 1976) (emphasis added).

³⁵ *SGV v. Philippines*, Decision on Jurisdiction, para. 167.

In addition, the breaching conduct may comprise a series of actions or omissions that taken as a whole are wrongful, whether or not severally lawful. In that case, consistently with the principle of non-retroactivity, an ICSID tribunal will have jurisdiction if at least some of the actions and omissions occur after the applicable treaty's effective date. Article 15(1)-(2) of the *Articles on State Responsibility* provides:

- '(1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

- (2) In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.'³⁶

The Commentary to Article 15 provides examples of this conduct, including 'systematic acts of discrimination prohibited by a trade agreement.'³⁷ It further states that '[o]nly after a series of action or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e., an act defined in aggregate as wrongful.'³⁸ Thus, the composite act does not 'occur' until the completion of the series, and it is sufficient that the point of completion, rather than every event in the series, takes place after the effective date of the treaty in order for a tribunal to find that it has jurisdiction *ratione temporis*. The Commentary also provides that 'while composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation.'³⁹

³⁶ Articles on State Responsibility, Article 15(1)-(2).

³⁷ Articles on State Responsibility, Commentary to Article 15, para. 2.

³⁸ Articles on State Responsibility, Commentary to Article 15, para. 7.

³⁹ Articles on State Responsibility, Commentary to Article 15, para. 7.

One should be mindful of the fact that the general principle of non-retroactivity as described above applies in the absence of a specific agreement between the parties to a treaty providing otherwise.

As Article 28 of the Vienna Convention states, the rule applies '[un]less a different intention appears from the treaty or is otherwise established.'⁴⁰ Thus, while the principle of non-retroactivity governs the applicability *ratione temporis* of the substantive provisions of a treaty, the parties to an investment treaty are free to impose further limitations on the jurisdiction of an ICSID tribunal *ratione temporis*. As the *Salini* tribunal observed, 'one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal (i.e., the existence of a dispute) and applicability *ratione temporis* of the substantive obligations contained in a BIT'.⁴¹

For example, the parties to a treaty can limit ICSID's jurisdiction *ratione temporis* by excluding from their scope of consent to such jurisdiction disputes that have arisen before the entry into force of the BIT. This is the case of some BITs that expressly exclude disputes arising before the BIT entered into force, even if the disputes continue to exist after the BIT's effective date and even if they involve conduct, facts or situations continuing or occurring after that date.⁴² Under this type of provision, a tribunal would not have jurisdiction over disputes that arose before the BIT's entry into force even when such disputes are of a continuing nature. In other words, while the acts, facts and situations have not ceased to exist and are, therefore, covered by the scope of the BIT's substantive provisions, an ICSID tribunal would have no jurisdiction if the dispute relating to such acts, facts, or situations arose prior to its entry into force.

⁴⁰ Vienna Convention, Article 28.

⁴¹ *Salini v. Jordan*, Decision on Jurisdiction, para. 176.

⁴² See *Agreement between the Portuguese Republic and the Islamic Republic of Pakistan on the Mutual Promotion and Protection of Investments*, 17 April 1995, Article 11 (Article 11, 'Application of the Agreement States' that the BIT 'shall not apply to any dispute concerning investments which have arisen before its entry into force').

2.3 Concluding remarks on ICSID's Jurisdiction

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

The rise of BITs and regional multilateral agreements, which refer to ICSID as the chosen arbitration forum, will make it more relevant as time passes by. That is why States should be aware of the circumstances in which ICSID has jurisdiction. That might persuade parties not to file claims where there is no jurisdiction or not to object jurisdiction when it is groundless.

CHAPTER THREE: THE EVOLVING JURISPRUDENCE OF ICSID AND RELEVANCE TO AFRICAN STATES

3.0 INTRODUCTION

The cases before ICSID are only those in which both parties have consented in writing to submit their disputes to ICSID's jurisdiction. Becoming a party to the Convention does not at the same time constitute agreement to submit any disputes to ICSID's jurisdiction; that is usually done in a BIT or separate agreement, such as in Article 4:4 of Chapter IV of the VBTA. However, under Article 25(1) of the Convention once a party to a dispute (private or government) gives consent such consent may not be withdrawn.¹

Most signatory States to the ICSID Convention object to the jurisdiction of the Centre once a claim is filed against them.² Obviously, the mere ratification of the Convention does not vest jurisdiction on the ICSID. But the signals sent by sometimes superfluous objections seem to be in contradiction with the ones sent by signing the Convention.

It may simply be the case that as more investors become aware of and benefit from treaty protections, more investors are also acting to enforce them. With the growth in the number of investor-state arbitrations has come considerable scrutiny of the jurisdictional requirements for investors' claims. This is in part a function of the fact that, because of many of the pending cases were filed recently; many of them are still embroiled in the opening phases of their proceedings including challenges to jurisdiction. Thus, the parameters of jurisdiction in investor-state treaty arbitrations are evolving and crystallizing as additional jurisdictional decisions emerge. It is also partly a function of the fact that, to some, the growth in investor-state arbitration is itself a cause of alarm, or at least introspection and caution, leading to questions about whether overly generous jurisdictional standards are to blame.

¹ *ibid* note 2.

² States feel that resorting to local jurisdiction is all about controlling constitutionality, a matter of ensuring that the essential principles of a country's highest law are not laid waste by an unaccountable foreign body.

The jurisprudence of ICSID on jurisdiction is setting the criteria in areas where it was unclear whether an investment legal dispute fell or not under its authority. Known investment treaty arbitrations surged from almost zero to almost 250 by 2005, most of the cases being conducted under ICSID. Whereas the conclusion of BITs had its peak in the middle of the nineties and is since then relatively declining, the disputes arising out of those BITs are on a continuous surge. Many of the indeterminate legal terms to be found in the BITs have only recently become more clarified by the decisions of ICSID tribunals and many of the interpretations are highly disputed, e.g. the jurisdictional question on who is an investor where not only the question of nationality but also the question of minority shareholders arise; the meaning of “Fair and Equitable Treatment” as well as the “Umbrella-Clause”; that is, under what circumstances does a breach of contract amount to a breach of Public International Law with the consequence of international jurisdiction, the scope of the MFN clause and its possibility for forum shopping.

As an example cases where the tribunal examined these different questions and rendered decisions either upholding jurisdiction or rejecting jurisdiction thus creating jurisprudence will be described.

3.1 RATIONE MATERIAE

3.1.1. What is an investment?

Article 25(1) the jurisdiction of ICSID over disputes depends on the existence of an ‘investment’. Upon first reading, it may therefore be surprising that the Convention contains no definition of the term ‘investment’. Until relatively recently only a few jurisdictional challenges addressed the question of whether or not an investment had been made.

*Fedex N. V. v. Venezuela*³ was the first case in which the respondent state challenged the jurisdiction of the tribunal because the underlying transaction allegedly did not meet the requirements of an investment under the Convention. Fedax claimed that Venezuela breached the Netherlands-Venezuela BIT when it failed to pay on promissory notes that had been assigned to Fedax. Venezuela defended on the basis that the Tribunal had no jurisdiction because Fedax did not have an investment. Like most modern BITs, the Netherlands-Venezuela BIT included a broad definition of “investment”. Article 1(a) of the Treaty defined “investments” as every kind of asset,” and gave a broad list of examples, including “rights derived from shares, bonds, and other kinds of interests in companies and joint-ventures”, and “title to money, to other assets or to any performance having an economic value”.

Venezuela argued that Fedax’s right to payment under the notes could not be “every kind of asset”, under Article 1(a) of the Treaty, because, to satisfy this definition an activity must involve “the laying out of money or property in business ventures, so that it may produce a revenue or income.” Venezuela also argued that Fedax did not have an investment for purposes of Article 25(1) of the Convention. Venezuela relied on traditional definitions of investment, arguing that Fedax had neither a direct foreign investment nor a portfolio investment. Venezuela argued that Fedax’s right to payment under the notes was not foreign direct investment because that involves “a long term transfer of financial resources – capital flow – from one country to another (the recipient of the investment) in order to acquire interests in a corporation, a transaction which normally entails certain risks to the potential investor.” Venezuela argued that Fedax did not have a portfolio investment because that sort of investment is only recognised in Venezuela when the purchaser acquires title directly.

The Tribunal first addressed whether Fedax had an investment for the purposes of the Convention. The Tribunal classified the promissory note as a loan and concluded that the Centre had jurisdiction over loans. The Tribunal relied on opinions of commentators and

³ ICSID Case No. ARB/96/3 Decision on Objections to Jurisdiction (July 11, 1997), 1997 WL 33797791, reprinted in 37 I.L.M. 1378 (1998), at para. 19.

an earlier draft of the Convention, subsequently discarded, under which “investment” was defined as “any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years.” Finally, it concluded that “[s]ince promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this.”

The Tribunal then considered whether Fedax had an investment under the BIT, concluding that the right to be paid under the notes fell within the broad definition of investment used in the treaty. The Tribunal also partly relied on Article 5 of the BIT, under which the Parties guarantee the transfer of payments relating to an investment, including the transfer of funds for the reimbursement of loans. It concluded that the drafters of the treaty would not have included such a provision if they did not intend loans to be an investment. The Tribunal also noted that the treaty’s definition of investment was consistent with the broad definition used in most modern investment treaties, and that “only exceptionally has a multilateral treaty strictly related the listing of given assets such as interests to equity investments, or excluded claims to money that arise solely from commercial contracts for the sale of goods or services.

Finally, the Tribunal considered the effect of the fact that Fedax was only an assignee. The Tribunal found that Venezuela foresaw the possibility that the notes would be transferred and that “although the identity of the investor will change with every endorsement, the investment itself will remain constant. Furthermore, the Tribunal distinguished the transactions from “ordinary commercial transactions,” partly because they involved a “fundamental public interest.” According to the Tribunal, the law under which the notes were issued “was enacted to provide for the orderly development of public financial arrangements and has been appropriately utilised by the Republic of Venezuela in this case.

In conclusion the Fedax Tribunal introduced the criteria with: “The basic features of an investment have been described as involving a certain duration, a certain regularity of

profit and return, assumption of risk, a substantial commitment and a significance for the host State's development. In support of this statement, the Tribunal referred to Professor Schreuer where he explains that the criteria are not requirements.⁴

After *FEDAX v. Venezuela*, another arbitral tribunal, in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*⁵, also favoured the approach towards an objective test for determining whether a particular transaction is an investment under Article 25(1) of the Convention. The tribunal analyzed the objections to its jurisdiction, one of which referred to the argument that construction contracts did not qualify as investments under the Convention. The Tribunal considered the criteria generally identified by the Convention's commentators, indicating that those were: existence of contribution, certain duration and risk participation. It also added that the operation should contribute to the development of the host State as stated by the Convention's preamble. In that specific case the Tribunal found that the construction contract fulfilled the criteria. Even in the risk aspect, the Tribunal indicated that a construction project that lasts several years, for which total costs cannot be established with certainty in advance, created a risk for the contractor. Thus, the construction operation could be qualified as investment and the disputes that arose directly out of it were susceptible to be heard by ICSID.

The Tribunal, for example, stated that “[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction.

Salini v. Morocco, the arbitral tribunal eventually found that the contract between ADM and the Italian companies constituted an “investment” pursuant to the terms of the BIT as well as Article 25 of the Convention. However, rather than focusing the analysis exclusively on the consent of the parties, the tribunal reached that conclusion only after testing whether the contract in question had met the overall objective criteria referred to

⁴ Schreuer C., “Commentary on the ICSID Convention,” 11 *ICSID Review – Foreign Investment Law Journal* 1318 (1996) at 372.

⁵ Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/00/4.

above. In this regard, *Salini v. Morocco* represents a significant jurisprudential development.

In the last step in the conceptual evolution of the meaning of the term “investment” under the Convention is the arbitral decision in *Joy Mining Machinery Limited v. Egypt*.⁶ This case was the first time ever that an ICSID arbitral concluded that it lacked jurisdiction because the transaction involved in the dispute did not qualify as an “investment” under Article 25 of the Convention.

In *Joy Mining v. Egypt*, a British company alleged that it supplied mining equipment to an Egyptian State enterprise, IMC, for a project in Egypt under a contract requiring the claimant to put in place letters of guarantee. The claimant also alleged that although the equipment had been paid for, the guarantees were never released, and that it had been prevented by the Egyptian government from carrying out the commissioning and performance testing of the equipment, which was a prerequisite for the release of the guarantees. Thus, the claimant sought damages for the full value of the bank guarantees not released, and argued that Egypt had violated its obligations under the BIT with the United Kingdom, in particular by expropriating and depriving Joy Mining of the returns of its investment and by failing to accord fair and equitable treatment and full protection and security. Among other objections to jurisdiction, Egypt argued that the bank guarantees could not be considered as “investment” under the BIT and the Convention.

Following an objective approach towards determining whether the transaction involved was a covered investment under the BIT, the tribunal concluded that the guarantees were merely a contingent liability and an ordinary feature of a sales contract and, therefore, not an “investment”.⁷

Making reference to the *FEDAX Case*, the claimant had argued that the guarantees fell within the definition of “investment” used in the BIT, which included “*claims to money*

⁶ Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11.

⁷ *Ibid.*, para 45.

or to any performance under contract having a financial value". However, the *Joy Mining* Tribunal was not persuaded by this argument, and stated the following:

"...Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterising as an investment dispute a dispute which in essence concerns a contingent liability. The claim here is very different from that invoked in *Fedax* where the promissory notes held by the investor were the proceeds of an earlier credit transaction pursuant to which the State received value in exchange for its promise of future payment."⁸

Further, after applying the same test used by the tribunal in *Salini v. Morocco*, the tribunal concluded that the guarantees did not possess the essential qualities to qualify as an "investment" under Article 25 of the Convention. Thus, ICSID jurisprudence on term "investment" evolved from being an element on which the parties could basically freely agree upon towards becoming an idiom containing objective criteria.

"The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision..."⁹

Further, the tribunal in *Joy Mining v. Egypt*, following the reasoning in the previous *Fedax v. Venezuela* and *Salini v. Morocco*, consolidated the four requirements that, taken together, characterize an "investment":

"Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development. To what extent

⁸ *ibid*, para 47.

⁹ *Ibid*, para 50.

these are met is of course specific to each particular case they will normally depend on the circumstances of each case.”¹⁰

In the *Ceskoslovenska Obchodni Bank As (CSOB) v. Slovak Republic*¹¹ the Tribunal in the second decision on objections to jurisdiction addressed the principle of effectiveness and finality of jurisdiction. The Tribunal admitted that the principle of effectiveness and finality of jurisdiction implied that when a tribunal has jurisdiction over a matter it could be extended to secondary or incidental questions provided it is necessary to adjudicate the dispute over which it has jurisdiction. However, the Tribunal pointed out that that principle cannot override the basic rule that arbitral jurisdiction is based on consent of the parties. In that case the consent of the parties only extended ICSID’s jurisdiction to disputes between certain parties related to a specific agreement.

The subsequent CSOB decision quickly extinguished any doubt that loans can be investments under either the Convention or BITs. The case arose out of the privatisation of a Czechoslovakia state bank, CSOB, and its restructuring so it could operate in both the Czech and Slovak Republics. The agreement underlying the transaction provided for the assignment by CSOB on the right to payment on non-performing loans to companies established in the two Republics. The companies were to pay CSOB for the assigned receivables and CSOB brought an ICSID action under the Czech Republic-Slovak Republic BIT when the Slovak company failed to do so.

The Slovak Republic challenged the Tribunal’s jurisdiction on the grounds, *inter alia*, that the loans were not investments under either the BIT or the Convention. The Tribunal dismissed both objections. With regard to the BIT, the Tribunal concluded that “terms as broad as ‘assets’ and ‘monetary receivables or claims’ clearly encompass loans extended to a Slovak entity by a national of the other Contracting Party.” Furthermore, the Tribunal concluded that a loan could also be an investment for the purposes of the Convention “if

¹⁰ Ibid, para. 53.

¹¹ ICSID Case No. ARB/97/4 24 May 1999.

only because under certain circumstances a loan may contribute substantially to a State's economic development.

In determining if the specific loan in question qualified as an investment, the Tribunal, interestingly, examined the transaction as a whole. The Tribunal concluded:

TCSOB's activity in the Slovak Republic and its undertaking to ensure a sound banking infrastructure in that country compel the conclusion that CSOB qualifies as the holder of an "asset invested or obtained" in the territory of the Slovak Republic within the meaning of Article 1(1) of the BIT, including "movable and immovable property and any other encumbrances, including any mortgages, liens, guarantees, and similar rights" (Art. 1(1)(a)) and "monetary receivables or claims to any performance related to an investment" (Art. 1(1)(c)).

In regards to the Convention, the Tribunal concluded the "undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention.

The question has arisen in a number of ICSID arbitrations whether the ICSID tribunal has jurisdiction to resolve claims on a breach of contract as opposed to claims amounting to breaches of international law standards. The relevant contract may frequently include a jurisdiction clause, which refers contractual disputes to another forum.

Although the umbrella clause has been a subject of scholarly discussion for some decades now, it has never been part of jurisprudence until very recently. The first ICSID case that addressed the umbrella clause arose in 1998: *Fedax NV v. Republic of Venezuela*¹² based on the BIT between the Netherlands and the Republic of Venezuela. In this case, the tribunal was unaware that there was an umbrella clause, and did not carry out any in-depth examination of the clause or its application.

¹² *Fedax NV v. Republic of Venezuela*, Award 9 March 1998, 37 I.L.M. 1391 (1998).

It simply applied its “plain meaning”, that commitments should be observed under the BIT, to the promissory note contractual document. It found that Venezuela was under the obligation to “honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued”.¹³ The merits of the case were partially settled by the parties.

The first time an arbitral tribunal evaluated the scope of an umbrella clause was in *SGS (Societe Generale de Surveillance S.A.) v. Islamic Republic of Pakistan, International Arbitration*,¹⁴ appeared to be the first ICSID Tribunal facing the issue of whether a BIT provision could transform a purely contractual claim into a BIT claim.

In this case a Swiss company, SGS, had entered into a pre-shipment inspection agreement (the “PSI Agreement”) providing for all claims to be resolved by arbitration in Pakistan. Subsequently, Pakistan notified SGS that the contract was terminated. In 1998 SGS commenced proceedings in the Swiss courts alleging Pakistan’s unlawful termination of the PSI Agreement. Those claims were eventually dismissed. Pakistan commenced arbitration against SGS under the PSI Agreement arbitration clause in 2000 and related proceedings were brought in the Pakistan courts. In 2001 SGS filed a Request for Arbitration at ICSID under the Switzerland-Pakistan BIT. Pakistan objected to the ICSID tribunal’s jurisdiction on the basis *inter alia* that the dispute arose out of a contract rather than under the BIT. However, SGS asserted that the contractual disputes were elevated to treaty disputes by virtue of the “umbrella clause” at Article 11 of the BIT, which had a choice of forum provision different from ICSID, which provided:

“...either contracting party shall constantly guarantee the observance of the commitments it had entered into with respect to the investments of the investors of the other contracting party.”

¹³ Id. Paras 25, 29 (2002) 5 ICSID report 186 pp.

¹⁴ 6 August 2003) 18 ICSID Rev. FILJ 301 (2003).

The Tribunal accepted that a literal reading of Article 11 would support SGS's position but rejected SGS's argument:

“As a matter of textuality therefore, the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence appears susceptible of almost indefinite expansion.”

The Tribunal refused to attribute consequences of Article 11 by stating that

“...so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party”

It held that “...under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law”.¹⁵ Also, if investors were able to use an umbrella clause to elevate contract claims to BIT claims the tribunal reasoned that they would be able to nullify the effect of dispute resolution provisions contained in state contracts. Rather, the tribunal held that

“Article 11 of the BIT should be read in such a way as to enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders.”

The Tribunal concluded that it did not have jurisdiction over the contractual claim or over the contractual claim transformed into a BIT claim by virtue of an umbrella clause. However, it retained jurisdiction over the other parts of the BIT claim.

Although the decisions above do not all reach the same conclusion on the interpretation of the “umbrella clause” due in part to the different language included in the treaties under examination – it seems that there is a growing consistency on the interpretation of its meaning to include “all obligations” by the State, both treaty and contractual.

¹⁵ *Supra note 9* at paragraph 167.

In *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*,¹⁶ a different Tribunal took a different view on the issue of the umbrella clause. In that case the Philippines awarded SGS, a Swiss business group a contract to provide comprehensive import supervision for goods prior to shipment to the Philippines and specialized services to assist in improving the customs clearance and control processes. Part of the service was undertaken overseas. A dispute arose between SGS and the Philippines concerning alleged breaches of the services contract. SGS submitted certain monetary claims to the Philippines, which were subject to various attempts for amicable settlement before submitting the dispute to arbitration. SGS invoked the provisions of the 1997 BIT between the Swiss Confederation and the Republic of the Philippines.

The Tribunal was faced with a question similar to the one made in *SGS v. Pakistan*. Specifically the Tribunal had to determine whether a breach of contract is considered a violation of a BIT as per an “umbrella clause”. The Tribunal in *SGS v. Philippines* had to analyze article X(2) of the Switzerland-Philippines BIT, which read: “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”.

The question in place this time was whether that provision gave the Tribunal jurisdiction over claims against the Respondent State that were essentially contractual. The Tribunal held that, “...if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X (2)”¹⁷. The Tribunal then concluded, “...Article X (2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to

¹⁶*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, case No ARB/02/6 of January 29, 2004.

¹⁷ *Id* at para 117.

specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law...”¹⁸

The ICSID Tribunal was posed with the question of whether to follow the rationale provided by a previous decision, *SGS v. Pakistan*¹⁹, which involved similar issues. The Tribunal held that it was not bound to do so.

“The Convention provides only that awards rendered under it are ‘binding on the parties’ (Article 53(1)), a provision which might be regarded as directed to the res judicata effect of awards rather than their impact as precedents in later cases. In the Tribunal’s view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State”²⁰

In *AZURIX Corp. v. The Argentine Republic*,²¹ an American corporation filed a request to arbitrate a dispute against the Argentine Republic for alleged breach of the Argentine Republic- United States of America BIT related to a supposed expropriation in connection with a concession for distribution of potable water and the treatment of disposal sewerage in the Province of Buenos Aires. Although the concession was granted to an ad-hoc Argentine company incorporated by Azurix’s Argentine subsidiaries, the parent company took the claimant’s role.

Argentina objected the jurisdiction of the ICSID Tribunal based on the arguments that Azurix had agreed to the jurisdiction of the courts of La Plata and had waived any other fora and that Azurix had submitted the dispute to local courts and that triggered the “fork in the road” provision of the BIT.

¹⁸*Id* at para 128.

¹⁹*Supra* note 9.

²⁰*Supra* note 13 at para 97.

²¹43 I.L.M. 262 (2004).

The Tribunal stated that when the claims or causes of action between a local claim and a claim before an ICSID Tribunal are different, the waiver of jurisdiction clause does not exclude its jurisdiction. The dispute before the local courts was related to contractual arrangements whereas the one before ICSID was related to alleged breach of treaty obligations. Consequently, the waiver of any other jurisdiction and forum related to contractual actions and not to treaty actions. Rights arising under a contract are different from the rights arising out of the treaty. The Tribunal analyzed previous cases and concluded that the forum selection clause did not exclude ICSID jurisdiction when the “subject-matter of any proceedings before the domestic courts under the contractual arrangements in question and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply”²².

In *Azurix Corporation v. The Argentine Republic*²³, an American corporation filed a request to arbitrate a dispute against the Argentine Republic for alleged breach of the Argentine Republic – United States of America BIT related to a supposed expropriation in connection with a concession for distribution of potable water and the treatment of disposal sewerage in the Province of Buenos Aires. Although the concession was granted to an ad-hoc Argentine company incorporated by Azurix’s Argentine subsidiaries, the parent company took the claimant’s role.

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The Tribunal followed the same rationale used for the former objection to jurisdiction, i.e., the difference between contract and treaty claims. It concluded that for the “fork in

²²*Id* at paragraph 79.

²³ 43 I.L.M. 262 (2004).

the road” provision to be applicable the local court proceeding and the ICSID arbitration proceeding needed to be between the same parties, based on the same cause of action and based on the same facts.²⁴ Thus, a choice by a local subsidiary to file a domestic lawsuit arising out of a contract does not impede a foreign parent company to file a request for arbitration with ICSID –if all the other requirements for ICSID jurisdiction are met– for an alleged violation of a treaty.

3.1.2 Decisions finding that the Claimant did not have an Investment

The nature of the underlying transaction and its contribution to the development of the host state was also the focus of the tribunal’s award on jurisdiction in *CSOB v. Slovak Republic*²⁵ which concluded that “*an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment*”, and because “*a loan may contribute substantially to a State’s economic development*” there was no reason why it could not constitute an investment under Article 25(1).

By contrast two other cases have, in denying that an investment arose under Article 25(1), taken a more formalistic approach, considering not the effect of the transaction on the potential development of the host state, but the legal categorization of the relationship. Thus the tribunal in *Mihaly v. Sri Lanka*²⁶ decided that the significant funds expended with Sri Lanka’s encouragement in the pre-contractual development phase of a BOT power project did not constitute an investment because the state decided not to execute a final contract. The tribunal did not consider whether the claimant’s significant expenditure on feasibility projections and financial models contributed to the economic development of Sri Lanka; it conceded that the claimant may well have valid grounds for legal action against the state, but concluded that without a signed contract, the claimant’s expenditures did not constitute an investment for purposes of the Convention.

²⁴ *Id* at paragraph 90.

²⁵ ICSID Case No. ARB/97/4.

²⁶ ICSID Case No. ARB/00/2.

In the above case, the dispute arose from Sri Lanka's invitation to tender for the construction of a power plant. From the filed of candidates which applied, the U.S. corporation, Mihaly, was selected to enter into a Letter of Intent. Mihaly agreed to satisfy several requirements before it could obtain final approval to begin construction of the plant. After signing the Letter, Mihaly spent several million dollars attempting to satisfy its requirements. Sri Lanka subsequently refused to sign the project agreement and Mihaly filed a claim at the ICSID alleging breaches of the U.S. Sri Lanka BIT.

The Tribunal found that it did not have jurisdiction, *ratione materiae*, because Mihaly had no investment in Sri Lanka. According to the Tribunal, the Letter of Intent created no binding obligation on Sri Lanka to sign the project agreement and business development expenditures were no an investment under either the BIT or the Convention. The Tribunal did add in obiter dicta, however, that such expenditures could be claimed if a dispute arose after the project was approved.

Similarly in *Joy Mining v. Egypt*²⁷ the claim in this case arose from a contract for the sale and maintenance of mining equipment between the British company, Joy Mining, and an organ of Egypt, IMC. Under the contract, Joy Mining issued letters of guarantee over the quality of the equipment. The contract provided that IMC could retain the letters until satisfied with the quality. A dispute over the quality of equipment arose and IMC refused to release the letters of guarantee. Joy Mining filed an ICSID claim, arguing that the refusal to release the guarantees breached Egypt's obligations under the Egypt-UK Bit. Egypt responded, *inter alia*, that Joy Mining did not have an investment in Egypt.

The Egypt –UK BIT, like most modern BITs, defines investment in a broad manner. Joy Mining argued that the guarantee fell within several categories listed as investment in Article 1(a) of the Treaty. They argued that the guarantee fell within the categories of “every kind of asset”, “mortgage”, “lien”, “pledge” and “claims to money or to any other performance under contract having a financial value.”

²⁷ ICSID Case No. ARB/03/11.

The tribunal's analysis focused on the categories of transactions that should or should not be regarded as investments under the Convention. In this case the tribunal concluded that bank guarantees issued in connection with a contract for the sale of phosphate mining equipment and continuing support services, were not an investment because the underlying contract was equivalent to a sale of goods contract. The possible impact the contract may have had on the economic development or Egypt's phosphates or agricultural industries were not considered. The tribunal commented that if a distinction is not drawn between 'ordinary sales contracts' and investments, the result would be that any sale or procurement contract would qualify as an investment.

After finding that the guarantees were not an investment under the BIT, the Tribunal examined their consistency with the meaning of investment in the Convention. After recognizing that the Convention does not define the term "investment", the Tribunal went on to state that "[t]he fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. According to the Tribunal, "[t]he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. The tribunal then defined those requirements as:

Summarising the elements that an activity must have in order to qualify as investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development.

The Joy Mining Tribunal's decision also appears internally inconsistent. The Tribunal seeks to distinguish the CSOB decision on the grounds that "there was in that case a contract clause incorporating a bilateral investment treaty that contained an ICSID clause, but nothing of the sort is found in the present case. Similarly, the Tribunal states later in its decision:

The Tribunal is aware of the many ICSID and other arbitral decisions noted above and the fact that they have progressively given a broader meaning to the concept of investment. But in all those cases there was a specific connection to ICSID, either because the activity in question was beyond doubt an investment or because there was an arbitration clause involved.

The Tribunal fails to clarify why the parties' consent expressed in a contract overrides the ICSID's objective requirements, whereas the parties' consent in a BIT will not.

While the manner in which the Tribunal reached its decisions may be worthy of criticism, but it is difficult to fault the decision itself. Despite all *Joy Mining's* attempt to the contrary, what it really had was merely a sales contract with Egypt. Export sales of goods or services, which do not involve other indicia of investment, such as a local branch or subsidiary, generally cannot be considered to be covered by investment agreements, but by other international economic instruments such as the World Trade Organisation's General Agreement on Trade in Services or the General Agreement on Tariffs and Trade. This distinction is reflected in the ICSID's practice, the ICSID's Additional Facility Rules, specific investment treaties containing more detailed definitions of investment, such as the NAFTA, and has been constantly repeated by tribunals.²⁸

3.2 RATIONE PERSONAE

ICSID jurisprudence has tended to concentrate on two broad categories: First, in order to determine whether they have jurisdiction *ratione personae*, arbitral tribunals have addressed the question of the relevant criteria to determine the nationality of a natural and/or legal person. The second category relates to the rights that minority shareholders, non-controlling and indirect shareholders may have.

²⁸ See, for example, *Fedax N.V. v. The Republic of Venezuela*, Jurisdiction Decision "...under both ICSID and Additional Facility Rules the investment in question, even if direct, should be distinguishable from an ordinary commercial transaction."

3.2.1 Determination of investor's nationality

The parameter repeatedly used by arbitration tribunals in order to determine whether a person is a national of a particular state has tended to be the law of the state whose nationality is claimed.

In *Tokios Tokeles v. Ukraine*²⁹, a business enterprise established under the laws of Lithuania but 99% owned by Ukrainian nationals. Tokios Tokeles established a wholly owned subsidiary in the Ukraine to carry on the business of advertising, publishing and printing in the Ukraine and elsewhere. They alleged that the Ukraine had engaged in actions affecting the Ukrainian subsidiary in breach of the Lithuania-Ukraine BIT, Article 1(2)(b) of which defined “investor” as “any entity established in the territory of Lithuania in conformity with its law and regulations”. The BIT contained no “denial of benefits” provision.

Ukraine objected the jurisdiction of the ICSID Tribunal arguing that claimant was not an investor of Lithuania, had not made an investment in accordance with the local laws and the dispute did not arise from the investment. It also objected the admissibility of the claim.

The respondent asserted that the Tokios Tokeles was merely a nominal Lithuanian legal entity controlled by Ukrainian nationals and that the capital used was of Ukrainian origin, such that:

“...to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which... would be inconsistent with the object and purpose of the Convention”.

²⁹ Decision of April 29, 2004, Case No. ARB/02/18. <http://www.worldbank.org/icsid>.

The majority of the Tribunal stated that the parties to a BIT were free to determine the criteria to determine nationality³⁰ and set the definition of investor and foreign control of a local entity for purposes of article 25 (2)(b) of the Convention. It was not up to the Tribunal to question the criteria used therein.

“...Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended”.³¹

The majority of the Tribunal concluded that Tokios, a Lithuania incorporated company under control of Ukrainian nationals was a foreign investor under the terms of the Lithuania-Ukraine BIT and rejected the objection to its jurisdiction based on this argument.

The dissenting arbitrator³² stated that “...it is within the limits determined by the basic Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic Convention”.³³

Accordingly, the ICSID system was not intended to be used to settle disputes between a State and its own nationals, even if the investor acted through a foreign entity. Prof. Weil stressed that the purpose of the Convention was to govern international investments, that is one that implies a transborder flux of capital.³⁴

³⁰ *Id* at paragraph 24.

³¹ *Id* at paragraph 39.

³² Professor Prosper Weil dissented from the majority. <http://www.worldbank.org/icsid/cases/awards.htm>
April 29, 2004.

³³ *Supra* note 29 at paragraph 13.

³⁴ *Id* at paragraph 19.

For instance, in *Champion Trading v. Egypt*³⁵ the tribunal examined the facts taking into consideration the Egyptian law on nationality. Pointing out to the undisputed fact that the claimants had made transactions related to the investment at stake by referring to their Egyptian nationality, the arbitral tribunal found that the investors had dual nationality, and thus, that it lacked jurisdiction over the claims. The tribunal found that under the ordinary meaning of Article 25(2)(a) of the Convention dual nationals are excluded from invoking the protection of the Convention against the host country of the investment of which they are also citizens.

The pattern of referring to the national law of the State whose nationality is being claimed in order to determine whether a particular investor is a national of that State is also illustrated by the case *Soufraki v. United Arab Emirates*.³⁶ In that case, the claimant, an investor born in Italy who later became a citizen of Canada, sought the protection of the BIT between Italy and the UAE (1995). Under Italian law, Italian citizens acquiring another nationality and residing abroad automatically lose their Italian nationality. However, Italian legislation also allows former citizens to re-acquire Italian nationality by taking up residence in Italy for a period of no less than one year.³⁷ In this particular case, the tribunal based its decision on the provisions of the applicable Italian legislation, and found that pursuant to Italian law, the claimant had effectively lost his Italian nationality, and had not effectively demonstrated that he had complied with the residence requirements necessary to regain the Italian nationality.

3.2.2 Juridical Persons

With regard to juridical persons, three different criteria in different combinations have been traditionally used to define their nationality. These are the place of incorporation, the location of the company's seat also referred to as the "*siege social*", "real seat" or "principle place of business" and the nationality of ownership or control.

³⁵ Decision on Jurisdiction, 21 October 2003, ICSID Case No. ARB/02/9.

³⁶ Award, 21 October 2003, ICSID Case No. ARB/02/7.

³⁷ *Ibid*, para. 55.

In *Loewen*,³⁸ the claimant entered into a reorganization plan (better known as Chapter 11 of the United States Bankruptcy Code) and ceased to exist as a business entity. The former Canadian business was reorganized as a United States corporation. The rights, titles and interests under the arbitration claim against the United States of America were assigned to a newly created Canadian corporation, whose apparent only asset and business was the arbitration claim. The Tribunal found that the beneficiary of the claim was an American citizen, i.e., the company created as part of the reorganization plan. The Tribunal stated: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.”³⁹

The Convention does not specify any particular criteria to ascribe the nationality of a legal entity for purposes of determining the jurisdiction *ratione personae* of arbitral tribunals. Article 25(2)(b) envisages two different situations under which ICSID tribunals may have jurisdiction *ratione personae* when the claimant is a juridical person. One establishes the general principle according to which the legal entity must have the nationality of a Contracting State different from the host State on the date the consent for arbitration was given. The second alternative addresses the case when the legal entity, despite having the nationality of the host State, is nevertheless treated as foreign as a result of being controlled by foreigners.

As regards the general principle, ICSID tribunals have traditionally tended to apply the criterion of incorporation or seat rather than control when determining the nationality of a juridical person. This trend is illustrated by numerous ICSID cases such as in *Southern Pacific Properties v. Egypt*, where the claimants were considered from Hong Kong China because they were Hong Kong corporations domiciled in Hong Kong China;⁴⁰ or in *Kaiser Bauxite v. Jamaica*, where the claimant was found to be from the United States because “Kaiser Bauxite” was a private corporation organized under the laws of the State

³⁸ *Supra* note 2.

³⁹ *Id* at paragraph 225.

⁴⁰ Decision on Jurisdiction, 27 November 1985, ICSID Case No. ARB/84/3.

of Nevada.⁴¹ An interesting case is the *Tokios Tokeles v. Ukraine*, a dispute brought under the Lithuania-Ukraine BIT, in which the claimant was a corporate national of Lithuania, although 99 percent of the shareholders were nationals of Ukraine. In that case, the majority of the members of the arbitral tribunal considered that under the terms of the BIT and the Convention, the nationality of the state of incorporation of the investor and not the nationality of the controlling shareholders was decisive for the standing of the claimant.⁴²

The second scenario addressed by Article 25(2)(b) of the Convention entails a situation, in which the parties to the dispute agree to consider a legal entity constituted or having the seat in the host country as a foreign investor because of foreign control. This clause therefore establishes two requirements: First, that there is an agreement between the parties to the dispute to treat a legal entity of the host State as foreign; and second, that such legal entity is effectively controlled by foreigners.

According to the various ICSID tribunals, the test would be met if the specific circumstances of the case clearly indicate that this was the intention of the parties. For instance, several tribunals, such as in *Liberian Eastern Timber Corporation (LETCO) v. Liberia*⁴³ and *Klöckner Industrie-Anlagen GmbH and others v. Cameroon*⁴⁴, have considered that the mere existence of an ICSID clause in a contract with a local company constitutes an agreement to treat that legal entity as a national of another Contracting State. In *Amco Asia Corporation and others v. Indonesia*⁴⁵ the tribunal found that the Convention does not require a formal agreement to treat a local company as foreign because of foreign control.⁴⁶

Determining actual control over legal entities is not a simple matter. ICSID tribunals have developed an increasing awareness of the need to take a differentiated approach

⁴¹ Decision on Jurisdiction, 6 July 1975, ICSID Case No. ARB/74/3.

⁴² Decision on Jurisdiction, 29 April 2004, ICSID Case No. ARB/02/18.

⁴³ Award, 31 March 1986, ICSID Case No. ARB/83/2.

⁴⁴ Award, 21 October 1983, ICSID Case No. ARB/81/2.

⁴⁵ Award, 20 November 1984, ICSID Case No. ARB/81/1.

⁴⁶ Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 394.

when dealing with this question. Various tribunals have asked whether foreigners own a majority of the shares of the enterprise concerned. The parameter has been used in cases such as *Klöckner v. Cameroon*, where the tribunal found that the local company SACOME was under the majority control of foreign interests because Klöckner and its European partners had subscribed to 51 per cent of SACOME's capital.⁴⁷ In *LETCO v. Liberia*, French investors owned 100 percent of its shares although LETCO had been incorporated in Liberia.⁴⁸ The missing foreign control was the decisive element in *Vacuum Salt v. Ghana* for the tribunal to determine its lack of jurisdiction. In that case, the tribunal found that only 20 percent of the shares of the company incorporated in Ghana were in foreign hands, while 80 percent were owned by nationals of Ghana.⁴⁹

In *CMS*,⁵⁰ an American company CMS, who had invested in an Argentine company Transportadora de Gas del Norte (TGN) and owned 29.42% of the shares was affected by an alleged suspension by Argentina of a tariff adjustment formula for gas transportation all of which, it was argued, arose out of general economic policies.

The Tribunal stated that although it did not have jurisdiction over general economic policies taken by Argentina, it did have jurisdiction over measures of general economic policies that affect the investment provided they have been adopted in violation of international law or in violation of commitments made to the investor. "This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment".⁵¹ The Tribunal then held that nothing in international law prohibited investment claims submitted by shareholders independently from those of the corporation concerned. It also said that although that rule seemed to

⁴⁷ Award 21 October 1983, 2 ICSID Reports 16.

⁴⁸ Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349.

⁴⁹ Award, 16 February 1994, ICSID Case No. ARB/92/1.

⁵⁰ *Supra note 3*.

⁵¹ *Id* at paragraph 34.

protect majority or controlling shareholders, the prevalence of protection to all kind of shareholders through treaty arrangements made that approach the exception.

Likewise in *Enron v. Argentina*,⁵² the Tribunal held that minority shareholders might be permitted to mount separate and competing arbitration claims. Accordingly, the tribunal noted that, notwithstanding the claimant being a minority shareholder, it was treated as a covered investor under the terms of the relevant BIT, because the Respondent had pursued and asked the Claimant in its newly privatized natural gas industry.

In conclusion, the Convention does not specify any particular criteria to ascribe the nationality of a legal entity for purposes of determining the jurisdiction *ratione personae* of arbitral tribunals. Article 25(2)(b) envisages two different situations under which ICSID tribunals may have jurisdiction *ratione personae* when the claimant is a juridical person. One establishes the general principle according to which the legal entity must have the nationality of a contracting state different the host state on the date the consent for arbitration was given. The second alternative addresses the case when the legal entity, despite having the nationality of the host state, is nevertheless treated as foreign as a result of being controlled by foreigners.

As regards the principle, ICSID tribunals have traditionally tended to apply the criterion of incorporation or seat rather than control when determining the nationality of a juridical person. The trend is illustrated by numerous cases as illustrated above.

3.3 RATIONE TEMPORIS

Another issue surfaced relating to jurisdiction over contractual claims that occurred before the BIT entered into force. The Tribunal stated that it did not need to look at disputes concerning breaches of investment contracts, which occurred and were completed before the treaty's entry into force. But the Tribunal did have jurisdiction

⁵² *Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic*, ICSID Case No. (ARB/01/3), Decision on Jurisdiction, January 14, 2004, published in *International Law in Brief*, American Society of International Law, March 15, 2004.

“...to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach”.⁵³

Likewise in *TECMED v. Mexico*,⁵⁴ the ICSID additional facility arbitral Tribunal stated that “...acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal’s jurisdiction”.⁵⁵ The Tribunal then held that that conclusion was subject to the condition that the conducts or acts, upon consummation or completion constituted a breach of the relevant BIT in force at that time.

The findings of the tribunal in *Mandev* were consistent with the principles of the *Articles on State Responsibility*. In *Mandev*, the respondent objected to the tribunal’s jurisdiction over claims for expropriation and violation of the standard treatment under NAFTA on the basis of, *inter alia*, the non-retroactive application of NAFTA. The tribunal found that if the conduct in question occurred prior to the entry into force of NAFTA and continued after that date, it could be in breach of the treaty.⁵⁶ Thus, the question to be resolved was whether the dispute in *Mandev* involved an act of a continuing character or a completed act that continued to cause loss or damage. To make that determination, the *Mandev* tribunal noted that it would be dependent ‘both on the facts and on the obligation said to have been breached.’⁵⁷ Based on the facts before it, the tribunal concluded that the claimant’s expropriation claims were based on a completed act that took place prior to NAFTA’s entry into force. Therefore, the tribunal lacked jurisdiction over the claimant’s

⁵³ *Supra* note 13 at para 167.

⁵⁴ *Tecnicas Medioambientales TECMED, S.A. v. The United Mexican States*, May 29, 2003, 43 I.L.M. 133 (2004).

⁵⁵ *Id* at para 68.

⁵⁶ See *Mondev*, 42 I.L.M. at 96, paras. 57-58.

⁵⁷ *ibid* at pg 96 para. 58.

expropriation claims. With respect to claimant's claim for violation of the minimum standard of treatment, the tribunal noted:

'[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must be possible to point to conduct of the State after that date which is itself a breach.'⁵⁸

The *Mandev* tribunal thus made two significant points. First, there is jurisdiction *ratione temporis* when the breaching conduct continues after the entry into force of the treaty. Second, when it does, prior conduct may be relevant for the tribunal's determination of whether there is a breach of the treaty's provisions.

3.4 CONCLUDING REMARKS

The above awards have provided ICSID followers with a considerable amount of material to ponder over the coming years. They have supplied some direction, both good and bad, as well as some fireworks. With these awards in hand, it is becoming easier to predict, with some certainty, what types of claims can be brought, and what kind of commitment will be required to see them through to a successful completion. Barring another interpretative surprise statement from ICSID parties, these awards have set us off in what, for the most part, appears to be the right direction.

The fact that many of the investment arbitrations are dealt with in terms of ICSID and this Convention does not contain a definition of investment however, remains a cause for concern. It would be useful to have a number of guidelines as to what would be considered to be investments, obviously with a discretion on the side of the arbitrators. In this regard one could start thinking along the lines of the elements of "international or foreign" and what that would entail; the issue of capital that needs to be transferred; and a fairly broad description that goes wider than mere asset-based investments. If the ICSID guidelines are broad, the BITs and other agreements can have narrower definitions, thus

⁵⁸ *ibid* at page 98, para. 70.

making it possible to have party autonomy prevail. If a fairly narrow definition of investment is then used in a BIT and a dispute should arise, the strictest test would be to determine whether the particular transaction amounts to an investment for purposes of that BIT and if not, then ICSID would not come into play.

The position of the nationality of corporations and their position as investors in the international investment field however, is also not clear-cut. Tribunals have placed much reliance on the wording of bilateral treaties and have not given the context within which many of these investments take place, namely the framework of the Convention, into account.

3.5 ICSID ARBITRATION AND AFRICAN COUNTRIES

A number of African governments have made efforts to encourage investment in the continent by entering into BITs and adopting arbitration legislation. Investment in Africa is often made against a background of perceived, if not actual, political risk. This includes the perception that domestic courts in Africa lack the commercial focus, propriety and efficiency that investors are ordinarily used to; fears that decisions of African courts may not be enforceable in other jurisdictions; and the perception that African host states sometimes act in an unpredictable and/or arbitrary fashion.⁵⁹

African governments have attempted to alleviate such concerns by entering into BITs and adopting arbitration legislation, which respects party autonomy in accordance with the United Nations Commission on UNCITRAL. The procedural law governing an arbitration (other than delocalized arbitration) will be that of the state where the arbitration has its legal place or 'seat' and the mandatory laws of procedure of any other state in which the parties choose to hold hearings, even though this latter state is not the seat of the arbitration. Therefore, if the parties choose the seat of the arbitration to be in

⁵⁹ Consider, for example, Algeria's recent reversal of its hydrocarbons law and Zimbabwe's expropriation of its agricultural industry – a matter which is currently before the World Bank arbitration forum, ICSID.

an African state, they should be familiar with the applicable procedural laws of arbitration. In particular, they should be aware of the degree to which local courts will be able to intervene in the arbitration process.

States that have adopted the model law generally provide a regime whereby interference in the arbitration by courts is limited and in line with modern commercial arbitration practices. Nevertheless, investors should check with local counsel the degree to which the model law is subject to other domestic laws of the host state, which may present a possibility for court intervention.

Three of the largest economies in Africa –South Africa, Nigeria and Egypt – have each different approaches, with varying degrees of success, to introducing and applying modern arbitration legislation. Local arbitration legislation in Nigeria and South Africa gives the courts wide powers to interfere in arbitration proceedings on grounds beyond the limited grounds stipulated in the model law, which effectively discourages arbitration. Egyptian arbitration law recognizes international arbitration awards that can only be challenged in court by means of a specific annulment action based on a limited number of grounds (all relating to procedure or due process) in accordance with the model law. The Egyptian judiciary has also cooperated with and supported arbitration proceedings in the past. Although Nigeria has adopted the model law, the local courts may, on the application of a party to an arbitration agreement, set aside the award if the arbitrator has ‘misconducted’ himself. In the past, the local courts have interfered in arbitration proceedings by interpreting these grounds as being wider than the grounds specified in the model law. Arbitration proceedings in Nigeria can also be delayed by a party challenging an arbitration tribunal’s jurisdiction in court during which time the arbitration proceedings may be suspended.

South Africa has not adopted the model law and its arbitration dates back to 1965. The legislation has three particular areas of concern. First, the courts may at any time on application of a party to an arbitration agreement on ‘good cause’ has been interpreted widely to include disputes that primarily relate to questions of law and disputes where it

would be inconvenient or unnecessarily expensive for a dispute to be resolved in accordance with the relevant arbitration agreement.

Second, the courts “may” stay court proceedings if there is “no sufficient reason” for the matter not to be referred to arbitration and, third, there are provisions for the courts to rule on any question of law by way of a stated case procedure. Nevertheless, an increasing number of South Africans are resorting to South African arbitration for the resolution of commercial disputes.

As in the rest of the world, arbitration in Africa can be held ad hoc or under an institutional arbitration body. The main recognized institutional arbitration centres in Africa are the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Lagos Regional Centre for International Commercial Arbitration (LRCICA) and the Arbitration Foundation of South Africa (AFSA), all of which are recognized in their respective regions of influence. Although the CRCICA and the LRCICA have an international personality, like ICSID, tribunals sitting under the auspices of these institutions are, unlike ICSID, still subject to the procedural laws of the state in which the seat of the arbitration is located. The arbitration rules for the CRCICA and the LRCICA are modified versions of the UNCITRAL arbitration rules, whereas AFSA’s arbitration rules draw inspiration from a number of sources and are also subject to the constraints of the local arbitration legislation.

Arbitration awards are enforced under the New York Convention, which has been ratified by the majority of African states. However, a significant number have not ratified the Convention to date. Of those African states that have ratified the New York Convention, many have made the permitted reservations as to reciprocity and commercial relationships. The reciprocity issue means it is essential to consider enforcement issues if choosing the seat in Africa. Egypt and South Africa have no reservations, while Nigeria has reservations as to both reciprocity and commercial relationships.

Considerable resources may have to be expended before the execution of the award is possible. It is therefore, always advisable to consider the procedural law of the enforcement country prior to enforcing an award.

Investors can minimize the political risk of investing in Africa by ensuring their investments are covered by BITs. Such treaties are signed between states which provide that nationals of each state, when investing in the other state, will be accorded rights such as fair and equitable treatment, no expropriation without compensation and the right to submit disputes with the host state to binding international arbitration. BITs involving African states usually provide for the arbitration to be at the ICSID pursuant to the Washington Convention or the Additional Facility Rules, or ad hoc arbitration pursuant to the UNCITRAL arbitration rules.

Foreign investors are increasingly channeling their investments through companies established in jurisdictions that have ratified a BIT with the host state in which the investment is made, combining such planning with their tax structuring. Some African governments are waking up to their obligations under such treaties.

Many non-African investors are unwilling to submit to arbitration in Africa with the seat of the arbitration in Africa, yet the African counter-parties are generally reluctant to incur the expenses associated with international arbitration institutions, which is often perceived to require travel to the northern hemisphere. A compromise commonly negotiated is to agree to arbitration under the auspices of one of the international institutions with the seat of the arbitration in the northern hemisphere, but to expressly provide that the hearings for the arbitration will be held in the relevant African host state – provided the mandatory laws of procedure of such host state do not interfere in arbitration proceedings.

It is arguable for a number of reasons that African courts are unsuitable for settling investment disputes and, therefore, the role of African courts in this area should, as far as possible, be minimized.

First, there is the absence of strong traditions of judicial independence from the executive in Africa. In fact, Francophone African countries like Guinea and the Ivory Coast subordinate the judiciary to the executive. In Kenya for example, some ministers do not even obey court orders. In the past, some African judges who had displeased the executive by deciding important cases against them had either been killed,⁶⁰ dismissed⁶¹ or forced to resign.⁶² Even though in many African constitutions and statutes western standards of judicial independence and impartiality are emphasized,⁶³ in practice they are often not respected. According to Bryde,

“in almost all African countries, power is highly concentrated. The ruling group controls the state apparatus effectively. There are not many possibilities for a career in politics, administration or business against the wishes of this group. Most of the time one will need its active patronage. These are not ideal conditions for the development of judicial independence. While the actual degree of judicial independence varies considerably, there are limits to judicial power in most African countries”.⁶⁴

Secondly, some African states often tend to argue that what is at stake in an investment dispute are considerable national interests, because investment contracts in Africa often involve the exploitation of vast natural resources upon which host African states are heavily dependent for their survival. In such cases, according to a report of the

⁶⁰ For example, Chief Justice Kiwanuka of Uganda “disappeared” after displeasing the Amin regime by deciding a case against it see Afr. Res. Bull; Ser., 1972, 2608 C.

⁶¹ For example, Chief Justice Korsah of Ghana was dismissed by President Nkrumah after the Supreme Court had delivered a verdict against the Government – Harvey, *Law and Social Change* in Ghana (1966) 235-236; Zaire’s Supreme Court Present was dismissed in 1975 – Afr. Res. Bull; Pol. Ser., 1975, 3763 B.

⁶² In 1969, President Kaunda of Zambia forced the Zambian Chief Justice to resign when Government policy and judicial attitudes conflicted - Afr. Res. Bull; Pol. Se., 1969, 1479 C – 1539 A.

⁶³ For example, the constitutions of Botswana (S.98-102); Gabon (Article 56(2)); Gambia (S.91); Kenya (S.62); Liberia (Article IV (II)); Malawi (S.64); Mauritius (S.78). See Blaustein & Flanz, *Constitutions of the Countries of the World*, Vols. II, V, VI, VIII, IX.

⁶⁴ Bryde, *The Politics and Sociology of African Legal Department*, (1976) 67.

International Law Association, “experience has taught that... the indispensable objectivity and impartiality of national courts are sometimes jeopardized by considerations of national interest”.⁶⁵

As national courts, African courts may be bound to enforce legislations enacted by host African states, even if they are patently contrary to the terms of investments contracts, in order to support these host states’ perceived national interests.

Thirdly, an African host state could specifically limit the jurisdiction of its courts to decide matters like the validity of expropriation laws or the assessment of compensation one such limitation is indicated by the Constitution (Suspension and Modification) Decree 1984 of Nigeria which provides that “no question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria. Such a provision precludes local courts from entertaining suits of investors who will want to challenge the validity of decrees expropriating their assets.

The jurisdiction of local courts over investment disputes may also be limited explicitly by the law effecting an expropriation. For instance, in the case of *AGIP v. Congo*, which involved a dispute over the nationalization of AGIP’s assets in the Congo by the Congolese Government, Order No. 6/75 taking over the assets of AGIP’s locally incorporated subsidiary provided, *inter alia*, “this decision creates no right to any compensation”.⁶⁶

Fourthly, the possibility of court decisions being overruled by legislative means needs to be noted. In a group of cases, ***the Algerian Nationalisation cases***, provision had been made, in situations where the properties of French nationals in Algeria had been nationalized, for such persons to have recourse to the Algerian Courts to request the annulment of such measures if necessary.⁶⁷

⁶⁵ International Law Association, *Rep. Of 40th Conf.* (Amsterdam, 1939) 174-175.

⁶⁶ (1982) 21 I.L.M. 726, 729.

⁶⁷ Zoller, “Algerian Nationalisations: The Legal Issues”, (1972) 6 J.W.T.L. 33,51.

It could therefore be argued that with very few exceptions, African courts are unlikely to be able impartially to determine investment disputes. It is improbable that disputes over matters like expropriation and the assessment of compensation, which some African states regard as subjects exclusively within their sovereign competence,⁶⁸ can be settled impartially by an African court. Even if a decision adverse to the interests of the host state were to be made it is likely to be reversed by legislative measures. National courts are bound to be very cautious in such cases so as to avoid the wrath and displeasure of the various Governments. Investment disputes often concern claims for compensation, involving vast sums of money and because of the potential for the jurisdiction of African courts to be limited in such matters, investors are unlikely to be equitably treated in such forums.

Fifthly, the judges of the superior courts in Africa are not suitably trained and equipped to deal with the complex and intricate problems posed by investment disputes. They are trained mostly in the laws of the metropolitan states, which formerly colonized Africa.⁶⁹ For instance, judges in Anglophone and Francophone Africa are largely trained in the English common-law and the French Civil Law traditions.⁷⁰ Owing to the often complex and intricate nature of investment contracts, disputes over them should be settled by, for instance, specialist arbitrators and certainly not by African judges. African courts are already inadequately equipped to handle their heavy workloads.⁷¹ They are therefore, assuredly inappropriate forums for settling investment disputes.

In principle, African courts could play the useful role of enforcing arbitral awards. In practice, however, African courts may not be suitable for enforcing awards because of the

⁶⁸ For example, Libya's Memorandum to the President of the ICJ quoted in *The Texaco/Calasiatic v. Libya Case*, (1978) 17 I.L.M. 1, 27; UN Resolutions on Permanent Sovereignty over Natural Resources, for example, Resolution 18093 (XVII) of 1962; Resolution 3281 (XXIX) of 15th January 1975.

⁶⁹ Gower, *Independent Africa* (1967) 102-145.

⁷⁰ Ibid

⁷¹ Tiewul & Tsegah, "Arbitration and the Settlement of Commercial Disputes; A Selective Survey of African Practice" (1975) 24 I.C.L.Q. 393, 395; Agyeman-Duah, "Ghana, 1982-6: the Politics of the P.N.D.C." (1987) 25 J. of Mod. Afr. Studies 613, 626.

same kind of pressures outlined above could be brought to bear on them to preclude them for enforcing awards against African host states.⁷² This, perhaps, explains why foreign investors prefer to utilize European and U.S. courts to enforce their awards. They tend to have more confidence in the impartiality and fairness of the national courts for those countries.

3.5.1 Reaction of African Countries to ICSID

ICSID, received rather widespread support from the majority of the African states, primarily because of the expectation that much-needed foreign investment for economic development would flow into their countries. Although most African states ratified the ICSID Convention, they had attracted a much lower flow of foreign investment than the Latin American states, which initially opposed the Convention. That support, and some disputes involving African states, revealed early on the practice of relevance of ICSID. The rapid conclusion of bilateral investment treaties and the enactment of national investment codes making reference to ICSID proceedings, amongst others, led to ICSID's increasing caseload.

Under the auspices of the African-Asian Legal Consultative Committee (AALCC), several regional arbitration centers were created in Africa for the purpose of promoting and establishing national arbitral institutions. The regional centers, which adopted a modified version of the UNCITRAL Arbitration Rules, are meant to provide a relatively inexpensive and fair procedure for the settlement of international commercial disputes within the region. Yet, parties to disputes rarely select African cities as venues for the settlement of their disputes. The prevailing perceptions are that the courts in Africa cannot be trusted and the national legal frameworks for arbitration are not conducive for international dispute resolution. There are other notions that the relevant states do not possess the institutional or administrative facilities for holding arbitrations, and they

⁷² On the decay of law enforcement machinery in Africa, see, Mazrui, A., *The Africans, a Triple Heritage* (1986) 205.

may not be parties to the 1958 New York Convention or other pertinent treaties, and therefore, enforceability of arbitral awards and agreements cannot be guaranteed.

A number of developing countries have failed to sign or ratify the Convention. Latin American countries, for example were absent at the beginning of the ICSID Convention in the mid-1960s. They chose not to become involved because of their adherence to the Calvo Doctrine.⁷³ The drafters of the Convention specially drafted it to address, among other things, some of the particular concerns of the Latin American delegations and other potential members. For instance, joining ICSID was made purely voluntary and states that ratified the Convention did not have mandatorily to use ICSID arbitration.

Despite the fact that in Africa there are some capital importing countries, still they do not utilise ICSID. There are three main reasons for their failure to utilise ICSID. First, capital-importing countries may not use ICSID because of the superior bargaining power which they wield with regard to private investors. Second, although these countries know that ICSID membership can improve their position in the eyes of private investors, they have other resources like oil and minerals which will persuade investors to do business with them. Third, joining ICSID is not crucial for economic reasons. These countries will not join and take aboard the arduous responsibilities which they would have to complete as members of ICSID. However, one only has to look at the long list of countries which have signed and ratified the Convention to realise ICSID's growing popularity among developing countries.

According to the most recent published list, out of the countries that have signed the Convention, no more than twenty one states belong to the industrialised group of countries of Western Europe, the US, Japan, Australia and New Zealand. The

⁷³ The Calvo Doctrine was embraced by Latin American states in the 19th Century. The doctrine 'gives exclusive jurisdiction over disputes arising from foreign investment contracts to national tribunals'. Sornarajah, *The International Law on Foreign Investment* 123. as a result, Latin American states held firmly to the position that 'disputes involving Latin American state, including arbitration to which a state party is party must be adjudicated in accordance with local law.

remaining countries, even though not all of them qualify as developing countries, virtually all fall mainly within the category of states that are permitted under ICSID to grant special guarantees to attract foreign investment.⁷⁴

A study of those thirty-seven disputes submitted to ICSID arbitral tribunals that involved governments of developing countries shows the extent to which these governments followed usual patterns in their conduct of the arbitration proceedings. They performed in a manner that differs from what institutions like the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA) are familiar with when handling transnational arbitrations that are ultimately subject to control of municipal courts.⁷⁵

Respondent African countries will usually agree to the appointment of qualified arbitrators and are usually indifferent of their nationality. 'On eight occasions the developing countries Africa included agreed to have ICSID arbitral tribunals composed exclusively of western arbitrators, including those they appointed themselves. In fact, Morocco appointed Paul Reuter of France in the first ICSID Case; Gabon appointed Victor-Gaston Martiny of Belgium in its dispute with *Societe Serete S.A.*, and Nigeria appointed Elihu Lauterpatch of the United Kingdom in its dispute with *Guadeloupe Gas Products Corporation V. Military Government of Nigeria*⁷⁶ In *AMCO Asia Corp. v. Republic of Indonesia, Indonesia*⁷⁷ appointed a Danish citizen to both the first and the second tribunal.

However, it has been noted that with the ICSID system the role played from African countries is progressively expanding. For instance, in the *Asian Agricultural Products*

⁷⁴ www.worldbank.org.

⁷⁵ El-Kosheri, A., ICSID Arbitration and Developing Countries, 8 ICSID Review: Foreign Investment Law Journal 104 (1993).

⁷⁶ ICSID Case No. ARB/98/1.

⁷⁷ ICSID Case No. ARB/81/1.

v. Sri Lanka.⁷⁸ two out of the three members of the tribunal were from Africa. Another one was the *Southern Pacific Properties Ltd (SPP) v. Egypt, Societe Ouest Africaine des Betons Industriels (SOABI) v. Senegal, and Societe d'Etudes de Travaux et de Gestion SETIMEG S.A. v. Republic of Gabon*.

Although the Convention is an international entity, none of its proceedings so far have taken place outside the U.S. and France. Recognizing the general lack of ICSID arbitrators and conciliators from the developing countries, More arbitrators and conciliators should be appointed from Africa to ICSID tribunals or commissions.

Until very recently most African states participated in very modest ways, if at all, in the process of developing modern rules of application in the field of international investment disputes. One well-respected international lawyer and prominent advocate of the progressive development and unification of legal rules in this area has aptly described the absence of Africa's participation.⁷⁹

The developing countries of recent independence have had the opportunity to participate only to a small degree in the activities carried out up to now in the field of harmonization, unification and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws, which are indispensable to gaining equality in their international trade.

Reasons for the lack of involvement appear to be directly related to the fact that, until comparatively recently, many of the new states of Africa and Asia which had just been admitted to the international community of nations as full participants, tended to devote much of their efforts on forcing a re-examination of certain sociological and normative foundations of positive international law and some of its basic assumptions as they relate to the new political and socio-economic realities engendered by decolonisation and

⁷⁸ ICSID Case No. ARB/87/3.

⁷⁹ Schmitthoff, "Progressive Development of the Law of International Trade", in Report of the Secretary General (UN Doc.A/6396, para.210), reprinted in (1968-70) I(1) UNCITRAL Y.B. II.

sovereignty for that reason, the effort with respect to formulation and progressive unification of the legal rules of international investment law in so far as African states are concerned, occurred with very little of their direct input or involvement. For one thing, the operative legislation in many countries of Africa predates their attainment of political independence. Moreover, the respective laws and procedures in individual countries vary from state to state, depending on the legal system of their former colonial masters.⁸⁰

The emergence of developing countries, Africa included as participants in international commercial arbitration was met with a robust rejection of the application of their laws to what are now known as ‘state contracts’.⁸¹ It was claimed by George Elombi that the legal systems of the countries concerned were too under-developed to handle the complex character of the transactions involved.⁸² However, ICSID tribunals have in many cases found other ways of avoiding the laws. *In Klockner v. United Republic of Cameroon*,⁸³ the tribunal discovered that the applicable Cameroonian law was obtained from French law, and on this basis decided to draw directly on French law without further reference to Cameroonian law. This bias in favour of the European law has led African countries to internationalise state contracts by making international law the governing law of their contracts. Indeed, the Convention makes both domestic and international law systems relevant to investment disputes.

3.5.2 Why ICSID Matter for African Countries

As in many areas of the world, judicial systems in Africa are not equipped to handle the multitude of cases brought before them, particularly as pertains to commercial disputes. In fact, sizeable caseloads leave many African courts over-extended and under-budgeted. Some investors are merely inconvenienced by the existence of slow, overburdened

⁸⁰ International and Comparative Law Quarterly, Vol. 41, No. 2 (April 1992) pg 390.

⁸¹ Elombi, G., ICSID Awards and the Denial of Host State Laws, 11 Journal of International Arbitration 61 (1994).

⁸² Ibid., note 62.

⁸³ ICSID Case No.ARB/82/2.

judicial systems in Africa. These investors invest in the region, and when a dispute arises they resort to arbitration and alternative dispute resolution for a outside he region. Other investors are deterred outright from investing in the region due to the perceived lack of timely and affordable dispute resolution options located in the region. ICSID is useful in resolving investment disputes by providing speedier, enforceable decisions through arbitration, mediation, or conciliation mechanisms. The presence of cost-effective and predictable ADR mechanisms capable of resolving complex commercial disputes helps to bolster the confidence of investors interested in African region and therefore stimulates trade and investment both internationally and locally.

From the perspective of an African investor wishing to use ICSID in a dispute with a foreign Contracting State, it should also be noted that states have normally complied voluntarily with ICSID awards against them and would be encouraged by the Secretary-General of ICSID (who is also a World Bank official) to do so. The World Bank is however unlikely to resort to stronger sanctions like refusing further loans, because it seeks to maintain a reputation for even-handed dealings with member states.

From the State's perspective, states are also perceived to have faired reasonably well in ICSID arbitrations and have certainly received fair treatment. Other factor making ICSID attractive from the perspective of the state party are, first, ICSID's unique standing as the only arbitral institution available for State/investor disputes which operates under public international law, although this factor by itself would deserve little weight in the absence of proof that a quality service is provided.

Secondly, ICSID mechanism reduces the involvement of foreign state courts to an absolute minimum, thereby reducing sensitivity concerning national sovereignty.

Thirdly, in the absence of an agreement to the contrary, the arbitral tribunal is usually obliged to apply the law of the state party (article 42(1)).

Fourthly, a qualitative assessment of ICSID's Rules, its procedures for the appointment of arbitral tribunals, the calibre of the arbitrators, the average duration of ICSID

proceedings bearing in mind the large amounts at stake and the relative complexity of the disputes, and the quality of the administrative services and support provided by ICSID staff, shows that ICSID provides a quality service which compares very favourably with that of other arbitral institutions.

Finally, again bearing in mind the amounts in dispute and the complexity of the issues, it is clear that ICSID provides a cost-effective service, if it is properly used, compared to other arbitral institutions. The Rules (by seeking to draw on the best features of both common-law and civil-law procedural traditions) avoid an extensive hearing on the Anglo-American Model, thereby reducing the most expensive item of an arbitration, the fees paid by parties to their own lawyers. The fees paid to ICSID arbitrators are controlled, and therefore very modest (at US \$ 850 per day), without as yet affecting the calibre of prospective arbitrators. Because of its modest caseload and the fact that ICSID arbitrations are subsidised to some degree by the World Bank, ICSID is able to provide an extremely good administrative and supportive service at a very modest cost to the parties. Moreover, if the arbitration takes place at the World Bank Headquarters or at a regional office no charge is made for the use of the venue. Large advances (deposits) are not required from the parties and interest at commercial rates is paid to the parties on those advances.

3.6 Concluding Remarks

Increase in the number of investment disputes is often associated with numerous challenges for African countries. It is true that African countries are confronted with important challenges as a result of the increase in investment related litigious activities. What is certainly an innovation is the fact that investors and their countries of origin, instead than relying on other means to solve their grievances, are increasingly relying on international law to solve them.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

The success of the ICSID system cannot be measured or based on the level of use of its arbitration process. The significance of ICSID is however increasing due to the service it provides to both investors and Contracting States. It has been argued that ICSID provides ‘an impartial, low-cost repository of dispute resolution expertise’. This has been shown by the increasing frequency with which investors and host governments use ICSID as their preferred mechanism for settling disputes. Until the creation of ICSID, there were no tribunals, which had any expertise in settling disputes, which arose from foreign investment transactions involving states and private parties. Although the International Chamber of Commerce (ICC) had some experience with arbitration of disputes arising from state contracts.

Despite the significant caseload, it should be noted that ICSID’s jurisprudence is still in its early stages, and the majority of the cases submitted to arbitration during the last couple of years are still in process. Within this context, it should not be a surprise that most of the emerging patterns in jurisprudence are related to matters of jurisdiction and the tribunals have addressed this.

ICSID’s jurisprudence has tended to focus on questions of jurisdiction, and has clarified a series of issues until recently remained limited to theoretical discussions. The jurisdictional objectives have raised novel issues concerning, for example, the overlap of contractual and BIT disputes, the *jus standi* of minority and non-controlling shareholders, criteria to attribute to the host state measures adopted by state enterprises and the “fork-in-the-road” clauses.

It remains to be seen whether the ICSID system at present achieves the required degree of consistency. A proper treatment of this matter would clearly go beyond the scope of the present contribution; therefore it will only be dealt with summarily. Three points are worth making:-

The first point to make is that while consistency is widely hailed as an important factor in dispute settlement, the ICSID system provides relatively few safeguards to bring it about. Like other systems of arbitration or adjudication, it does not enshrine any concept of binding precedent, or *stare decisis*. Awards are binding between the parties, but have no third party effect.¹ Decisions of tribunals (including those by annulment committees) neither bind other litigants, nor less subsequent panels of arbitrators in a different set of proceedings.² Also, with the potential exception of interpretative notes under NAFTA Article 1131, there is no system of reference proceedings, such as that under Article 234 TEC, by which lower tribunals can refer abstract question to a hierarchically superior institution for (binding) interpretation. What is more (and perhaps most importantly), arbitral tribunals in different proceedings usually do not apply the same norms, but identically phrased norms taken from different treaties. As has been pointed out already, this opens up a further avenue for inconsistent decisions, as, despite their identical or similar wording, these norms may have been intended by the parties to have a different meaning. Finally, in a system based on *ad hoc* arbitral there is no personal consistency, as different cases are decided by different panels of arbitrators.

In short, there are no “hard” mechanisms for forcing tribunals to arrive at consistent decisions. The risk of inconsistent decisions therefore is inherent in the system; it is part and parcel of a process of decentralized, non-hierarchical, and *ad hoc* dispute resolution, such as that of investment arbitration.

¹ This is implicit in Article 53(1) ICSID Convention and Article 52(4) of the Additional Facility Rules. As *Schreuer* notes: “Nothing in the Convention’s travaux preparatoires suggests that the doctrine of *stare decisis* should be applied to ICSID arbitration” (The ICSID Convention, Article 53 MN 15, with further references to case-law).

² As a matter of law, the arbitral tribunal in the *SGS-Philippines* thus was entirely correct to observe that “in the end it must be for each tribunal to exercise its competence in accordance with the applicable law {...} Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.” (Decision on Jurisdiction, available on the internet:<http://www.investmentclaims.com/oa 1.html>, para. 97 (visited on 15 May 2006).

As is well known, in a number of recent proceedings, this risk has materialized. At least in some instances, tribunals have rendered diametrically opposed or conflicting decisions, and have also openly criticized the reasoning of previous awards. The *Lauder cases*³ provide a spectacular example of opposite decisions by different tribunals, concerning the same set of facts, almost identical parties, and nearly identical legal norms. Instances like the different *SGS cases*⁴ concern the conflicting interpretation, given by different treaties, and applicable in similar cases between different parties.

With the huge number of ICSID cases registered in recent years, some degree of inconsistency is probably inevitable. Yet, even if they are exceptional, the instances of inconsistent decisions are noteworthy. They would seem to be more than occasional aberrations occurring within any system of law. Given the popularity of ICSID proceedings, their number is unlikely to decrease in the future. What is more, inconsistent decisions are clearly visible in a system now increasingly moving towards transparency and greater public scrutiny.

Since they will usually concern similar provisions found in different but similarly phrased treaties, the contradiction between decisions will also be particularly evident. It remains to be seen whether the problem is a fact of life with which investors and states have to put up, or whether it could be remedied by the establishment of an appeals facility.

At present, decisions of ICSID tribunals are final, and can be challenged only before another ICSID tribunal on procedural or ‘natural justice’ grounds (tribunal not properly constituted, corruption, excess of power, failure to follow rule of procedure, failure to

³ CME Czech Republic V. v. Czech Republic, Partial Award of 13 September 2001 and Final Award of 14 March 2003 (the ‘Stockholm Award’); *Lauder v. Czech Republic*, Final Award of 3 September 2001 (the ‘London Award’). All awards are available on the Internet: <http://www.investmentclaims.com/oal.html> (visited on 15 May 2006).

⁴ *SGS Societe Generale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction of 6 August 2003 (‘SGS-Pakistan’); *SGS Societe Generale de Surveillance S.A. v. Philippines*, Decision on Jurisdiction of 29 January 2004 (‘SGS-Philippines’), both available on the Internet: <http://www.investmentclaims.com/oal.html> (visited on 15 May 2006).

give reasons). There is no facility for an appeal on the substance of the decision, for example in respect of an error of law.

Recommendations

The issues surrounding possible multiple proceedings and potential contradictory awards, and the risks associated with them, also need to be addressed. Multiple proceedings clearly impose a burden on the host state. Some procedural or institutional measures in this regard could include (a) a requirement that cases based on the same facts be consolidated, irrespective of the relationship or different legal personality of the claimants. NAFTA has a model for this, as have the latest BIT by the United States and Canadian BIT model; (b) the use of a general appellate body that would ensure consistency in similar cases, as well as the possible establishment of a permanent tribunal to adjudicate investment disputes. Comparative experience, both at the national and international level, suggests that indeed, hierarchically-structured systems of judicial dispute settlement can succeed in producing a consistent line of jurisprudence, and thus reduce uncertainty. For example, the WTO Appellate Body is widely credited for having rendered dispute settlement in world trade law more reliable and predictable.⁵

Whether ICSID should be the forum to house an appellate process depends, in my view, on its willingness to change its institutional structure. ICSID is not, today, an independent organization. It is a part of the World Bank Group. It is financially and structurally dependent upon the Bank. The President of the World Bank chairs its Administrative Council. The Legal Vice President of the Bank is also Secretary General of ICSID. At the same time, the Bank routinely expresses specific positions regarding the values of investment agreements, and the interpretation of specific provisions and obligations and goals, and the role of the investor-state process. All of this means that the

⁵ This task indeed is clearly stated in Article 3:2 DSU, which in part provides that WTO dispute settlement “serves [...] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.

independence of ICSID as currently constituted is, from a conflict of interest perspective, undeniably compromised.

In addition, it is entirely possible that other parts of the World Bank Group may have a financial stake in a project brought to arbitration or in another project in similar circumstances facing related challenges as the circumstances generating a dispute. Again, this presents the potential for an actual or reasonably apprehended conflict of interest.

Thus, a prerequisite for ICSID operating an appellate facility is its divestiture by the World Bank and re-establishment as a single, independent body with individualized governmental control entirely outside the existing World Bank voting system. While the linkage to the Bank may have been necessary at the beginning of the process, it is not demonstrably necessary now. The linkage to the Vice Presidency of the World Bank is particularly unnecessary.

Of course, the above is equally true for the current role of ICSID in terms of arbitration panels, and most pronouncedly in relation to the annulment panels. An independent organization could house both the leading arbitration panel process and the single appellate process. This would create some additional governance and financing needs, beyond those that could be recovered by arbitration and appeal fees. However, given the vital role of foreign investment in the global economy today, and its critical role in the pursuit of development and sustainable development, this cost is one worth bearing.

Developing an appellate process must lead to demonstrable improvements in the current situation of unequal review processes, unrealistic review standards, non-transparent appointments to annulment tribunals, and the checkerboard of transparent and non-transparent proceedings and documents. Simply having an appeal process is not a valid objective; the end goal must be a better process than what we have now.

ICSID, like most arbitration systems, operates under a shroud of privacy and binds its tribunals with a duty to keep the matters before them confidential. Even the award itself may only be published by ICSID if both parties give their consent, which is often not granted (of the 159 cases registered with ICSID since its inception, its website contains published awards in only 28 cases). Publications of all awards on a prompt and full basis will serve to increase transparency and advance to harmonise the jurisprudence of ICSID, and thus aid parties in evaluating the merits of their case. Currently, in circumstances where only some awards are public, awards that are out of step with the fundamental policies and purpose of the Convention may assume undue and unwarranted importance. Equally, whilst helpful, the legal principle excerpted by the Secretariat (in cases where publication is not authorized) are limited in usefulness by the lack of context in which to properly understand the thinking of the tribunal in those cases.

As a starting point and in order to involve the participation of all African countries, it is essential to alleviate the old fears engendered by Western countries and their investment entities, which must disappear with the emergence of modern investment realities. The African countries and investors must also increase their utilization of ICSID in the resolution of their investment disputes as well as their disputes with foreigners.

One key concern for African countries is to increase their ability to manage the investor-State disputes effectively. However, some broader development concerns and policy implications for African countries remain to be addressed. Their vulnerability in this regard is based on their limited technical capacity to handle investment disputes coupled with the increasing number of such disputes, the potentially high costs involved of conducting such procedures, potential impact of awards on the budget and a country's reputation as an investment location. At the same time, the proper functioning of the dispute settlement system is dependent on well-informed partners. Technical assistance seems necessary required to enable countries to make effective and efficient use of the investor-State dispute settlement system as part of an overall endeavor to improve the investment climate, the rule of law and ensuing that IIAs contribute to countries' efforts to attract and benefit from foreign direct investment.

In conclusion, the discussion illustrates some of the issues, which have come to light following the large increase in ICSID's caseload that has resulted from the extensive BIT programmes adopted by states. Assuming that one goal of international law is to create stability and predictability, then it is clear that the ICSID System would benefit from a drive to harmonise the body of jurisprudence emanating from its tribunals.

Whichever way ICSID and ICSID tribunals choose to address these issues, it is hoped that they keep as their guiding principle the rationale for the Convention, which was concisely stated by the tribunal in *Amco v. Indonesia*⁶ in the following terms:

“thus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investment is to protect the general interest of development and of developing countries”.

⁶ ICSID Case No. ARB/81/1.

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