

**THE JURISDICTION OF ICSID:
The Application of the Article 25 of Convention on the
Settlement of Investment Disputes Between States and
Nationals of Other States**

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ABBREVIATIONS

Art.	Article
e.g.	For example (Latin <i>exempli gratia</i>)
C.	Cilt
I.C.L.Q	International & Comparative Law Quarterly
i.e.	In other words (Latin <i>id est</i>)
ICSID	The International Centre for Settlement of Investment Disputes
Id.	The same (Latin <i>idem</i>)
ILM	International Legal Materials
infra	Below
J. Int.Arb.	Journal of International Arbitration
No.	Number
para.	Paragraph
Rep	Report
S.	Sayı
s.	Sayfa
supra	Above
The Centre	The International Centre for Settlement of Investment Disputes
The Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
US	United States
v.	Versus; Against
VAJ.INT'law L.	Virginia Journal of International Law
Vol.	Volume
Y.B. Com. Arb.	Yearbook of Commercial Arbitration

I. INTRODUCTION

Foreign investments are crucial to the development of international trade and the continuation of the globalization process. ICSID, the International Centre for Settlement of Investment Disputes (“the Centre”) was established as an autonomous international organization by the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (“the Convention”), which came into force on October 14, 1966.¹

The Centre aims to ease the flow of investments to countries that need them the most. The countries, which voluntarily ratify the convention, limit their sovereignty in a significant degree to encourage foreign investment. As of August 7, 2001, 149 States have signed the Convention, of which 134 have deposited their instruments of ratification.² The Centre is part of the World Bank Group. The members of the Centre are also members of the World Bank. The World Bank finances ICSID Secretariat’s expenses.³ ICSID’s web page displays 58 concluded cases and 35 pending cases as of November 2001.⁴

In 1978, ICSID formed an Additional Facility for the Administration of Conciliation, Arbitration, and Fact Finding Proceedings to administer certain types of proceedings between States and foreign nationals, which fall outside the scope of the Convention. Particularly disputes where either the State party or the home State of the foreign national is not a member of ICSID.⁵ Additional Facility rules will not be covered in this paper.

Another activity, which will not be subject to this paper, is Secretary-General of ICSID’s authority to appoint arbitrators for *ad hoc* (i.e., non-institutional) arbitration proceedings.⁶ It also excludes, in the event of annulment, the subject matter jurisdiction (“jurisdiction of *ratione materiae*”) of annulment committee under Article 52 of the Convention. This paper only covers the jurisdiction of an initial arbitration tribunal established to resolve a dispute pursuant to Article 25 of the Convention.

¹ <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (last visited on November 2001). For the Turkish text of the Convention see. RG. 6.12.1988-19830.

² *Id.*

³ *Id.*

⁴ <http://www.worldbank.org/icsid/cases/cases.htm> (last visited on November 2001).

⁵ Kenneth S. Jacobs, *Reinvigorating ICSID with a new mission and with Renewed Respect for Party Autonomy*, 33 VA.J.INT’LAW L. 123 (1992) at 131. See also <http://www.worldbank.org/icsid/facility/v.htm> (last visited on November 2001).

⁶ <http://www.worldbank.org/icsid/about/about.htm> (last visited on November 2001).

Success of arbitration tribunals significantly depends on the fact that they are conflict resolution places that the parties to a dispute agree upon to settle differences. An arbitration tribunal such as the Centre needs to be consistent in its decisions on jurisdiction to provide clear guidance, to avoid uncertainty and to be continuously chosen by the parties to a dispute.

It appears from the case law that the Centre is struggling to define its jurisdiction. There are several decisions creating doubts on Centre's interpretation of the Convention. The Centre seems to enlarge its jurisdiction by further delimiting the sovereignty of member states through a line of inconsistent decisions concerning corporate nationality and consent. To develop a bright line rule on jurisdiction might take time in a newly developing area. However, in cases where it is a question of interpretation of a Convention such development should not hamper the main objectives of the Convention. ICSID should keep in mind that its inconsistent decisions on jurisdiction:

- a) may restrict further acceptance of the ICSID arbitration by new states;
- b) may result in enforcement problems;
- c) may impair the efficiency of arbitration process by lengthening the procedure;

This paper mainly focuses on

- a) the jurisdiction of ICSID;
- b) whether the ICSID awards on jurisdiction hinders the main objectives of the Convention;
- c) whether some of the decisions of the Centre on jurisdiction are inconsistent;
- d) the consequences of such inconsistency.

II. JURISDICTION OF THE CENTRE

The main purpose of the Centre is to help to promote increased flows of international investment by facilitating the settlement of investment disputes

between governments and foreign investors.⁷ The drafters of the Convention intended to balance the interests of investors and host states.⁸

As indicated in the Preamble⁹, the use of ICSID conciliation and arbitration is entirely voluntary. Parties have to consent to arbitrate a dispute under the Convention, but once they have consented to arbitration, they cannot unilaterally withdraw their consent.¹⁰

Under Article 36(3) of the Convention the Centre may refuse to register one request for arbitration due to a reason that the dispute is “manifestly outside the jurisdiction of the Centre”.¹¹ *Asian Express Int'l PTE Limited v. Greater Colombo Economic Commission* case is an example for this proceeding.¹²

Article 25 of the Convention requires four elements in order to have the ICSID jurisdiction over a case.¹³

⁷ *Id.*

⁸ Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, ICSID Review, Foreign Investment Law Journal, Vol 6, Number 2, Fall 1991 at 463.

⁹ The Preamble reads: “...no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”

¹⁰ Article 25(1) of the Convention.

¹¹ Article 36(3) of the Convention reads: “(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”

¹² News from ICSID, Summer 1995, p 3.

¹³ Article 25 of the Convention reads:

“Jurisdiction of the Centre

Article 25:

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

(2) “National of another Contracting State” means:

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

First element is a **written consent** of the parties to the jurisdiction of the Centre. Second and third elements come under rubric of **Jurisdiction Ratione Materiae**:

- a) The dispute must **arise out of an investment**;
- b) The dispute in question needs to be a **legal dispute**.

Forth element is related to **the parties**, one party must be a **“Contracting State”** (or one of its constituent subdivisions or agencies), other party must be a foreign **“National of another Contracting State”**. ICSID does not have jurisdiction over disputes between states. One of the parties must be a natural or juridical person of another Contracting State. This element comes under **Jurisdiction Ratione Personae**.

Those four elements will be explained and discussed below, first as they are stated in the Convention, second, as they are applied to the cases.

1. Consent

a) Article 25 of the Convention

Article 25 of the Convention requires written consent of parties. The Preamble of the Convention also refers to “mutual consent by the parties”.

According to Executive Directors of the World Bank Report on the Convention¹⁴, the consent should not be “expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the

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

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes, which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).”

¹⁴ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, published at 4 ILM 524 (18 March 1965) para.24 (Report of the Executive Directors).

jurisdiction of the Centre, and the investor might give its consents by accepting the offer in writing.”¹⁵

According to Article 25(1), once a Contracting State gives consent to ICSID arbitration it is irrevocable. Article 25(1) states that “When the parties have given their consent, no party may withdraw its consent unilaterally.”

By consenting, ICSID arbitration states waive their sovereignty. Article 26 of the Convention provides that “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

According to Article 27 of the Convention, in case the Centre has jurisdiction, a contracting State cannot give diplomatic protection or bring an international claim on behalf of its nationals. Article 27 reads:

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Parties’ consent includes the Arbitration Rules of the Convention. According to Art 44 of the Convention the parties can agree on modifications Article 44 reads:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Consent also determines the scope of matters which are subject to the ICSID arbitration. Article 25 (4) provides two types of arbitration agreement

¹⁵ *Id.*

relating to the scope of matters that are subject to the ICSID arbitration: One is the general consent to ICSID arbitration, which means to consent to submitting all the matters relating to the investment transaction. The other is the limited consent, to submit only certain matters to ICSID arbitration.¹⁶

Article 25(4) reads:

Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes, which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

ICSID Model Clause provides both examples.¹⁷

b) The Case Law

Objections to the jurisdiction of the Centre have been raised in a significant number of ICSID arbitrations. The following section will discuss the ICSID's understanding of the requirements of Consent in Article 25 of the Convention and the development through case law.

***Holiday Inns v. Morocco* case¹⁸; objection to jurisdiction on several grounds**

In 1966, the Government of Morocco executed an agreement (hereinafter 1966 Agreement) with Holiday Inns SA, a Swiss subsidiary of Holiday Inns Inc., a US company, and an unnamed subsidiary of Occidental Petroleum Corporation (hereinafter OPC), a US company. Under that agreement, the Holiday Inns group undertook to form local subsidiaries of Holiday Inns in Morocco and to build four Hotels in Rabat, Marrakesh, Tangier and Fez, which were to become Holiday Inns' local subsidiaries' property. In return, the government was to lend the U.S. investors the amount needed to construct the hotels and to grant the investors foreign

¹⁶ Lamm, *supra* note 8 at 466.

¹⁷ ICSID Model Clauses, 4 ICSID Reports 360 (1993) at clause II and I. This issue is going to be discussed under the rubric of Jurisdiction Ratione Materiae.

¹⁸ Case ARB/72/1, this decision has not been published. The decision is discussed by Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*, 1 ICSID Reports 645-681. See also W. Michael Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, ICLQ, Vol. 35, April 1986 at 817.

exchange transfer facilities, duties exemptions, and other tax benefits. The agreement provided for ICSID arbitration clause.¹⁹

As a result of disputes that arose during the construction period in 1972, Holiday Inns SA and OPC filed jointly for ICSID arbitration. The two companies had stated that besides acting in their own names they were acting on behalf of Holiday Inns Inc. and four of its Moroccan subsidiaries as well as a US subsidiary of OPC.

Morocco objected to the jurisdiction of the Centre related to the consent on three grounds:

1) a) Morocco and Switzerland were not a party to the Convention at the date of 1966 agreement. Therefore, the parties lacked the capacity to agree to ICSID arbitration. Morocco became a party to the ICSID Convention in 1967²⁰.

b) Holiday Inns SA was not a legal entity under Swiss law in 1966. (Switzerland became a Contracting State in 1968)²¹. The tribunal rejected these arguments on the following grounds:

The tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of a company envisaged by the agreement. On this assumption, it is the date when these conditions definitely satisfied, as regards one of the parties involved, which constitutes in a sense of the Convention the date of consent by that party.²²

The tribunal held that the parties “consented to submit the dispute to arbitration within the meaning of ... the Convention”²³ Therefore, state and foreign nationals’ state have to be member of the Centre on the day of dispute not on the day of agreement.

2) Morocco argued that Holiday Inns Inc. and OPC did not sign the agreement containing ICSID clause, therefore, they have no right to be parties to the arbitration.

¹⁹ Lalive, *supra* note 18.

²⁰ Tupman, *supra* note 18.

²¹ *Id.* at 818.

²² *Id.* at 818.

²³ *Id.*

The tribunal concluded that, “any party on whom rights and obligations under the agreement have devolved is entitled to the benefits and subject to the burdens of the arbitration clause”.²⁴ The same day that the 1966 agreement was signed, Holiday Inns Inc. and OPC “undertook by a letter addressed to the government of Morocco and incorporated in the Basic Agreement... ‘to assume all responsibilities of Guarantors to warrant all commitments and liabilities and the true and complete fulfillment of all obligations [their subsidiaries] have entered into pursuant to the Agreement’ ”²⁵. Therefore, even though both Holiday Inns Inc. and OPC were not signatories to the agreement, they had right to be parties to the arbitration.

3) Another Moroccan objection on jurisdiction was about subsequent agreements concluded following the 1966 Agreement. Loan contracts between the local Holiday Inns Inc. subsidiaries and government agency, Credit Immobilier et Hotelier had a jurisdiction clause entitling Moroccan courts to have jurisdiction over disputes.

Three of the local Holiday Inns subsidiaries were sued by Credit Immobilier et Hotelier in Moroccan courts. Moroccan government argued that ICSID tribunal should wait until the Moroccan courts render decisions, then, get involved in the case to review only the possible effects of Moroccan courts’ decisions on the concerned parties to the ICSID Arbitration.²⁶

The tribunal did not accept this argument stating that all investment projects are “accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of parties to consider each of these acts in complete isolation from the others.”²⁷ The tribunal also stated that the 1966 agreement was like the “charter of the investment”, and that the loan contracts were “the means to execute this agreement”. Although particular disputes related to the loan contracts that are of secondary importance for the investment could be taken to local courts, ICSID had the primary jurisdiction to decide questions directly relating to the investment.

The tribunal took further step stating that:

... the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the tribunal had

²⁴ *Id.* at 819.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

already decided them, the Moroccan tribunals should follow its opinion. Any other solution would endanger the rule that international proceedings prevail over internal proceedings.²⁸

Therefore, domestic (municipal) proceedings will have no effect on the jurisdiction of ICSID. ICSID is an exclusive remedy for settlement of dispute.

One can argue that separate agreements related to the investment having dispute resolution mechanism other than ICSID could be interpreted as modification of mutual consent of the parties. Also, it could be discussed that the intention of the parties should be investigated in subsequent agreement. It should also be pointed out that in the *Benvenuti et Bonfant v Congo* case²⁹ the tribunal decided that ICSID arbitration may be suspended because of ongoing domestic proceeding.

***Amco Asia v. Indonesia* case³⁰; ICSID clause in a foreign investment application**

In 1968, under an agreement between Amco Asia, a US corporation and Wisma Kartika (hereinafter Wisma), an Indonesian company, Amco Asia undertook to build a hotel on Wisma's land. Amco Asia agreed to be in charge of the management of the hotel in return for a proportion of profit.³¹

Amco Asia applied to the Indonesian government for a foreign investment license. This application had an ICSID arbitration clause.³²

Same year, Amco Asia formed a local company, P.T. Amco, and transferred its rights arising from the contract with Wisma to P.T. Amco. In 1972, Amco Asia transferred 90% of its shares in P.T. Amco to Pan American Development Limited (hereinafter Pan American), an affiliated Hong Kong company. Indonesian government approved this transaction.³³

The dispute arose in 1980. Wisma terminated the contract with P.T. Amco claiming that P.T. Amco was mismanaging the hotel and causing revenue and profit losses, thus, it was not able to receive its proportion from

²⁸ *Id.* at 820.

²⁹ *Benvenuti et Bonfant v. Congo case*, 1 ICSID Reports 330.

³⁰ *Amco Asia v. Indonesia case*, ICSID ARB/81/1 published at 23 ILM 351 (1984).

³¹ Tupman, *supra* note 18.

³² *Amco Asia v. Indonesia case*, see *supra* note 30.

³³ Tupman, *supra* note 18.

the hotel's profits and sued P.T. Amco in Jakarta District Court. The Court granted Wisma damages.³⁴

In the meantime, P.T. Amco's investment license was cancelled by Indonesian Foreign Investment Board for not bringing money from overseas to capitalize the company. Amco Asia, P.T. Amco and Pan American filed a request for ICSID arbitration.

One of the objections Indonesia made to the jurisdiction of the Centre was related to the element of consent: The ICSID clause was in the foreign investment license application. Indonesia alleged that the approval of the investment license application did not constitute consent under the Convention. Indonesia argued that the consent must be express and unambiguous, since ICSID arbitration establishes significant limitations on sovereignty.³⁵ The Tribunal rejected the restrictive interpretation made by Indonesia stating, "... a convention to arbitrate is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way, which leads to find out, and to respect common will of parties ..."³⁶ The Tribunal added that there is no need to express consent "in a solemn, ritual and unique formulation".³⁷

It seems that the Tribunal rejects the plain meaning of the Convention. Because Article 25 requires "written consent" which is by definition an express, "solemn, ritual and unique formulation", this case demonstrates that the Tribunal has broadened the "written consent" requirement, one of the key elements of the ICSID's jurisdiction, found in the Convention.

***Klockner v. Cameroon case*³⁸; subsequent agreements**

Klockner group which consists of West German, Belgian and Dutch companies executed several contracts with the Cameroon government in order to build and operate a fertilizer plant. In November 1971, they signed a protocol determining the nature and number of contracts to be effected in order to realize the project. This protocol had ICSID arbitration clause. They were going to form a joint venture company, named SOCAME, which was

³⁴ *Id.*

³⁵ Tupman, *supra* note 18 at 825.

³⁶ *Amco Asia v. Indonesia case*, see *supra* note 30

³⁷ *Id.*

³⁸ *Klockner v. Cameroon case*, Case ARB/81/2, 2 ICSID Reports 4. See also J. Paulson, "The ICSID *Klockner v. Cameroon Award The Duties of Partners in North-South Economic Development Agreement*" 1 J.Int.Arb. 145(1984).

going to operate the plant, and 51 % owned by Klockner and 49% by the government.³⁹

The government guaranteed to provide the factory site as well as the payment of entire factory cost by SOCAME.⁴⁰

Klockner was obliged to conclude a management contract with SOCAME and in that contract it undertook the responsibility for plant management for a minimum of five years.⁴¹

Klockner and government signed another (turnkey) contract on March 1972 (1972 contract) to specify the technical details of the plant, which also had ICSID arbitration clause.⁴²

In March 1973, following SOCAME's incorporation, the government transferred to SOCAME all its rights and obligations derived from the protocol and 1972 contract. In June 1973, with a separate agreement (1973 agreement), the government undertook to guaranty such as preferential tax and custom treatment according to Cameroon's investment code. The 1973 agreement provided for ICSID arbitration in the event of dispute.⁴³

In April 1977, Klockner and SOCAME signed the management agreement (1977 Contract) pursuant to Article 9 of the protocol. This agreement provided for ICC arbitration clause.⁴⁴

Fertilizer plant started production in 1975, but in December 1977, it was shut down due to lack of demand and poor financial performance. Cameroon and SOCAME declined to pay the balance of the contract price. Klockner invoked ICSID arbitration clause, which was incorporated in the 1972 contract.⁴⁵ Cameroon and SOCAME asserted that the jurisdiction of the Centre extended to all of the provisions of the Protocol including disputes relating to Article 9 of the Protocol. Klockner argued that ICC arbitration clause in 1977 agreement had caused the removal of the disputes relating to Article 9 of the Protocol from ICSID jurisdiction.

³⁹ *Klockner v. Cameroon* case, see *supra* note 38.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 5

⁴⁴ *Id.*

⁴⁵ *Id.*

The tribunal admitted that 1977 contract is under the jurisdiction of ICC and the dispute arises from 1977 contract. However, this contract could not "be interpreted as an implicit waiver of a fundamental undertaking of the Protocol of Agreement either in its substance or with respect to its jurisdictional guaranties."⁴⁶

In *Klockner*, the tribunal found that it has jurisdiction over the case based on the framework agreement even though the subsequent agreement had an ICC arbitration clause.

Relating to the subsequent agreements which were outside ICSID jurisdiction, as in *Holiday Inns v. Morocco* case and *Klockner v. Cameroon* case, the tribunal seems to render other provisions for dispute resolution meaningless.⁴⁷ For example, in *Klockner v. Cameroon* case the concerned parties have deliberately chosen ICC arbitration clause in the 1977 agreement. Therefore, the interpretation of the ICSID tribunal in denying the ICC arbitration is again too broad. The intention of the parties seems to be omitted. Thus, parties must be free to modify their consent mutually. The Article the 25 of the Convention only prohibits unilateral withdrawal of consent.

***SPP v. Egypt* case⁴⁸, a unilateral promise for arbitration and enforcement problems**

This was the first case that the Tribunal found jurisdiction on the basis of a unilateral promise made by Egypt prior to the formation of a particular foreign investment agreement.

One of the ways States attract foreign investment is to make a unilateral promise to submit disputes to ICSID arbitration.

In this case, Egypt contented against the jurisdiction of the Centre alleging that their legislation containing a unilateral promise for arbitration of ICSID "was only an invitation" and cannot be construed as an offer⁴⁹. Article 8 of the Egyptian law reads:⁵⁰

Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner agreed upon with the investor, or

⁴⁶ *Id.*

⁴⁷ *Tupman supra* note 18.

⁴⁸ *SPP v. Egypt* case, 3 ICSID Rep 131 (1993).

⁴⁹ M. Somarajah, *The Settlement of Foreign Investment Disputes* (2000) at 210.

⁵⁰ *Id.*

within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and nationals of another countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where the Convention applies.

Egypt contended that, in the light of its internal laws there should be an additional agreement, therefore, there was no real consent for ICSID arbitration. Law provided a choice only, there was no binding obligation to arbitrate. The tribunal interpreted the aforementioned legislation as an offer.

Egypt applied to the Centre to annul the award.⁵¹

According to Sornarajah, an academician, in this case, there was a "credible basis considering the civilian base of Egyptian law, for the view that Egypt had taken that a further agreement was necessary for there to be a binding arbitration agreement."⁵² Further there was strong evidence suggesting that Egypt clearly had no intention to consent for ICSID arbitration with this legislation.⁵³ Egypt was extremely unhappy about this decision on jurisdiction since it did not mean to have a blanket consent for ICSID arbitration by its general investment law provisions. Subsequently, Egypt amended its law.⁵⁴

In the end, the dispute was settled by the parties, however, this case demonstrated that difficult situations may arise in case where the state involved refuses to accept the ICSID's decision and, thus, its enforcement.

Another related issue is a choice of law problem. In case where there is a genuine unilateral offer in legislation, what law ICSID tribunal should apply to resolve the dispute. Usually such a general unilateral offer in legislation will not indicate the applicable law however, Article 42 of the Convention has an answer for this question. Article 42 of the Convention reads: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international

⁵¹ *SPP v. Egypt* case, see supra note 48.

⁵² Sornarajah, supra note 49.

⁵³ *Id.*

⁵⁴ *Id.* The new section reads: "Without prejudice to the right to resort to Egyptian Courts investment disputes related to the implementation of the provisions of this Law may be settled in the manner agreed upon with the investor".

law as may be applicable”⁵⁵. Sornarajah points out that “there is a risk in assuming jurisdiction on the basis of unilateral offer and constructing an agreement which gives no indication as to choice of law”.

Other Ways of Giving Consent

AAPL v. Sri Lanka case⁵⁶ was the first case where an arbitration clause was incorporated in a bilateral investment treaty, United Kingdom-Sri Lanka investment treaty. This case is important because it recognizes that bilateral investment treaties may provide a basis for establishing the consent of a State - party to a dispute.

Because Sri Lanka admitted the jurisdiction of the Centre, the issue of consent based on bilateral investment treaties and the implication of Article 25 of the Convention had not been fully discussed in this case.⁵⁷ Thus, several jurisdictional issues related to bilateral investment treaties remain unresolved.

In the *Icelandic Aluminum Co Ltd. v. Iceland* case, the tribunal held that the consent could be given even after the dispute arises.⁵⁸

In sum, according to the case law, the consent to the ICSID arbitration does not need to be expressed in a single instrument. The consent could be expressed:

- a) In the domestic legislation of the host state (a unilateral act of the contracting state);
- b) In an investment agreement between parties to the dispute;
- c) In an international treaty (bilateral or multilateral).

A party, which was not signatory to the investment agreement bearing an ICSID clause, might have the right to be party to the arbitration. Consent

⁵⁵ Article 42 (1) of the Convention. Other paragraphs of the same Article are:

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

⁵⁶ *AAPL v. Sri Lanka* case, 4 ICSID Rep. 245.

⁵⁷ *Id* at 247.

⁵⁸ Lamm, *supra* note 8 .

could be given before or after the dispute arises. It could also be given before a State becomes a party to the Convention. In other words, the State and foreign nationals' state have to be members of the Centre on the day of dispute not on the day of agreement.

According to case law, there is also no unique formulation for consent. If the interpretation of investment agreement in good faith shows that the parties agreed to ICSID arbitration, it would be sufficient for the Centre to have jurisdiction. In cases involving separate agreements having different arbitration clauses or domestic proceeding clauses rather than ICSID, the clause specified in the framework investment agreement would be applicable.

2) Jurisdiction *ratione materiae*

The dispute submitted to the ICSID tribunal should be “ a legal dispute arising directly out of an investment”⁵⁹. Therefore, first, there should be a dispute; second, it should be a legal one; and finally, such legal dispute should arise out of an investment.

The Convention has not defined the term “legal dispute” and “investment”. The real intention behind the qualification by the term ‘legal’ is not clear in *travaux preparatoires*.⁶⁰ Executive Director’s Report states that, “ the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of a legal obligation”⁶¹ ICSID does not have jurisdiction over “disputes of a purely commercial or political nature.”⁶²

The term “legal dispute” has not caused a problem in ICSID’s decisions so far.⁶³ In *Alcoa v. Jamaica* case⁶⁴ it has been briefly discussed.

The drafters of the Convention refrained from including a definition of the term “investment” in the Convention.⁶⁵ Article 25(4) of the Convention

⁵⁹ Article 25(1) of the Convention..

⁶⁰ C.F. Amerasinghe, *A Guide to the Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 1978.

⁶¹ Report of the Executive Director’s *supra* note 14 at 9. See also Lamm, *supra* note 8 at 463-474.

⁶² *Documents concerning the Origin and Formulation of the Convention* (1968) (Convention History) Vol.II, Part 1 . p. 322. see also Rifat Erten, “ICSID Tahkimi”. *Banka ve Ticaret Hukuku Dergisi*. 1998, C. XIX, S. 4, s. 215.

⁶³ Moshe Hirsch, *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes*, p. 58.

⁶⁴ *Alcoa v. Jamaica* case, Case No ARB/74/2, 4 Y.B. Com. Arb.206 (1979).

allows parties to limit the subject matter jurisdiction as several have done by excluding the disputes arisen from cases involving natural sources. Some countries excluded certain territories.⁶⁶

The term “investment” is also discussed in *Alcoa v. Jamaica* case. An examination of the term “investment” took place in this case. Alcoa Minerals, a US company, entered into an agreement with the government of Jamaica, which has ICSID arbitration clause.⁶⁷ Jamaica undertook to give Alcoa bauxite-mining rights and tax concessions for twenty years. Alcoa undertook to construct an alumina refining plant, which would operate to extract alumina from the mineral bauxite. Alcoa filed for ICSID arbitration alleging that the collection of additional tax constitutes breach of agreement.

The Alcoa tribunal considered the jurisdiction where “ a [private] ... company has invested substantial amounts in a foreign State in reliance upon an agreement with that State”. Therefore, the tribunal held that the contribution of capital was a type of “investment”.

The Convention allows for “additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”⁶⁸ Article 46 provides that it is “unnecessary for parties making additional claims or counterclaims to start new procedures”.⁶⁹

3) Jurisdiction *Ratione Personae*

a) Article 25 of the Convention

The personal jurisdiction of ICSID is limited to disputes “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”.⁷⁰

- Contracting States: ⁷¹

⁶⁶ W.M. Tupman, ‘Case Studies in the Jurisdiction of the International Centre for Investment Disputes’, 35 ICLQ., 815, 816.

⁶⁷ Tupman, *supra* note 18 at 816.

⁶⁸ Lamm, *supra* note 8 at 474-475.

⁶⁹ Article 46 of the Convention.

⁷⁰ Convention History, *supra* note 63 at 270.

⁷¹ Article 25(1) of the Convention.

⁷¹ <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (last visited on November 2001). See also Article 68 and 70 of the Convention.

According to the Convention, both State and investor's State must be "Contracting State". They must deposit an instrument of ratification, which is required to be accepted or approved by the World Bank.

- Constituent Subdivisions and Agency of a Contracting State:

For a Constituent Subdivision or Agency to invoke ICSID arbitration to the Centre it must have been designated by the State. In addition, consent to ICSID arbitration "by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required"⁷²

- National of Another Contracting State:

"National of another Contracting State" is defined in the Article 25(2) of the Convention⁷³. This could be a natural or juridical person. Both juridical and natural persons have to be nationals of a Contracting State other than the state party to the dispute according to Article 25(2). In addition to this requirement, a natural person must be a national of another Contracting State on the date the request for arbitration is submitted and 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.⁷⁴ Several disputes have arisen out of the meaning of juridical person under this Article.

Under international law, generally, the nationals of a particular state cannot sue their state in an international forum. Usually, host states require that foreign investors form a company under the laws of the host state to carry on the business. In that case, this company would have to be host state's national. In order to overcome this difficulty, Article 25 (2) (b)

⁷² Article 25(3) of the Convention.

⁷³ Article 25 (2) of the Convention reads:

(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.

⁷⁴ Article 25(2) (a), e.g. *Ghaith R. Pharaon v. Tunisia* case.

provides that "...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."

The purpose of Article 25(2)(b) of the Convention, explained by one of the formulators of the Convention, Dr. Broches is as follows: "... If no exceptions were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of this Convention".⁷⁵

b) The Case Law

Holiday Inns v. Morocco case

Morocco objected to the jurisdiction of the Center over four Moroccan subsidiaries of Holiday Inns Inc. alleging that those companies were Moroccan companies and that there was no consent to treat them as "national of another Contracting State".

The tribunal decided that the four Moroccan companies are not entitled to invoke ICSID arbitration. The tribunal found that even though those companies are under "foreign control" there was no express agreement to treat them as "nationals of another Contracting State" within the meaning of Article 25 (2)(b) of the Convention. The Tribunal stated that Article 25 (2)(b) is an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such derogation. The Tribunal further stated that an agreement intending to derogate from the general rule should be explicit. An implied agreement would only be acceptable in the event that specific circumstances would exclude any other interpretation of the intention of the parties.⁷⁶ Thus, the Tribunal concluded that there should be a clear expression of consent by the state of incorporation.

Professor Lalive asserts, in his article, that consent to international arbitration between a state and a juridical person should not be open to doubt. He states that a liberal interpretation of Article 25(2)(b) would hardly contribute to a wider acceptance of ICSID arbitration by States and to the protection of foreign investor, therefore, it is up to the foreign investor to

⁷⁵ M. Sornarajah, *supra* note 49 at 211.

⁷⁶ See *Holiday Inns v. Morocco case*. See also Tupman, *supra* note 17; Lalive, *supra* note 17.

take all necessary precautions whenever the creation of 'local' legal person (wholly or partly owned) is suggested or decided upon.⁷⁷

In *Holiday Inns v. Morocco* case, a cautious view is adopted as the Tribunal decided to emphasize the "clear expression of consent". By doing so, the Tribunal appears to be acting in conformity with the text of Article 25(2)(b) the Convention.

***Amco Asia v. Indonesia* case; broad interpretation of Article 25(2)(b)**

In *Amco Asia v. Indonesia* case, The Tribunal expanded and changed its interpretation of Article 25(2)(b). In this case, Indonesia argued that assuming that Indonesia consented to ICSID arbitration with P.T. Amco, an Indonesian company, there was no "explicit consent" to treat P.T. Amco as a "national of another Contracting State".⁷⁸

The claimants argued that Indonesia perfectly knew that P.T. Amco was controlled by Amco Asia, a US national, and therefore it should be treated as a "national of another Contracting State". The claimants showed as evidence a number of provisions of the investment application, the request to establish a foreign investment in Indonesia, etc.⁷⁹

The tribunal held that P.T. Amco was entitled to invoke ICSID arbitration. The tribunal emphasized in its decision on jurisdiction the purpose of ascertaining "the true common will and intention of the parties ... from the normal expectations of the parties, as they may be established in view of the agreement as a whole"⁸⁰. The tribunal decided that the government had accepted that Amco Asia would control P.T. Amco, and thus had implicitly consented to treat P.T. Amco as a "national of another Contracting State" within the context of the Convention. The tribunal stated that Article 25(2)(b) does not require an express clause. The tribunal added that the Convention did not require that "a formal indication, in the arbitration clause itself, of the nationality of the foreign juridical or natural persons who control the juridical person having the nationality of the contracting State party to the dispute". Since, in its investment application, Amco Asia proposed to set up a foreign business in Indonesia and capitalize P.T. Amco with foreign capital, that constitutes acknowledgement of P.T. Amco as foreign controlled.

⁷⁷ Lalive, *supra* note 18.

⁷⁸ *Amco Asia v. Indonesia* case, *supra* note 30.

⁷⁹ *Id.*

⁸⁰ *Id.*

The decision is clearly in contradiction with the approach observed in *Holiday Inns* case.⁸¹ Sornarajah questions whether such an interpretation of the tribunal is consistent with the plain meaning of Article 25, its drafting history, and model clause.⁸² He further states that if one considers as a foreign national, each company controlled by a foreign corporation a government permit “ then why have Article 25(2)(b) at all?”⁸³

As is the case in many countries, there exists an agency such as BKPM in Indonesia, which reviews and approves all the investments projects proposed by foreign companies. The Indonesian law requires that a foreign company can operate in an approved area provided that it is incorporated as an Indonesian company and, its project is approved by BKPM. It seems that the tribunal reached to an unexpected conclusion by deciding that any company that is reviewed by BKPM be treated as a foreign national. As stated by Sornarajah, such an astonishing result could not have been intended by the States who might have such investment review and approval agencies.

It also seems that such an over reaching understanding does not comply with the intent of the Article 25(2)(b). Moreover, it is clear that this decision is at odds with the tribunal’s earlier decision on the same issue.

Even though some commentators consider tribunal’s view regarding this case as “broader view”⁸⁴, this does not correspond to the literal interpretation of the Convention. Especially, if we take into consideration ICSID model clauses that recommend that nationality be stated. It is important to keep in mind that in order to attract foreign investments, States waive their sovereignty. Thus the jurisdiction of ICSID should provide clear provisions to respect the limits of such waiver. However, this case illustrates the eagerness of the Tribunal to broaden ICSID’s jurisdiction and the introduction of uncertainty to the meaning of certain provisions of the Convention.

Klockner v. Cameroon case

In the *Klockner v. Cameroon* case, a similar approach was taken. The tribunal continued undermining the Article 25(2)(b). Klockner objected to the jurisdiction of ICSID with respect to the 1973 Agreement arguing that

⁸¹ See *supra* note 18.

⁸² M. Sornarajah, *supra* note 49 at 201.

⁸³ *Id.*

⁸⁴ Lamm, *supra* note 8 .

SOCAME was a Cameroon company, not a national of another Contracting State.⁸⁵

The tribunal dismissed this argument. According to the Tribunal, since SOCAME was a foreign controlled company, this was, in itself, sufficient to impute that it was also considered as being a “national of another Contracting State” within the meaning of Article 25(2)(b). The tribunal surprisingly asserted that the insertion of an ICSID arbitration clause is sufficient by itself to presuppose and imply that the parties had agreed to consider SOCAME, at the time, to be a company under foreign control.⁸⁶ In addition, Klockner argued that even if SOCAME was a company under foreign control at the time of the agreement, over time, as the government took control of SOCAME by becoming its majority shareholder, it ceased to be a foreign controlled company thus it should no longer benefit from ICSID’s jurisdiction. The tribunal rejected this argument and stated that by the time the establishment agreement was negotiated between Cameroon and Klockner, Klockner was holding the majority of SOCAME’s shares and Klockner benefited from “the legal, economic, financial, and fiscal advantages and guaranties granted in the ‘establishment Agreement’.” The Tribunal concluded that the nationality of foreign controlled companies at the date of consent to ICSID arbitration is the determining criteria of ICSID rights.⁸⁷

As mentioned earlier, this type interpretation reveals the eagerness of the Centre to take the cases, and how far it enlarges its jurisdiction by ignoring the wording of the Convention. Assuming that the mere inclusion of an ICSID arbitration clause in an agreement implies that the host State had also agreed to treat its corporate national as a foreign corporation, then the whole provision concerning the parties’ agreements to treat nationals of a Contracting State as nationals of another Contracting State in Article 25(2)(b) seems to be superfluous. It is also difficult to say that Article 25’s internal structure support such interpretation. A statute generally should be interpreted so as to give effect to each of its provisions. Therefore, one provision should not be read so as to render itself or another superfluous. Moreover, it also seems that under such interpretation, it is difficult to explain the inclusion of the Model Clause VIII to provide for the situation where a host country is prepared to treat its corporate national as a foreign national for the purposes of ICSID arbitration.

⁸⁵ *Klockner v. Cameroon* case, supra note 37.

⁸⁶ *Id.* See also Paulson, supra note 37 at 151.

⁸⁷ *Klockner v. Cameroon* case, supra note 38. See also Somarajah, supra note 49 at 201.

*Letco v. Liberia Case*⁸⁸

LETCO was a Liberian company, controlled by French interest. In 1970, LETCO and Government of Liberia signed a forestry concession agreement, which had an ICSID clause. However, there was no explicit agreement between parties that LETCO "should be treated as a national of another Contracting State".

The Tribunal concluded that when a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it had agreed to treat that company as a juridical person of another Contracting State, the former Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause.

It is important to remember that by contrast to cases above, in this case, the agreement containing ICSID jurisdiction was between a Member State (Liberia) and its own national (LETCO). The tribunal in this case stated that even though it is not necessary to go so far it could be argued with some force that the mere fact that Liberia and LETCO included an ICSID arbitration clause in the Concession Agreement constitutes an agreement to treat LETCO as a "national of another Contracting State". This seems to be an effort by the Tribunal to signal its consistency with the application of Article 25(2)(b) to other cases specifically with its application in *Amco Asia v. Indonesia* and *Klockner v. Cameroon*. However, in a recent decision *Vacuum Salt Product v. Ghana*⁸⁹ the Tribunal seems to going back to its initial approach found in *Holiday Inns v. Morocco* case in a limited way.

SOABI v. Senegal case

In *SOABI v. Senegal*⁹⁰, SOABI, a Senegalese company, was going to construct 15 000 units of low income housing in Senegal. All of the shares of SOABI were owned by Flexa, a Panamanian company. Panama had not signed the Convention; therefore it was not an ICSID Contracting State. However, the Panamanian company, Flexa, was controlled by Belgian nationals who were nationals of a Contracting State. The Tribunal held that indirect control by nationals of Contracting States of the company

⁸⁸*Letco v. Liberia Case*, ICSID ARB/83/2, published at 1984 2 ICSID Rpts. 349 .

⁸⁹*Vacuum Salt Product v. Ghana case*, Case No ARB/92/1, published at 4 ICSID Rpts 321(1993). See *infra* page 31 for its discussion.

⁹⁰*SOABI v. Senegal case*, ICSID ARB/82/1, published at 1993 2 ICSID Rpts. 165 .

established under local law was sufficient to satisfy the nationality requirements of Article 25 of the Convention. The Tribunal found that, although the nationality of Flexa was Panamanian, control over Flexa was exercised by nationals of Belgium, a contracting state. Because SOABI were owned by Flexa, which was controlled by nationals of a member state, the nationality requirement of the Convention was satisfied.⁹¹

This holding seems to go further than *Amco Asia v. Indonesia* by extending “foreign nationality” to “controlling the controlling juridical person itself”.⁹²

In this case, it is observed that the trend to enlarge the jurisdiction of ICSID is continuing.

*Vacuum Salt Product v. Ghana case*⁹³

In *Vacuum Salt Product v. Ghana*, a recent case, the Tribunal applied Article 25(2)(b) by giving effect to each of its provisions and limited its desire to expand jurisdiction.

In 1988, Vacuum Salt, a Ghanaian company, and Ghana signed a lease agreement granting Vacuum Salt the right to develop a salt production and mining facility for 30 years. This agreement had an ICSID arbitration clause.⁹⁴

In this case, Ghana objected to the jurisdiction on the ground that Vacuum Salt was a Ghanaian company. They never agreed to treat Vacuum Salt as “a national of another Contracting State”. The request for arbitration was dismissed for lack of jurisdiction.

The Tribunal held that the second clause in Article 25(2)(b) required both that:

(1) there be an agreement that such party, though a national of one Contracting State party to the dispute, should be treated as a national of another Contracting State;

(2) and such agreement be “because of the foreign control”.

⁹¹ *Id.* at 168.

⁹² Lamm, *supra* note 8 at 473.

⁹³ *Vacuum Salt Product v. Ghana case*, Case No ARB/92/1, published at 4 ICSID Repts 321(1993).

⁹⁴ *Id.*

The Tribunal stated that while specific reference to the agreement was desirable, the jurisprudence and practice indicated that agreement to treat such party as a national of another Contracting State need not specifically refer to the clause in Article 25(2)(b). However, the Tribunal stated that an agreement that such party be treated as a foreign national because of foreign control did not, as a matter of law, confer jurisdiction. The Tribunal further stated that the reference to foreign control set an objective limit to ICSID jurisdiction, which could be waived irrespective of the Parties' intent. The Tribunal observed that the existence of an arbitration clause may in some circumstances be treated as a rebuttable presumption that the "foreign control" criterion had been satisfied.⁹⁵ The Tribunal concluded that existence of ICSID arbitration clause in an investment agreement is not enough to prove the nationality of the subsidiary. The Tribunal stated that there must be "foreign control" as well.⁹⁶ In the earlier cases, a company was considered foreign controlled if the majority shareholder was a foreign national. In this case, the tribunal concluded that there was no foreign control and dismissed the case for lack of jurisdiction.

Amco Asia v. Indonesia; transferring the shares in local company

In this case Indonesia objected that the only parties which are able to invoke ICSID arbitration clause are the ones named in the investment application. In the license only P.T. Amco was mentioned, Amco Asia and Pan American were not. Indonesia alleged that the consent they have given was not for latter companies.⁹⁷

The claimants contended that:

a) The term "the company" in the arbitration clause should be interpreted as investment venture. Therefore, "the company" includes Amco Asia as a source of P.T. Amco's capital.

b) Indonesia approved the transfer of P.T. Amco shares to Pan American. Therefore, Indonesia had confirmed both the participation of Pan American in the investment and the right of Amco Asia's to recourse to ICSID arbitration.⁹⁸

The tribunal stated that since the main purpose of ICSID is to promote private foreign investment, "the real party in interest" should be determined.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Amco Asia v. Indonesia case, supra note 30.*

⁹⁸ *Id.*

P.T. Amco is only an investor vehicle.⁹⁹ Therefore, Amco Asia has right to invoke ICSID arbitration.

The tribunal also went further and concluded that Pan American has a right to ICSID arbitration.

It was stated by the Tribunal that

“... the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in P.T. Amco and may be transferred with those shares. To be sure, for such a transfer to be effective, the government of the host-country must approve it , which approval has its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision.”¹⁰⁰

Therefore, according to this case companies can transfer arbitration rights to other companies, which may cause States to lose their sovereign rights to decide which companies should be permitted to invest and have ICSID rights.

III. CONCLUSION

The accelerated pace of globalization, and development of information technology and communication technologies coupled with significant efforts to promote foreign trade and investments have resulted in an unprecedented level of foreign investments in the last decade. As a result of increases in the number and volume of foreign investments, the number of disputes related to foreign investments has considerably boosted. These developments have been reflected in the number and variety of disputes handled by ICSID in the last decade.

The existence of ICSID has contributed to the promotion of foreign private investment particularly in developing economies.

However, the ICSID case law demonstrates two significant issues regarding jurisdiction. First of all, an eagerness to take the cases, on the part of ICSID, is observed. ICSID's approach is generally based on a broad interpretation of its jurisdiction. Secondly, the cases examined in this paper

⁹⁹ *Id.*

¹⁰⁰ *Id.*

reveal that in all cases related to jurisdiction the awards have disfavored the States that are parties to the Convention.

In order for an arbitration tribunal to be credible there needs to be consistency in the decisions, provision of clear guidance, predictability and certainty. It appears from case law that ICSID decisions do not always satisfy these objectives. ICSID, in certain cases, has tried to enlarge its jurisdiction by further limiting the sovereignty of member States. This has been reflected in some inconsistent decisions concerning corporate nationality and consent.

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

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

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