Page 1301 - 1331 **DOI:** *https://doij.org/10.10000/IJLMH.117158*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 2

2024

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The Jurisdiction of Tribunals in Matters of Arbitration: An Examination of ICSID Arbitration

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ABSTRACT

This study examines the legal framework of the ICSID arbitration, focusing on the doctrine of ratione materiae and the involvement of national courts. Jurisdictional determinations play a crucial role in setting the boundaries of the ICSID arbitration, making them a fundamental aspect of the process. This paper examines the concept of ratione materiae, which refers to the specific range of conflicts that fall under the authority of the ICSID tribunals. This research explores the criteria employed by tribunals to determine their jurisdiction based on ratione materiae, drawing on the rules of the ICSID Convention and relevant case law. The paper examines two main topics: the meaning of the term "investment" and its importance in determining the extent of the ICSID jurisdiction and the changing legal principles regarding the definition of protected investments in bilateral and multilateral investment treaties. This article examines the relationship between the ICSID tribunals and national courts in deciding jurisdiction problems, specifically in cases where disagreements emerge about the validity of arbitration clauses and the arbitration agreement. This study aims to clarify the processes by which national courts impact the jurisdictional framework of the ICSID arbitration. It does so by analyzing critical legal decisions and expert opinions, which reveal how national courts either support the authority of arbitration tribunals or resolve disputes related to jurisdiction.

This article provides a detailed examination of the function of national courts to shed light on the intricate nature of jurisdictional determinations in ICSID arbitration. The article emphasizes the significance of consistency between tribunal awards and national court rulings to guarantee the arbitration process's effectiveness and credibility. In conclusion, this examination contributes to a deeper understanding of the jurisdictional dynamics within ICSID arbitration. It provides a foundation for further scholarly inquiry and practical application in international investment law.

***Keywords**: Ratione Materiae, ICSID, Jurisdiction, Investment, Arbitral Tribunal Authority.*

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I. INTRODUCTION

International arbitration jurisdictional criteria are often categorized as *ratione personae, ratione materiae, and ratione temporis*. The ICSID Convention requires disputes to include a contracting State or its authorized department or agency and a national of another contractual State.[4] The particular criteria mentioned are not crucial when assessing ICSID and non-ICSID arbitration, as all the States involved are signatories to the Convention, and the investor's nationality from another contracting State is typically undisputed by the parties in dispute.[5] The principle of *ratione temporis* is equally enforced in both ICSID and non-ICSID arbitration. However, only the requirement of *ratione materiae* will be analyzed. In conventional non-ICSID arbitration, jurisdictional criteria are met when parties with legal capacity and authority enter into a valid arbitration agreement that covers certain arbitrable issues. Specific factors must also meet specific conditions outlined in the ICSID Convention and relevant investment treaties to determine if an investment qualifies for ICSID arbitration. Aside from external jurisdictional boundaries, the lack of compatibility between ICSID arbitration and other dispute resolution methods, as well as ICSID's exclusion of remedies from national courts, may appear less effective initially when compared to the harmony between non-ICSID arbitration, conciliation, and support from national authorities. Despite this, in recent decades, ICSID jurisdiction has expanded through various methods, using the subject matter to broaden the scope of ICSID jurisdiction. This has allowed ICSID tribunals to interpret the term "investment" broadly, enabling them to have jurisdiction over a wide range of assets and activities. The self-contained system offers many methods that enhance the efficiency and efficacy of arbitral proceedings at the jurisdictional stage.

(A) Scope of Agreement Agreed Upon by Parties in Non-ICSID Arbitration

Disputing parties under the ICSID Convention or non-ICSID arbitration rules can agree on subject matters related to contract-based and treaty-based investment arbitration. In contract-based investor-state arbitration, the scope of the subject matter in non-ICSID arbitration can be extensive. This allows disputing parties to agree to arbitrate any investment-related dispute, even those that occurred before or indirectly resulted from it, before non-ICSID arbitral tribunals based on a recognized broad interpretation of the concept of 'commerciality.'[6] Despite

[4] Art 25(1), (2) and (3) of the ICSID Convention.
[5] Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 163). The ICSID Convention does not establish specific criteria for ratione personae. When a company can be incorporated in many countries, ICSID tribunals consistently use the criterion of incorporation or seat rather than control.
[6] Arbitration laws outside of the International Centre for Settlement of Investment Disputes (ICSID) often allow for exceptionally wide jurisdictional access.

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several States making commercial reservations under the New York Convention,[7] national courts will probably interpret the term 'commercial' extensively in reality. For instance, a U.S. Court has held that "commercial" should be construed broadly to include issues arising from economic connections.[8] Investors do not need to assess in advance whether their claims are considered 'commercial' after their lawsuit has reached the critical enforcement stage.

The consent given in concession agreements between investors and States, which mention ICSID arbitration, is contingent upon certain conditions. ICSID arbitral tribunals will only have jurisdiction over the disputes if the condition precedent is lawfully met. The condition precedent is frequently referred to as a 'dual test,'[9] which establishes both the mutual agreement of the parties and the specific criteria outlined in the ICSID Convention. These criteria state that ICSID jurisdiction only applies to legal issues directly arising from an investment.[10] Furthermore, the extent of ICSID's jurisdiction can also be limited as a contracting State can inform the Centre of the specific types of disputes that it would or would not agree to subject to the Centre's jurisdiction.[11] Although there is disagreement about the impact of such notice, it is clear that the topics discussed in ICSID arbitration are far more limited than those in non-ICSID arbitration. Some observers argue that ICSID arbitration should be classified as 'international commercial arbitration' because it often deals with commercial disputes arising from international contracts between States and foreign private companies.[12] It is crucial to remember that ICSID arbitration is not subject to the standard norms of international arbitration since it is a system intended to settle disputes between investors and States on investments.

The other sort pertains to investor-state arbitration based on treaties, requiring the consent of the disputing parties to meet the criteria outlined in the applicable treaties. In recent decades, there has been a shift from the consent of states based on contracts to treaties.[13] Using ICSID arbitration as an example, the time when ICSID jurisdiction relied primarily on a State's consent expressed through commercial agreements is no longer prevalent.[14] Almost 60 percent of cases

[7] New York Convention art. I (3).
[8] *United Mexican State v. Metalclad Corp*. (89 B.C.L.R.3d 359)
[9] Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 117.
[10] Art 25(1) of the ICSID Convention.
[11] Art 25(4) of the ICSID Convention. For example, when China ratified the Convention, it declared (Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Center, ICSID/8-D) that it would only consider submitting investment disputes to the Center over compensation resulting from expropriation and nationalization.
[12] Emmanuel Gaillard, et al (eds), Fouchard Gaillard Goldman on International Commercial Arbitration, 42.
[13] It is important to note that the overall number of freshly negotiated Bilateral Investment Treaties (BITs), which are sometimes referred to as 'one size fits all', has decreased in recent years, but there have been some BITs signed more recently, such as the Colombia-Turkey BIT in July 2014.
[14] Timothy G. Nelson, '"History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution"' in Michael Waibel, et al (eds), The Backlash Against Investment Arbitration: Perceptions and Reality, 566-67, 71.

require the State's approval to be within the jurisdiction of ICSID through BITs, and an additional 11 percent of cases are under ICSID jurisdiction because of NAFTA.[15] Consent given by parties in ICSID and non-ICSID arbitration is subject to requirements outlined in relevant investment treaties. However, the scope of the subject matter in non-ICSID arbitration based on treaties may be broader than that in ICSID arbitration if the definition of 'investment' in the applicable treaties is not more limited than that in the ICSID Convention.

Contract-based and treaty-based non-ICSID arbitration can encompass a wide range of subject matter. Regarding resolving investment disputes, non-ICSID arbitration, with its broad jurisdiction, is more advantageous, particularly for situations involving many interconnected claims. Transnational investments in natural resources and large infrastructure projects in developing countries are highly intricate. Disputes related to financing, banking, insurance, consulting, or any industrial or business cooperation may arise before or as a result of these investments. It would be more efficient and cost-effective to address all relevant disputes relating to the transaction in a single, appropriate instrument.

a. Increasing Scope of ICSID Jurisdiction

In recent decades, there has been a gradual increase in the jurisdiction of ICSID. This expansion is achieved through various techniques, such as broadly interpreting the concept of 'foreign investors' and invoking the most-favored-nation clause or umbrella clause.[16] The subject matter is also being utilized to broaden the scope of ICSID jurisdiction. It is worth mentioning that countries who enter into investment treaties usually want to relax investment laws to preserve investments. As a result, they include a wide and extensive term of 'investment' in these treaties. In addition, it appears that ICSID tribunals, to varying degrees, broaden the range of jurisdictions in practice, albeit they define the concept of 'investment' under Article 25 of the ICSID Convention in various ways.

In contrast to early international investment treaties that used a simplistic approach of defining 'investment' based on either assets or a broad definition, the distinction between these two methods is becoming less evident in the era of investment liberalization.[17] The recent Bilateral Investment Treaties (BITs) between developed and developing States have become crucial in the push for liberalization.[18] These treaties aim to promote investment and safeguard various

[15] Kathleen S. McArthur, Pablo A. Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28 Rev Litig 559, 573.
[16] M. Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P. Sauvant, et al (eds), Appeals Mechanism in International Investment Disputes (OUP, 2008) 40.
[17] UNCTAD, 'Scope and Definition', UNCTAD/ITE/IIT/11 (vol II), 1999, 15.
[18] Kenneth J. Vandevelde, 'Investment Liberalization and Economic Development: The Role of Bilateral

cross-border investment-related activities through a broad definition of 'investment.' In investment treaties, the broad meaning of 'investment' may be observed in at least three areas. Initially, the method used to define investment was using literary approaches to create a comprehensive definition that allows for several interpretations. (i) The conventional definition of assets in BITs is broad enough to encompass nearly any asset held or controlled by investors without significant limitations. Some BITs even include 'any sort of economic interest,' which suggests a broader scope.[19] (ii) Some treaties adopt a 'tautological' or 'circular' approach to highlight investment characteristics rather than defining them to encompass new investment forms.[20] (iii) Many treaties choose to use an open-ended definition by employing flexible language such as 'including, but it is not limited to,' and 'includes, in particular, but not primarily,' therefore allowing for a significant amount of discretion in interpreting the wording of investment.[21]

Secondly, the definition of 'investment' has been expanded to include various investment forms. This includes indirect investments such as bonds, debentures, and long-term notes, now covered by the U.S. Model BIT (2012).[22] Certain contractual claims, such as those arising from service agreements, are also considered investments. However, the inclusion of contractual rights in the investment concept falls into a gray area between investment and trade.[23] Indirectly controlled investments, which have economic value, are covered by many Bilateral Investment Treaties (BITs).[24] This allows transnational corporations to manipulate corporate structures such as intermediate holding companies or special investment holding companies organized under the laws of a third State.[25]

Furthermore, it is worth noting that many treaties provide protection not just for tangible assets and new investments in the conventional sense but also for "activities related to investments" and "investments that already exist." Regarding activities connected to investments, the China-Australia BIT specifies that these activities encompass a wide range of corporate operations, including every investment-related activity.[26] The U.S. Model BIT safeguards existing investments by recognizing that a contracting State, State enterprise, or national enterprise of a

Investment Treaties' (1998) 36 Colum J Transnatl L 501, 502-03.
[19] UNCTAD, 'Scope and Definition,' UNCTAD/DIAE/IA/2010/2, 2011, 24.
[20]UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking', UNCTAD/ITE/IIT/2006/5, 2007, 10.
[21] For example, art 1 of China-Germany BIT (2003).
[22] Art 1 of the U.S. Model BIT (2012).
[23] UNCTAD, 'Scope and Definition', 2011, 9-10.
[24] Barton Legum, 'Defining Investment and Investor: Who is Entitled to Claim?' (2006) 22(4) Arb Intl 521, 523-24.
[25] Barton (N 24 above).
[26] art I.1(f) of the China-Australia BIT (1988).

contracting State might be considered an "investor of a party" if they invest.[27]

b. Expansion in the Application of ICSID Arbitration

The *travaux préparatoires* of the ICSID Convention have revealed that contracting States have been granted the right to unilaterally tailor the definition of "investment" eligible for protection through notification under Article 25(4) in exchange for wide-open jurisdiction over any plausible asset or activity.[28] Additionally, the absence of any attempt to define the term "investment" gives ICSID arbitral tribunals a great deal of latitude. It is also probable that courts will use a liberal interpretation to allow a broad spectrum of investment into the Center's jurisdiction.[29] The Preamble of the Convention recognizes the importance of private international investment in the cooperation for economic development, and tribunals, while maintaining their neutrality, may adopt a liberal principle favoring investment protection based on the expansion of investment in pertinent investment treaties. In practice, most ICSID tribunals—if not all—are *de facto* in favor of comprehensive investment protection.

The argument that a disagreement resulted indirectly from investment was rarely used to challenge ICSID jurisdiction throughout the first three decades of its existence. The pivotal case was ***Fedax N.V. v. the Republic of Venezuela***,[30] in which Venezuela contended that the promissory notes held by Fedax N.V. did not meet the criteria for being considered an "investment" since there was no direct foreign investment involved, only a long-term transfer of financial resources - capital flow - from one country to another to acquire interests in a corporation. This transaction typically entailed certain risks to the potential investor. Following an analysis of the Convention's negotiation history, the tribunal took a broad stance on the meaning of "investment" and classified transnational loans as such, concluding that, in contrast to quickly concluded commercial, financial facilities, loans with a specific duration fell within the framework for the concept of investment given the Convention's historical context. Moreover, the loan contract specifically stated that the loan qualified as an investment for the Convention, a precaution the parties had already taken.[31]

ICSID jurisprudence has refined two opposing approaches to the understanding of investment under Article 25, notwithstanding that the notion of stare decisis is irrelevant in ICSID arbitration. The liberal intuitive technique identifies the characteristics of investments; these

[27] Art 1 of the U.S. Model BIT (2012).
[28] Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 114-17.
[29] Michael M. Moore, 'International Arbitration between States and Foreign Investors - The World Bank Convention' (1965-1966) 18 Stan L Rev 1359, 1362.
[30] See ICSID Case No ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997, para 19.
[31] ICSID Case No ARB/96/3, paras 22-23

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characteristics may differ from case to case and are not necessary to determine if an investment exists. The deductive approach aims to provide a precise definition of investment before using it in a particular situation.[32] This dichotomy is comparable to the two fundamental approaches to the interpretation of "investment"—the objective approach, which maintains that investment has a discernible meaning under the Convention and is commonly referred to as the "Salini Test," and the subjective approach, which contends that the ICSID Convention's vague definition of investment permits the disputing parties to determine the concept of investment to some extent.[33] Generally speaking, tribunals can refuse jurisdiction even when the parties agree that the transaction qualifies as an investment for an ICSID arbitration case if the investment in question does not meet the objective standards (like the "Salini Test") outlined in Article 25. It is true that these criteria expressly exclude some asset classes from the investment class covered by the Convention. However, even with the "Salini Test" being used in several instances, it is unlikely to go beyond the boundaries of ICSID jurisdiction. A review of ICSID case law has shown that rights granted by various instruments (e.g., domestic laws, BITs, authorizations) can be practically viewed as investments in practice. These rights include loans, contracts for the sale of services, claims to money, claims to performance having an economic value, pre-investment expenditures, and legitimate expectations.[34]

c. ICSID Arbitration's Gordian Knot Theory

Aiming to provide adequate protection and security to lessen the harm caused by the legal and policy system, which may lack coherence, predictability, and stability, capital-exporting states frequently place dispute settlement outside of host states' domestic systems, given that they may have concerns about the effectiveness of those states' domestic institutions in defending property rights.[35] To further show how developing nations are dedicated to protecting foreign investment, investment treaties often allow for a comprehensive and flexible definition of "investment," encompassing nearly every type of asset or activity connected to investment. However, states consistently insist on a restrictive interpretation of "investment" under the ICSID Convention if they defend themselves as respondents in ICSID arbitration cases. This is because a restrictive interpretation is crucial to preserving judicial sovereignty and is also a

[32] Emmanuel Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder, *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, 408-11.
[33] See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 16 July 2001, paras 52-58.
[34] Farouk Yala, 'The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?' (2005) 22(2) J Intl Arb 105.
[35] UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries', 12-13, 16-17

means of presenting solid defenses. This leads to the first Gordian knot: States often establish a broad definition of investment in investment treaties intended to draw in foreign investment, but they insist on a narrow interpretation of the term in arbitral procedures.

The second Gordian knot concerns the standards by which courts under the ICSID define the word "investment." Objections to ICSID jurisdiction are virtually always made under BITs because treaty-based ICSID arbitration cases inflate as BITs grow exponentially and because respondent States are typically unfamiliar with jurisdictional grounds.[36] The ability of arbitral tribunals to ascertain their jurisdiction or competence has been acknowledged in the contemporary arbitration arena.[37]

Nonetheless, there are no consistent standards governing the use of this power, and as a result, tribunals essentially have complete discretion when determining jurisdiction. Interestingly, ICSID tribunals generally tend to uphold claimants' contention that an interpretation must respect the fundamental principles *pacta sunt servanda and ut res magis valeat quam pereat*, eventually adopting a liberal approach to broaden the scope of investment, despite respondent States' usual insistence on a restrictive method. Given that jurisdiction objections based on unqualified investments often result in a bifurcation of the proceedings into a jurisdiction phase and, if jurisdiction is established, a separate merits phase,[38] the extra-jurisdictional hurdle under the ICSID Convention may leave foreign investors financially depleted and unable to continue the proceedings regarding the actual merits of the dispute. Even if ICSID tribunals ultimately reject respondent States' arguments for jurisdiction, the process has been significantly delayed due to their submission.[39]

To resolve the two opposing approaches to the interpretation of investment, practitioners have argued that ICSID should publish a policy statement under Article 25, which would allow ICSID to affirm that the Convention's definition of investment is, in fact, broad and that, in cases where an investment is permitted by a contract or treaty agreed upon by the host State, tribunals should not be overly stringent. On the other hand, because ICSID arbitration is intended for significant investment disputes, it is inappropriate for small-scale financial disputes with claims of no more than $3–$ million.[40] Some academics encourage ICSID courts to

[36] Lucy Reed, *et al*, *Guide to ICSID Arbitration*, 143.
[37] William W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction, The Limits of Language' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer International, 2007) 56).
[38] V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties,' 7.
[39] *Sempra Energy International v. Argentine Republic* (ICSID Case No ARB/02/16) the tribunal was seated in May 2003, but decided the issue of objections to jurisdiction in May 2005.
[40] V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties,' 8.

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preserve micro-investments under the Convention to support the reality of the international society advancing towards community ideals, in sharp contrast to those who favor the exclusion of minor monetary claims.[41] The ad hoc annulment committee in ***Malaysian Historical Salvors, SDN, BHD v. Malaysia***, which found that the ICSID Convention rejected a minimum criterion, supports this view.[42] This is where the second Gordian knot appears. Since the ICSID Convention does not expressly forbid minor financial claims and is designed to offer a dependable platform for international cooperation in the interest of economic development, ICSID tribunals may interpret Article 25 liberally. If this assumption proves to be valid, there's a chance that more insignificant cases will be brought before ICSID tribunals, further undermining or ruining the value of investor-state arbitration and drawing the dispute resolution process into a maze of competing jurisdictions.

While jurisdiction objections are not unheard of in non-ICSID arbitration, they seem unlikely to cause a significant delay in the arbitral process. Therefore, a comparable Gordian knot would not arise in non-ICSID arbitration. Objections to the jurisdiction of non-ICSID arbitral tribunals may cause delays or even disruptions in arbitral procedures as the practice of investor-state arbitration gets increasingly complex. It occurs when a disagreeing party tampers with national court procedures to sabotage arbitral proceedings.[43]

But this is not a typical circumstance. There are two ways to contest a non-ICSID arbitral tribunal's jurisdiction: partial and entire challenges. A partial challenge does not constitute a significant attack on the jurisdiction of the tribunal; instead, it is based on whether a portion of the claims fit under the purview of an arbitration agreement. The theory of compétence-compétence allows arbitral tribunals to determine their jurisdiction in the event of a complete challenge when petitioners often contest the validity of an arbitration agreement and attempt to undermine the foundation upon which the tribunal has jurisdiction. More significantly, the outcome of tribunal decisions is impacted substantially by the separability concept. The arbitration agreement will be considered independent of the main agreement, and a tribunal's ruling that the main agreement is void will not *ipso jure*, which means the arbitration agreement is invalid. This is because the doctrine of separability states that any challenge to the main

[41] Perry S. Bechky, 'Microinvestment Disputes' (2012) 45 Vand J Transnatl L 1043; Peter Gooderham (Director of ICC UK) 'Small Investors Would be Denied Access to Remedy', Financial Times, Letters, 27 October, 2014)
[42] ICSID Case No ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para 82.
[43] S*alini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, ICC Arbitration No10623/AER/ACS, Award regarding the suspension of the proceedings and jurisdiction, 7 December 2001; *Himpurna California Energy Ltd v. Indonesia*, Interim Award (*Ad Hoc* UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109 (2000).

agreement does not affect the validity of the arbitration agreement.[44]These concepts increase the authority of arbitral tribunals in non-ICSID arbitration and reduce the likelihood that challenges would be used as a ruse to stall or disrupt arbitration procedures. However, the theories are not very helpful in ICSID arbitration because the method used to interpret Article 25 of the Convention often determines whether an objection to ICSID jurisdiction is accepted.

Second, the ICSID tribunals will interpret Article 25 of the Convention in good faith rather than in a restrictive or liberal manner. It seems that ICSID tribunals are not brought between Scylla and Charybdis in the Gordian knot, at least not entirely. ICSID tribunals can reasonably and jointly consider the interests of respondent States and investors when making case decisions. Because to "protect investment is to protect the general interest of development and developing countries," as stated in ***Amco Asia Corporation and others v. Republic of Indonesia***, investors were interested in bringing disputes before international arbitration, and host States matched this interest.[45] As a result, jurisdictional instruments need to be understood objectively, benevolently,[46] and with effects that both parties might be said to have reasonably and lawfully anticipated. This avoids reading jurisdictional instruments too narrowly or too broadly.[47] Setting a boundary that ICSID tribunals are not permitted to go beyond to broaden the definition of investment is one possible strategy for accounting for the expectations of both the State and investors. Because claimants always seek to expand the investment concept, assessing respondent states' expectations is even more critical. It is recommended that ICSID tribunals determine whether the matter falls under a transaction category that host states would prefer to bring directly before international arbitration when ruling on the definition's boundaries per Article 25(1). This can be done by looking at the definition of investment in other treaties or agreements that host states have concluded.[48] As ICSID arbitral proceedings shall be neither more intensive nor more extensive than necessary to reconcile the interests of investors and States with an equivalent stake in an orderly, constructive, and efficient resolution of jurisdictional contention, this approach is more than a temporary expediency.

It is now clear and widely acknowledged that the present evolution has shown a liberal tendency to support an extension of ICSID jurisdiction to encompass any asset or activity connected to

[44] Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 334-35. The doctrines of *compétence-compétence* and separability have been adopted by a number of institutional rules. Eg, art 23(1) of the UNCITRAL Rules.
[45] ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 23.
[46] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction and Dissenting Opinion of 14 April 1988, para 63.
[47] ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983, para 14.
[48] Tony Cole, Kumar Vaksha, 'Power-conferring Treaties: The Meaning of "Investment" in the ICSID Convention' (2011) Leiden J Intl L 305, 327-29.

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investments. It is acceptable that almost every asset or activity related to investment can be decided by an ICSID tribunal, given that one of the goals of ICSID is to establish a trustworthy forum that enables States to negotiate with potential foreign capital sources and that host States would provide a secure legal environment in exchange for foreign investment based on BITs that contain a broad definition of investment.[49] The notion of investment in contemporary arbitration is enough for ICSID courts to exercise their jurisdiction over a wide variety of assets and activities, although less extensive than the definition of "commercial" in non-ICSID arbitration.

II. THE EXHAUSTION OF LOCAL REMEDIES RULE

The relationship or compatibility between arbitration and other dispute resolution methods becomes significant as investor-state arbitration has grown in popularity. Efficiency is one of the perceived doctrinal bases in the central tenet of international arbitration, and it has been amplified significantly in recent years. When it comes to jurisdiction, the unique characteristics of ICSID and non-ICSID arbitration have varying effects on the skill of balancing State sovereignty and investment protection; in this regard, the fork-in-the-road clause and conciliation should be given consideration when applying the rule of exhaustion of local remedies.

States still maintain their inalienable regulatory right to limit the amount of judicial sovereignty that would be transferred to international tribunals, even though investor-state arbitration cases are partially the consequence of host States ceding their judicial sovereignty for the goal of investment protection. It has been demonstrated that placing restrictions on consent to international arbitration is a common practice that most States support as a sensible plan to protect national sovereignty. In most cases, the requirements involve using all available local administrative and legal options before bringing a matter to an international tribunal. Numerous BITs have acknowledged that such depletion is allowed by the ICSID Convention.[50]

The implied waiver rule, or more specifically, the radically different implied waiver rule on the exhaustion of local remedies applied in ICSID arbitration under the ICSID Convention and in non-ICSID arbitration under general international law, is what makes the differences between ICSID and non-ICSID arbitration so fascinating. Generally, using the local remedy exhaustion rule is self-evident and does not require prior consent. Unless specifically reserved or waived, there is no general assumption that the exhaustion of the local remedies rule will not apply in

[49] Julian Davis Mortenson, 'Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harv Intl LJ 257.
[50] Art 26 of the ICSID Convention.

an international arbitration case involving an alien.[51] Put differently, the rule of exhaustion of local remedies is not impliedly waived by the lack of mention in a treaty; instead, the rule will still apply without an explicit waiver.[52] In the case of Electrotechnica Sicula S.p.A. (***United States of America v. Italy***), the International Court of Justice (ICJ) tribunal upheld this principle. The tribunal could not accept that "an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[53]

The ICSID Convention fundamentally modifies the conventional understanding, which holds that an implicit declaration does not imply a waiver of an international law norm under customary international law. Article 26 of the Convention states that if a contracting state does not expressly state that the prior exhaustion of local remedies is a prerequisite for accessing ICSID arbitration, the contracting state is considered to have abandoned the right to apply the norm of exhaustion of local remedies. Article 26 is based on the presumption that when a State and an investor mutually agree to submit disputes to ICSID arbitration without reserving the right to resort to any other remedy or requiring the prior exhaustion of any other remedy, the parties intend to have recourse to ICSID arbitration to the exclusion of any other remedy. This rationale is explained in the Report of the Executive Directors of the International Bank for Reconstruction and Development.[54] The broad consensus is that Article 26 de facto reverses the position that conventional international law recognizes.[55] Nonetheless, the traditional approach to the implicit waiver of the rule of exhaustion of local remedies was not intended to be modified by the ICSID Convention.[56]

This is why the second sentence of Article 26—which has been reaffirmed by the first annulment committee in ***Amco Asia Corp. v. Republic of Indonesia***—explicitly recognizes a state's right to demand the use of all available domestic judicial or administrative remedies before bringing a case before an ICSID tribunal. Indonesia argued in this case that the ICSID tribunal had overreached itself in allowing Amco to bring claims directly before it, circumventing the general international law on the exhaustion of domestic remedies. In

[51] Chittharanjan Félix Amerasinghe, *Local Remedies in International Law* (CUP, 2004) 250-51.
[52] Robert Jennings, Arthur Watts (eds), *International Law: A Treatise* (9th edn, Longman, 1992) 526.
[53] ICJ Rep 1989, 42.
[54] ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 18 March 1965, para 32.
[55] Christoph H. Schreuer, *et al*, *The ICSID Convention: A Commentary*, 403.
[56] ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', para 32.

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addition, the tribunal had not justified its decision to disregard this rule.[57] The ad hoc committee denied Indonesia's request, ruling that even though the tribunal's ruling did not require Amco to exhaust local remedies against the actions of Army and Police personnel, this portion of the award could not be overturned because Indonesia had waived its right to require the exhaustion of local remedies before resorting to ICSID tribunals by accepting ICSID jurisdiction without reserving that right under Article 26 of the ICSID Convention.[58] The ad hoc committee's ruling clarified that an implicit declaration gave rise to waiving the ICSID arbitration criterion of exhaustion of local remedies.

The distinction between ICSID and non-ICSID arbitration lies in the implicit waiver rule regarding the exhaustion of local remedies. This distinction carries a significant risk throughout the venue selection procedure. It is possible that respecting State sovereignty is one of the main goals of the rule of exhaustion of local remedies.[59] Host States are at least unable to submit to international arbitration and are free to administer justice according to their own internal legal or administrative processes. The ICSID Convention appears to be a diminution of State sovereignty because states are more likely to disregard the explicit waiver requirement under Article 26 of the ICSID Convention and lose their opportunities to settle disputes through domestic judicial or administrative systems. According to current investment jurisprudence, the local remedy requirement is coming back in several investment treaties, which raises concerns about risk avoidance and the express need for a waiver under the ICSID Convention.[60] The Parliament supports strengthening the home courts' function by mandating the exhaustion of local remedies when drafting future E.U. investment treaties.[61]

However, Article 26 somewhat eases foreign investors' access to international remedies because a host State's administrative and judicial systems inevitably harbor an inherent national prejudice to benefit the host State that is one of the disputing parties, or at least the domestic system is thought to harbor such prejudice. Furthermore, contemporary BITs have included a phrase known as the "fork-in-the-road clause" that gives claimants the right to reject all local remedies in response to perceived or actual discrimination.[62] The provision, which forces the

[57] ICSID Case No ARB/81/1, *Ad Hoc* Committee Decision on the Application for Annulment, 16 May 1986, para 62.
[58] ICSID Case No ARB/81/1, *Ad Hoc* Committee Decision on the Application for Annulment, 16 May 1986, paras 63-64.
[59] Malcolm N. Shaw, *International Law* (CUP, 2003) 730.
[60] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 Law & Prac Intl Cts & Tribunals 1.
[61] August Reinisch, 'The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements'135.
[62] A typical example can be seen in art 7 of the China-France BIT (2007).

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contesting parties to follow the ultimate decision between national remedies and international arbitration, is akin to a road of no return. More precisely, because of the numerous contractual and treaty agreements, parties would face many possibilities of fora (e.g., national courts, ICSID arbitration, or national arbitration). However, once a side selects a forum, that decision is definitive and binding, ending all other possibilities for both parties.[63] Put differently; host states cannot mandate the use of the rule of exhaustion of local remedies in dispute resolution processes if claimants choose to pursue ICSID or non-ICSID arbitration. At the jurisdictional stage, international arbitration becomes an autonomous process free from intervention by national courts or other national authorities, as there would be no space for applying domestic judicial or administrative remedies. Therefore, even if it is claimed that Article 26 of the ICSID Convention may grant State sovereignty, the fork-in-the-road phrase further diminishes that sovereignty. More significantly, the fork-in-the-road provision derogates sovereignty in both ICSID and non-ICSID arbitration in the same manner if the implicit waiver concedes sovereignty in ICSID arbitration relative to the explicit waiver rule in non-ICSID arbitration.

Additionally, since a rigorous interpretation of what constitutes triggering the fork-in-the-road clause has been adopted in practice, it is essential to emphasize that investors are not prevented from pursuing specific legal action at the outset of a dispute settlement procedure by the fork-in-the-road clause. It would put investors in an unreasonable position if they had to choose between asserting their rights domestically or through international arbitration because many BITs contain provisions that guarantee investors effective remedies under domestic laws, including redress through domestic courts or administrative tribunals. This is because the fork-in-the-road clause may view local remedies as a choice, even though they may be required in certain situations where investors should act quickly to take temporary measures. As a result, investors may be forced to tolerate injustice without speaking out for fear of losing access to international arbitration. Consequently, the fork-in-the-road phrase should not be seen as being activated by the domestic procedural rights provided by BITs.[64]

However, the strict approach leads to confusion and even unfavorable results. It is recognized that preventing duplicate proceedings—in which the same issue is brought by the same claimant against the same respondent for resolution before various State courts or arbitral tribunals—is

[63] Andrea Schulz, 'The Future Convention on Exclusive Choice of Court Agreements and Arbitration: Parallel Proceedings and Possible Treaty Conflicts, in Particular with ICSID and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards', Prel Doc No 32, Hague Conference on Private International Law, June 2005, 12.

[64] Christoph Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 J World Investment & Trade 231, 248-49.

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one of the goals of the fork-in-the-road clause in BITs.[65] Under customary international law, the doctrine of *res judicata*—which emphasizes *persona* (person), *petitum* (object), and *causa petendi* (grounds)—is the primary tool used to examine whether a claim filed with an international tribunal is the same claim that has been brought before domestic courts or administrative tribunals.[66] In investment arbitration, ICSID tribunals frequently interpret the criteria of the same claimant/respondent and the same dispute in a restrictive and strict manner that is insufficient to activate the fork-in-the-road clause.[67]

The decision made by investors between domestic procedures and international arbitration thus loses its ultimate binding force, even though some claims have been brought before domestic courts or administrative tribunals. As a result, international tribunals retain the discretionary power to hear cases involving the same claims. Since they can first use domestic instruments and then turn to international tribunals if the domestic means prove unsuccessful or yield unfavorable awards against them, cunning investors may benefit from both domestic instruments and international arbitration.

(A) Conciliation and Arbitration: A Complementary Use

The tribunal can set non-ICSID arbitral processes and the parties to satisfy unique demands in a given instance since non-ICSID arbitration is based on the agreement reached by the disputing parties. Due to this feature, conciliation—which tribunals can suggest or start at any point during the arbitral procedures at the request of disputing parties—is utterly compatible with non-ICSID arbitration. The tribunal may apply the theory derived from "amiable composition" to the merits of the dispute,[68] and the LCIA Rules even urge opposing parties to agree on the conduct of their arbitral proceedings.[69] Some disagreeing parties will look to a more agreeable alternative resolution with the help of impartial conciliators due to the uncertainty of an adjudicatory result. Conciliation is a less adversarial process that places less emphasis on complete evidence and can prevent needless delay or expenditure, leading to a timely, satisfactory, and economical resolution.[70] Additionally, by focusing on the best course of action,

[65] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para 161.
[66] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953) 340.
[67] Regarding the same claimant, for instance, the ICSID tribunal in Enron v. The Argentine Republic noted that while TGS—which Enron invested in—was the one who applied to different Argentine courts, seeking remedies regarding the tax that affected it, Enron initiated the ICSID case. As a result, the parties to the ICSID arbitration were not the same as those bringing claims in Argentine courts (see ICSID Case No. ARB/01/3, Decision of Jurisdiction, 14 January 2004, paras 95-98).
[68] Art 22.4 of the LCIA Rules (2014).
[69] Art 14.2, 14.3 and 14.4 of the LCIA Rules (2014).
[70] Jack J. Coe, Jr, 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005-2006) 12 UC Davis J Intl L & Poly 7, 16.

a settlement reached amicably during arbitral proceedings can be beneficial in boosting the parties' business relationship's economic value. This is especially true when the parties are involved in continuous, long-term natural resource investment projects.

Contrarily, conciliation is rarely used in ICSID arbitration processes, primarily for two reasons. First, the ICSID Convention provides for two competing methods: conciliation and arbitration. The disputing parties shall select one of these procedures at the beginning of the dispute submission process to the Center. However, conciliation is not often employed as an independent dispute resolution mechanism[71] since the most it can do is to issue a non-binding report,[72] which could not be enough to resolve an investor-state conflict and further postpone an arbitration settlement. Second, there is no conciliation clause in the ICSID Convention; nonetheless, the ICSID Arbitration Rules permit holding a pre-hearing meeting to discuss contentious issues and try to find a mutually agreeable solution.[73] Conciliation is one of the choices because the ICSID Arbitration Rules do not outline how an amicable solution would be reached. However, the pre-hearing conference method is rarely used, mainly because it needs the mutual consent of both parties and cannot be started by ICSID or the arbitral tribunal. However, conciliation would likely be the first option available to the parties at the beginning of their dispute submission if they wanted to schedule a pre-hearing session to reach an acceptable settlement.

Conciliation is recognized as a valuable tool for balancing conflicting interests and righting wrongs in arbitral proceedings;[74] in situations where the ICSID Convention controls the arbitral process, contending parties may find conciliation particularly appealing.[75] In this sense, it is preferable—or at the very least advantageous to the disputing parties—to employ conciliation in non-ICSID arbitration in a flexible and complementary manner. The ICSID Arbitration Rules can be amended to eliminate the disadvantage of conciliation's incompatibility with ICSID arbitration. Nonetheless, there exist more nuanced yet pragmatic and essential explanations for

[71] Only eleven conciliation cases have been registered under the Convention since the Centre was established. See ICSID, 'ICSID Caseload – Statistics', 2024-1, 8.

[72]According to art 30 of the ICSID Conciliation Rule, Conciliation Commissions just draw up a report noting the issues in dispute and recording that the parties had reached an agreement.

[73] Pre-hearing conferences between the tribunal and the parties, duly represented by their authorized representatives, may be arranged at the parties' request in order to discuss the problems at hand and try to come to an acceptable resolution. Refer to ICSID Arbitration Rules 21(2).

[74] Stephen M. Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?' (2007) 22(2) ICSID RevForeign Investment LJ 237; V. V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties,' 10-11; Jack J. Coe, Jr, Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch; Jeswald W Salacuse, 'Is There A Better Way? Alternative Methods of Treaty-based, Investor-State Dispute Resolution' (2007-2008) 31 Fordham Intl LJ 138.

[75] Up to the time of writing, up to 38 per cent of arbitral proceedings under the ICSID Convention end with awards in which settlement agreements were embodied at parties' request. See ICSID, 'ICSID Caseload – Statistics', 2044-1, 15.

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the contradiction. Firstly, increasing BITs have compensated for the lack of conciliation compatibility by imposing a waiting period requirement. Under this requirement, any dispute arising between investors and the States must be resolved as amicably as possible through consultations and negotiations. Investors will only resort to ICSID arbitration if the dispute cannot be resolved amicably within a predetermined period, such as six months.[76] In the ***Murphy Exploration and Production Company International v. Republic of Ecuador*** case, the ICSID tribunal explicitly stated that the waiting period requirement was a fundamental requirement that had to be followed and that failure to do so would result in the tribunal's jurisdiction being rejected.[77] Generally speaking, conciliation as an amicable method would not be expected to play a substantial part in arbitration procedures if the dispute could not be addressed amicably within a significant amount of time, up to six months before it was filed with the ICSID panel.

Additionally, it is noteworthy that conciliation can be used in conjunction with non-ICSID arbitration in a private, confidential setting. In contrast, maintaining confidentiality in ICSID arbitration would be very difficult because the process is invariably linked to various interests of non-governmental organizations and other stakeholders.[78]

Moreover, governments could be reluctant to resolve a private disagreement for fear of being charged with corruption or showing weakness in upholding the country's interests. The necessity and intricacy of obtaining consent from several government bodies further lessen the likelihood of settling.[79] From a more comprehensive standpoint, aside from practical reasons, a non-binding decision made in a private setting doesn't advance the body of knowledge in international investment law.[80] Therefore, even with the potential advantages, conciliation may not be the best strategy for creating a more effective conflict resolution system when used in place of arbitration or conjunction with it in ICSID arbitral procedures.

(B) The Determination of Arbitral Jurisdiction by Domestic Courts

While investor-state arbitration offers the advantages of depoliticization and delocalization in resolving disputes, non-ICSID arbitration requires a specific legal seat. In non-ICSID

[76] See, eg, art 9(1), (2) of the China-Spain BIT (2005), art 23 of the U.S. Model BIT (2012).
[77] ICSID Case No ARB/08/4, Award, 15 December 2010, para 149.
[78] W. Michael Reisman, 'International Investment Arbitration and ADR: Married But Best Living Apart' in UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* II, 2011, 26.
[79] Barton Legum, 'The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch'' (2006) 21(4) Mealey's Intl Arb Rep 72, 73.
[80] Jeswald W Salacuse, Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 178-79.

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arbitration, the law of the seat of arbitration typically serves as the governing law, indicating that national courts at the location of the arbitration naturally have the authority to oversee the arbitral processes. Non-ICSID arbitral tribunals has the power to establish their own jurisdiction or competence under the notion of 'compétence-compétence' or 'Kompetenz-Kompetenz'. However, their determinations regarding jurisdiction are subject to thorough examination by national courts.[81] The purpose of a comprehensive assessment is to avoid contradictions with the public policy of obligating a party to abide by a judgment reached by an arbitral tribunal without their consent.[82] No application is currently accessible to national courts to review jurisdictional decisions in ICSID arbitration. This capacity to review is instead given to internal *ad hoc* committees constituted under the ICSID Convention.[83] Specifically, initial determinations confirming the authority of arbitration panels are not eligible for potential cancellation procedures. As a result, disputing parties can only seek to nullify adverse jurisdictional rulings that resolve the dispute.[84]

Furthermore, apart from arbitral tribunals, national courts may also be called upon to ascertain the jurisdiction of these tribunals in non-ICSID arbitration cases. Appealing to national courts about the jurisdiction of arbitral tribunals can occur at three points: before the commencement of the arbitral processes, during the ongoing proceedings, or after the final awards have been made. According to the New York Convention, if parties have agreed to resolve a dispute through arbitration, a national court where the dispute is brought must refer the parties to arbitration unless the court determines that the agreement is invalid, unenforceable, or impossible to carry out.[85]

The benefits of national courts determining non-ICSID arbitral jurisdiction early on are evident. Disputing parties can avoid wasting significant time and money on arbitral proceedings that may be pointless if national courts after the award has been made, find that the arbitral tribunals have no jurisdiction and reject their authority to settle the disputes. Nevertheless, there is limited established legal precedent about whether national courts, when tasked with determining the

[81] Section 67(1) of the English Arbitration Act allows a party involved in arbitration to seek intervention from national courts. This can be done to challenge the validity of an award made by the arbitration tribunal regarding its authority to decide on the matter, or to request that an award made by the tribunal be declared invalid, either in part or in its entirety, due to the tribunal lacking the necessary authority to decide on the dispute.
[82] Julian D. M. Lew, *et al*, *Comparative International Commercial Arbitration*, 337-38.
[83] Art 48(3) of the ICSID Convention; Hassan Francis Whitfield, "Kompetenz-Kompetenz: An Arbitral Tribunal Authority to Decide Its Jurisdiction." *Beijing Law Review* 14.04 (2023): 1941-1953.
[84] The wording used by the ICSID Secretariat determines whether a judgment rendered by arbitral tribunals can be invalidated. The ICSID Secretariat used the term 'decision on jurisdiction' to refer to a positive ruling on jurisdiction, whereas 'award on jurisdiction' is used when the jurisdictional decision-making is negative, and the case is ultimately dismissed. Ad hoc panels can only consider challenges to awards based on jurisdiction.
[85] Art II (3) of the New York Convention.

jurisdiction of arbitral tribunals before an award is made, should comprehensively examine the substantive problems or only confirm the initial existence of a valid arbitration agreement.[86]

While it is known that national courts have a role in assessing the jurisdiction of non-ICSID arbitral tribunals, the extent and manner of court action remain uncertain. This raises the prospect that parties involved in a dispute may intentionally exploit judicial procedures to delay or impede the progress of arbitral proceedings. In a broader framework, the distinction between ICSID and non-ICSID arbitration lies primarily in the differing functions of national courts. National courts can be involved before, during, and after forming an arbitral tribunal. They have authority over essential matters like jurisdiction, annulment, and enforcement. Considering that selecting ICSID jurisdiction eliminates the possibility of national courts providing support, the next section will examine interim relief (which is a crucial function of national courts) that occurs after the jurisdictional step.

(C) The Constructive Presence of National Courts

According to the parties' agreement, a request for interim relief—also referred to as a "conservatory measure" or "provisional measure"—made by any disputing party to national courts is neither regarded as a waiver of the arbitration jurisdiction nor incompatible with it.[87] On the other hand, because of its a-national character, ICSID arbitration is entirely independent of any legal jurisdiction, depriving contesting parties of their ability to seek redress in national courts. Examining the impact of national courts' participation in investor-state arbitration is more valuable than illuminating the detailed differences between ICSID and non-ICSID arbitration in terms of the function of national courts at the jurisdictional stage. It is indisputable that the participation of national courts may benefit the parties to a dispute in certain situations where the national courts' supporting functions (such as gathering evidence, resolving legal disputes, and granting temporary relief) advance the goals of the arbitral proceedings.[88] In non-

[86] In the case *of First Options v. Kaplan* (1 115 S Ct. 1920 (1995)), the U.S. Supreme Court held that if parties in a dispute agree to have the question of arbitrability decided through arbitration, the court should use the same standard to review the arbitrator's decision as it would for any other matter that the parties have agreed to arbitrate. The court should use substantial discretion in deferring to the arbitrator's ruling, only overturning it in limited and specific instances. Put simply, if the parties have agreed to have their issues resolved by arbitration, national courts should approach the subject with caution when examining whether the conflicts are suitable for arbitration. However, if there is no such agreement, national courts must do a complete and fresh examination of the matter.

[87] For example, art 26(9) of the UNCITRAL Rules, art 28(2) of the ICC Rules, and art 46(4) of the ICSID Additional Facility.

[88] The principle of concurrent jurisdiction, which grants joint jurisdiction to national courts and arbitrators to obtain interim relief, is a well-established concept in contemporary arbitration. For instance, Article 6 of the UNCITRAL Model Law (2006) allows for the court or another authority to provide assistance and supervision for specific functions related to arbitration, while Article 17 J specifically addresses court-ordered interim measures. Furthermore, despite the confirmation of recognition and enforcement of interim measures ordered by arbitral tribunals in Article 17 H of the UNCITRAL Model Law, the supervisory function of national courts remains positive. This is because Article 9 specifies that a party may request interim measures from national courts, and

ICSID arbitration, national courts' assistance is often accessible for the whole arbitral procedure; otherwise, arbitral proceedings may face several obstacles.

First, before arbitral tribunals are established, contending parties in non-ICSID arbitration have the right to ask judicial authorities for interim relief. Until then, national courts can appropriately bridge the gap until arbitral tribunals are established. Furthermore, various non-ICSID arbitration procedures also provide distinct answers to issues arising from interim relief petitions made before tribunals were established.[89] However, given that the parties to a dispute must accept the special optional rules and that parties typically turn to the courts for prompt and enforceable remedies,[90] the efforts made by the ICC and the American Arbitration Association (henceforth, "AAA") were ineffective.[91] On the other hand, even though the request for arbitration has been made, a request for urgent interim relief from disputing parties before establishing the ICSID arbitral panel must be pending. In this context, the Secretary-General of ICSID will set deadlines for the parties to submit opinions on the request, which the tribunal can review as soon as it is established.[92] It is also important to note that, as long as the parties have expressly agreed in the agreement documenting their consent, neither the ICSID Convention nor the Arbitration Rules prohibit them from asking a court or other authority to order interim measures before or after the proceeding is instituted.[93] Nevertheless, it is impracticable for the parties to agree to turn to domestic courts to protect their rights and interests, as States' approval of ICSID jurisdiction is typically granted under investment treaties. Given the time it usually takes to establish an ICSID arbitral tribunal,[94] the need for immediate relief, and the impracticality of reaching a second agreement to ask national courts for interim relief, this approach becomes less appealing.

Second, because arbitration procedures can take a long time,[95] interim relief is crucial to prevent the proceedings from being delayed because it forces the parties to act in a way that would

national courts may grant such measures.

[89] See arts 1, 2 of the ICC Rules for a Pre-arbitral Referee Procedure; art 37 of the AAA International Dispute Resolution Procedures; see art 9A of the LCIA Arbitration Rule (2014).

[90] Raymond J. Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' (2003) 57-JAN Disp Resol J 62, 65; Gregoire Marchac, 'Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules' (1999) 10 Am Rev Intl Arb 123, 138.

[91] Emmanuel Gaillard and Philippe Pinsolle, 'The ICC PreArbitral Referee: First Practical Experiences' (2004) 20(1) Arb Intl 13, 14.

[92] R 39(5) of the ICSID Arbitration Rules.

[93] Ibid, R 39(6).

[94] Typically, it takes 3 months from the registration (and 263 days after making the request) for a tribunal to be established. In the instance of *Funnekotter v Zimbabwe*, it took 1,251 days from the time the request for a tribunal to be established was filed for the slowest resolution to occur. See Anthony Sinclair, 'ICSID Arbitration: How Long Does It Take?'(2009) 4(5) Global Arb Rev 18, 19.

[95] Christian Bühring-Uhle, *et al*, *Arbitration and Mediation in International Business* (Kluwer Law International, 2006) 86; See Anthony Sinclair, 'ICSID Arbitration: How Long Does It Take?'18.

guarantee a successful arbitration.[96] Interim relief might occasionally significantly impact the eventual award's enforcement. Suppose interim steps are either not imposed or approved but are not enforced to stop the losing party from willfully moving and dissipating assets or destroying evidence. In that case, the party who wins a favorable award may ultimately achieve a Pyrrhic triumph. Although the word "recommend" in Articles 47 of the Convention and 39 of the Arbitration Rules seems to have no legal weight initially, ICSID tribunals are also empowered to suggest any temporary action at the parties' request or in their judgment. The tribunal in ***Emilio Agustín Maffezini v. Kingdom of Spain*** determined that the word "recommend" had the same value as the word "order," based on the argument that the semantic distinction between the two words was more visible than actual.[97] As such, the tribunal had the same legal weight as a final verdict when making decisions on interim measures.[98] ***In Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania***, the tribunal seems to have sought to differentiate between the various levels of legal force of interim measures, with orders from the tribunals carrying more significant weight than recommendations.[99] The tribunal noted that rather than "any finding" that Tanzania had or may behave adversely concerning such documents,[100] its recommendation was based on "a recognition of the need to preserve such evidence"[101] and "for reasons of case management"[102] or "a final determination" that Tanzania had the right to reveal any specific documents it possessed.[103] In contrast, "a specifically identified, narrow category of documents" that were "of obvious potential relevance and materiality to the issues in dispute" was what the panel ordered.[104]

Notwithstanding the various interpretations of the term "recommend," the binding nature of the provisional measures awarded by ICSID tribunals is indisputable because the legal authority of the tribunals' decisions regarding provisional measures should be interpreted to impose on the parties an obligation—rather than merely a moral duty—to comply with the provisions of the tribunals fully. Nevertheless, the boundaries of the jurisdiction of the ICSID tribunals are by no means trivial or inconsequential. First, ICSID arbitral tribunals are not authorized to provide a variety of temporary orders, including attachments and injunctions that impact third parties. However, in other situations, mandatory witness attendance and the presentation of trial

[96] Stephen M. Ferguson, 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results' (2003) 12 Currents: Intl Trade LJ 55, 55.
[97] ICSID Case No ARB/97/7, Decision on Request for Provisional Measures, 28 October 1999, para 9.
[98] Ibid.
[99] ICSID Case No ARB/05/22, Procedural Order No 1, 31 March 2006, paras 88, 98, 106.
[100] Ibid, para 87.
[101] Ibid, para 87.
[102] Ibid, para 97.
[103] Ibid, para 97.
[104] Ibid, para 104.

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evidence—which need the support of national courts—are essential to the hearing process. Second, national courts often do not participate in implementing orders issued by ICSID tribunals, and tribunals lack the jurisdiction to impose temporary remedies in the case of non-compliance. In the decision on the merits,[105] disputing parties' non-compliance with provisional measures is a workable way to improve compliance. However, it is less advantageous than national courts helping to enforce provisional orders made by non-ICSID tribunals.

Consenting to ICSID jurisdiction would prevent seeking any remedy from national courts. However, the ICSID mechanism does not have the necessary processes to handle a request for interim relief until a tribunal is established. Although the issuance of temporary remedies by ICSID tribunals is not only a suggestion, their function is somewhat limited due to the small scope of their jurisdiction to impose interim relief and their inherent flaw in implementing such relief. The effectiveness of non-ICSID arbitration options is enhanced when national courts can provide sufficient support without undermining the arbitration process, ensuring greater availability, timeliness, and enforceability. As international arbitration has rapidly expanded in recent decades, there has been a corresponding increase in the number of claims for interim relief from parties involved in disputes.[106] Given the growing number of requests for interim relief, the importance of national courts' active participation in non-ICSID arbitration becomes evident. This involvement is a strong defense against parties deliberately disrupting or destroying arbitral proceedings by intimidating witnesses, destroying evidence, or dissipating assets.

III. NATIONAL COURT INTERVENTION

To varying degrees, investor-state arbitration engages with national jurisdictions for reasons related to its legal basis, efficacy, or, at the very least, the execution of awards, all while maintaining arbitral autonomy. Nonetheless, national courts' support for non-ICSID arbitration appears not as noteworthy as contending parties may have thought. Regarding temporary remedy, national courts typically hesitate to use their authority to provide it, especially in cases where arbitral tribunals have the authority to provide interim relief.[107] Furthermore, the potential

[105] The respondent in AGIP S.p.A. v. People's Republic of the Congo disregarded the interim orders, and the tribunal considered this in making its ultimate decision. See ICSID Case No. ARB/77/1, Award, 30 November 1979, paras 7-9,42(c).

[106] Raymond J. Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' 64.

[107] In the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* ([1993] AC 334), for instance, the House of Lords ruled that the court had a duty to respect the choice of tribunal made by both parties and to refrain from taking away a decision-making power that the parties had entrusted to the arbitrators or other decision-makers. In *Leviathan Shipping Co Ltd v. Sky Sailing Overseas Co Ltd* ([1998] 4 HKC 347), the Hong Kong Court of First Instance denied an application for interim relief on the grounds that the court should only rarely intervene in arbitral proceedings and that, in accordance with s 2GC(6) of the Arbitration Ordinance, the arbitral tribunal

for national courts to become involved might lead to a conflict between national and arbitral jurisdiction, further exacerbating the possibility of intervention in arbitral proceedings. Currently, it is not unusual for national courts to issue anti-arbitration injunctions to stop investors from pursuing remedies before international tribunals or for requests to be made to contest and remove arbitrators. On the other hand, states are occasionally willing to exert control over international arbitral proceedings for their own benefit. Some of these States may be more drawn to domestic arbitration to obtain a strategic advantage in arbitrations with locations within their borders, particularly in cases where the executive branch can exert pressure on the judiciary to prioritize national interests over those of foreign investors because of the vaguely defined division of powers.[108]

The potential for national courts to significantly disrupt arbitral proceedings is substantial in investor-state arbitration. In the case of ***Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia,*** Addis Ababa Water and Sewerage Authority, Ethiopia promptly disputed the authority of the ICC arbitral tribunal after Salini, an Italian contractor, sought the intervention of the ICC Court.[109] After the ICC Court dismissed its objection to the qualifications of all three arbitrators, Ethiopia filed an appeal with the Addis Ababa Court of Appeal regarding the ICC Court's decision.[110] Additionally, Ethiopia initiated a separate legal action before the Federal First Instance Court, arguing that the arbitral tribunal had no authority to handle the dispute.[111] Furthermore, the Federal First Instance Court imposed an injunction prohibiting the claimant from continuing with the arbitration until the court ruled about the tribunal's jurisdiction.[112]

Himpurna California Energy Ltd, a business based in Bermuda owned by a U.S. investor, filed a lawsuit against Indonesia using the UNCITRAL Rules. This was in response to the Indonesian State entity's refusal to pay the damages specified in a previous UNCITRAL arbitral ruling. Himpurna received two legal notices from the Jakarta Court. One lawsuit aimed to stop the arbitration process, while Indonesia filed the other to invalidate the initial UNCITRAL ruling. Despite the order imposed by the Indonesian court to stop Himpurna from continuing with arbitration against Indonesia, the arbitral sessions were not interrupted. Additionally, Indonesia

should be the first resort because it had been established and could have issued the necessary orders.

[108] Giulia Carbone, 'The Interference of the Court of the Seat with International Arbitration' (2012) 2012 J Disp Resol 217, 233.

[109] ICC Arbitration No10623/AER/ACS, Award regarding the suspension of the proceedings and jurisdiction, 7 December 2001, para 16.

[110] Ibid, para 75.

[111] Ibid, para 77.

[112] Ibid, paras 88-89.

compelled the arbitrator they selected to return to Indonesia.[113] These two examples have shown that in some situations, national courts can cause delays in resolving disputes and further weaken the foundation of international arbitration.

The occurrence of national courts (or even States) engaging in abusive interference is a common occurrence in non-ICSID arbitration. The challenge of minimizing or preventing such interference by national courts has been and continues to be a complex topic in international arbitration. An ICSID case that occurred recently has significantly contributed to establishing the limits of national courts' participation. In the case of ***Saipem S.p.A. v. Bangladesh***, the Bangladeshi national court issued an injunction to prevent the Italian investor Saipem from proceeding with arbitration. However, the ICC arbitral panel still decided to favor Saipem. However, when Bangladesh applied to have the ICC award canceled, the court in Bangladesh concluded that the award did not exist; therefore, it could not be canceled or implemented. The ICSID tribunal recognized that the national courts of the State where the arbitration occurred had the authority to oversee the arbitration process. However, the crucial issue in this case was whether the actions of the national courts went beyond their supervisory authority and constituted an expropriation.[114] On a practical level, the tribunal acknowledged that international arbitration is based on the legal system of the country where the arbitration takes place. However, it also recognized that arbitral tribunals have the authority to penalize the illegal actions of national courts and the State if the supervisory power of national courts at the arbitration site is not exercised in good faith and fails to comply with the rule of law and established principles of international arbitration.[115] By analyzing the jurisdiction of the national courts in Bangladesh, the ICSID tribunal determined that the court's decision to revoke the authority of the ICC tribunal and the Supreme Court's declaration that the ICC award was non-existent were illegal actions. These actions, attributed to the Bangladeshi courts, resulted in an expropriation claim.[116] Hence, the harmful interference of domestic courts can be seen not only as a deliberate strategy to obstruct arbitration and bring it to a standstill but also as a violation of international investment treaties.

IV. CONCLUSION

It is typically argued that more sovereign rights must be transferred to ICSID arbitral tribunals, even though States automatically and inevitably cede some of their judicial sovereignty in favor

[113] Interim Award (*Ad Hoc* UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109, 109-11, 191 (2000).
[114] ICSID Case No ARB/05/7, Award of 30 June 2009, paras 115-16.
[115] Ibid, para 186.
[116] Ibid, paras 120-173.

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of investment protection when verifying consent to ICSID and non-ICSID arbitral jurisdiction. States that seek to strike a balance between state sovereignty and foreign investors' interests must consider three propositions when negotiating investment treaties. These propositions address how and to what extent foreign investors can rely on investor-state arbitration rather than national administrative or juridical authority at the expense of surrendering sovereignty.

Initially, what types of conflicts are admissible before international courts? Since the decision of a rigorous "dual test" determines whether the subject matter in issue qualifies as an investment under the ICSID Convention, the scope of subject matter in ICSID arbitration is often noticeably narrower. However, a liberal approach taken by many ICSID tribunals to interpret the concept of investment under the ICSID Convention, thereby enhancing the competency of ICSID tribunals and jurisdiction, has led to an expansionary trend in ICSID jurisdiction in recent decades. This expansion results from the broad and open-ended definition of "investment" in investment treaties, evidence of States' consent to ICSID jurisdiction. The Gordian knot, which must be untangled in reality, was created by the ICSID's broad authority. Still, it also lessens the distinctions in jurisdictional standards between ICSID and non-ICSID arbitration. Currently, the definition of "investment" in ICSID arbitration is sufficient for ICSID tribunals to exercise their jurisdiction over disputes involving a wide range of assets and activities related to investment, even though it is not as broad as the comprehensive concept of "commercial" in non-ICSID arbitration.

Second, how does the balance between preserving State sovereignty and defending foreign investment change depending on how well-suited investor-state arbitration is to other conflict resolution processes? On the surface, the explicit waiver requirement of the application of the rule of exhaustion of local remedies appears to be a violation of State sovereignty because, in reality, States typically overlook the distinction between the ICSID Convention's and customary international law's waiver requirements, losing their opportunity to protect their sovereign rights through the use of internal, administrative, or legal channels. However, it is notable that the fork-in-the-road language in BITs and the explicit waiver requirement under the ICSID Convention both, in part, make it easier for foreign investors to obtain international remedies. There is a slightly conflicted aspect regarding conciliation and its complementary use in non-ICSID arbitration. Although it may serve the interests of most investors, the various interests of States and other stakeholders are likely compromised, given the private and confidential settings in which conciliation may occur.

Third, is it preferable for national courts to have supervisory authority over non-ICSID arbitration rather than having no recourse in ICSID arbitration? It is acknowledged that national

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courts can support arbitral proceedings in certain situations, such as determining an arbitral tribunal's jurisdiction early on and offering crucial interim relief. However, it can be highly disruptive and abusive when national courts get involved in international arbitration. The benefits (respect for and support of arbitral processes) and drawbacks (hegemony and interference with arbitral procedures) of national courts' functions are two sides of the same coin. ICSID arbitration's self-contained structure—which renders it completely independent of national courts' oversight authority—seems more crucial for safeguarding the integrity of arbitral procedures than granting or enforcing interim relief. Overall, in terms of jurisdiction, ICSID likewise aims to pursue similar ends in different ways, functioning as a quasi-judicial body based on its *sui generis* system to further the goal of protecting the legitimate rights and interests of both sovereign States and foreign investors, even though non-ICSID arbitration has already offered a relatively efficient and effective resolution.

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V. REFERENCES

[1] AAA International Dispute Resolution Procedures, art. 37.

[2] Amerasinghe, C.F., *Local Remedies in International Law* (CUP, 2004) 250-51.

[3] Bechky, P.S., 'Microinvestment Disputes' (2012) 45 Vand J Transnatl L 1043; Peter Gooderham (Director of ICC UK) 'Small Investors Would be Denied Access to Remedy', Financial Times, Letters, 27 October, 2014).

[4] Bühring-Uhle, C., *et al*, *Arbitration and Mediation in International Business* (Kluwer Law International, 2006) 86.

[5] Carbone, G., 'The Interference of the Court of the Seat with International Arbitration' (2012) 2012 J Disp Resol 217, 233.

[6] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd ([1993] AC 334).

[7] Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953) 340.

[8] China-Australia BIT (1988) art. I.1(f).

[9] China-France BIT (2007), art. 7.

[10] China-Germany BIT (2003).

[11] China-Spain BIT (2005), art 9(1), (2).

[12] Coe, J.J., 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch' (2005-2006) 12 UC Davis J Intl L & Poly 7, 16.

[13] Coe, J.J., 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch; Jeswald W Salacuse, Is There A Better Way? Alternative Methods of Treaty-based, Investor-State Dispute Resolution' (2007-2008) 31 Fordham Intl LJ 138.

[14] Cole, T., and Vaksha, K., 'Power-conferring Treaties: The Meaning of "Investment" in the ICSID Convention' (2011) Leiden J Intl L 305, 327-29.

[15] Colombia-Turkey BIT in July 2014.

[16] Electrotechnica Sicula S.p.A. ICJ Rep 1989, 42.

[17] English Arbitration Act, s. 67(1).

[18] Ferguson, S.M., 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results' (2003) 12 Currents: Intl Trade LJ 55, 55.

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

[19] First Options v. Kaplan (1 115 S Ct. 1920 (1995)).

[20] Gaillard, E., 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder, *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, 408-11.

[21] Gaillard, E., and Pinsolle, P., 'The ICC PreArbitral Referee: First Practical Experiences' (2004) 20(1) Arb Intl 13, 14.

[22] Gaillard, E., *et al* (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, 42.

[23] Himpurna California Energy Ltd v. Indonesia, Interim Award (Ad Hoc UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109 (2000).

[24] Hong Kong Arbitration Ordinance, s 2GC(6).

[25] ICC Arbitration No.10623/AER/ACS, 7 December 2001.

[26] ICC Rules

[27] ICSID Additional Facility, art. 46(4).

[28] ICSID Arbitration Rules

[29] ICSID Case No ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

[30] ICSID Case No ARB/05/22, Procedural Order No 1, 31 March 2006.

[31] ICSID Case No ARB/05/7, Award of 30 June 2009.

[32] ICSID Case No ARB/08/4, Award, 15 December 2010, para 149.

[33] ICSID Case No ARB/81/1, *Ad Hoc* Committee Decision on the Application for Annulment, 16 May 1986.

[34] ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983.

[35] ICSID Case No ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997.

[36] ICSID Case No ARB/97/7, Decision on Request for Provisional Measures, 28 October 1999.

[37] ICSID Case No. ARB/01/3, Decision of Jurisdiction, 14 January 2004, paras 95-98.

[38] ICSID Case No. ARB/77/1, Award, 30 November 1979, paras 7-9,42(c).

[39] ICSID Conciliation Rule, art. 30.

[40] ICSID Conventiion.

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

[41] ICSID, 'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,' 18 March 1965, para 32.

[42] Interim Award (*Ad Hoc* UNCITRAL Proceeding), 16 October 1999, 25 YB Com Arb 109, 109-11, 191 (2000).

[43] Jennings, R., Arthur Watts (eds), *International Law: A Treatise* (9th edn, Longman, 1992) 526.

[44] LCIA Arbitration Rule (2014).

[45] Legum, B., 'Defining Investment and Investor: Who is Entitled to Claim?' (2006) 22(4) Arb Intl 521, 523-24.

[46] Legum, B., 'The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch" (2006) 21(4) Mealey's Intl Arb Rep 72, 73.

[48] Leviathan Shipping Co Ltd v. Sky Sailing Overseas Co Ltd ([1998] 4 HKC 347).

[49] Lew, J.D.M., *et al*, *Comparative International Commercial Arbitration*.

[50] Marchac, G., 'Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules' (1999) 10 Am Rev Intl Arb 123, 138.

[51] McArthur, K.S., and Ormachea, P.A., 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28 Rev Litig 559, 573.

[52] Moore, M. M., 'International Arbitration between States and Foreign Investors - The World Bank Convention' (1965-1966) 18 Stan L Rev 1359, 1362.

[53] Mortenson, J.D., 'Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harv Intl LJ 257.

[54] Nelson, T.G., '"History Ain't Changed": Why Investor-State Arbitration Will Survive the "New Revolution"' in Michael Waibel, *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality*, 566-67, 71.

[55] New York Convention.

[56] Park, W.W., 'The Arbitrator's Jurisdiction to Determine Jurisdiction, The Limits of Language' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer International, 2007) 56).

[57[Reed, L., *et al, Guide to ICSID Arbitration*, 143.

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

[58] Reinisch, A., 'The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements'135.

[59] Reisman, W.M., 'International Investment Arbitration and ADR: Married But Best Living Apart' in UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* II, 2011, 26.

[60] Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award of 3 September 2001, para 161.

[61] Salacuse, J.W., Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 178-79.

[62] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction, 16 July 2001.

[63] Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Arbitration No10623/AER/ACS, 7 December 2001.

[64] Schreuer, C.H., *et al*, *The ICSID Convention: A Commentary*.

[65] Schreuer, C.H., 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration,' (2005) 4 Law & Prac Intl Cts & Tribunals 1.

[66] Schreuer, C.H., 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 J World Investment & Trade 231, 248-49.

[67] Schulz, A., 'The Future Convention on Exclusive Choice of Court Agreements and Arbitration: Parallel Proceedings and Possible Treaty Conflicts, in Particular with ICSID and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards', Prel Doc No 32, Hague Conference on Private International Law, June 2005, 12.

[68] Schwebel, S.M., 'Is Mediation of Foreign Investment Disputes Plausible?' (2007) 22(2) ICSID RevForeign Investment LJ 237.

[69] Sempra Energy International v. Argentine Republic (ICSID Case No ARB/02/16).

[70] Shaw, M.N., *International Law* (CUP, 2003) 730.

[71] Sinclair, A., 'ICSID Arbitration: How Long Does It Take?'(2009) 4(5) Global Arb Rev 18, 19.

[72] Sornarajah, M., 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P. Sauvant, et al (eds), Appeals Mechanism in International Investment Disputes (OUP, 2008) 40.

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

[73] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Jurisdiction and Dissenting Opinion of 14 April 1988.

[74] U.S. Model BIT (2012).

[75] UNCITRAL Model Law (2006), art. 6.

[76] UNCITRAL Rules.

[77] UNCTAD, 'Scope and Definition,' UNCTAD/DIAE/IA/2010/2, 2011, 24.

[78] UNCTAD, 'Scope and Definition', 2011, 9-10.

[79] UNCTAD, 'Scope and Definition', UNCTAD/ITE/IIT/11 (vol II), 1999, 15.

[80] UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries', 12-13, 16-17.

[81] UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking,' UNCTAD/ITE/IIT/2006/5, 2007, 10.

[82] United Mexican State v. Metalclad Corp. (89 B.C.L.R.3d 359).

[83] Vandevelde, K.J., 'Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties' (1998) 36 Colum J Transnatl L 501, 502-03.

[84] Veeder, V.V., *The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties.*

[85] Werbicki, R.J., 'Arbitral Interim Measures: Fact or Fiction?' (2003) 57-JAN Disp Resol J.

[86] Whitfield, H.F., "Kompetenz-Kompetenz: An Arbitral Tribunal Authority to Decide Its Jurisdiction." *Beijing Law Review* 14.04 (2023): 1941-1953.

[87] Yala, F., 'The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?' (2005) 22(2) J Intl Arb 105.

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