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Foreign Investment Disputes under ICSID: A review of its decisions

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Foreign Investment Disputes under ICSID: A review of its decisions on jurisdiction.

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I. INTRODUCTION

Different procedural mechanisms are available to solve foreign investment disputes. The kind of mechanism actually used will depend on the parties and on the nature of the dispute. This is so because foreign investment is a complex process which involves the investor, the host State, the transfer of capital into this State, and the investor's home State. There are many kinds of disputes:

- between investors;
- between States (investor's home and host);
- between an investor and a multilateral or bilateral agency of investment risk guarantee;
- between a multilateral or bilateral agency of investment risk guarantee and the host State; and
- between the investor and the host State.

All these disputes may be resolved by negotiation, mediation, arbitration or litigation. In case of disputes between investors, and if negotiations fail, the procedural mechanism available may be arbitration if the parties have so agreed. If there is no arbitration agreement, however, the parties may only litigate in the local courts that are competent as per *ratione materiae* or *ratione locus*.

In the case of a dispute between States, the mechanisms are diplomatic negotiation, arbitration (if all the parties so agree) or litigation before the International Court of Justice.

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The opinions expressed in this paper are personal and do not reflect the views of the organizations to which the author is affiliated.

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In *Barcelona Traction*,[1] a company incorporated in Canada whose shares were owned by Belgian citizens was expropriated by Spain. The International Court of Justice held that international law recognizes the existence of the corporate entity as a matter of local legislation caused by the economic reality and determined that Belgium could not protect the company in an action before the Court against Spain. The Decision was based in that, under customary international law, a company can claim the protection of the State in which it is registered but not the protection of the State of which the shareholders are nationals. However, in *Barcelona Traction*, Canada refused to grant diplomatic protection because it required not only a Canadian registration but also that the company had generated a substantial economic benefit domestically or that the company would have had some kind of domestic economic interest of substantial character.

Analyzing the facts, the Court found that the shareholders and the company were different entities with different judicial personalities and different rights. Therefore, a company could have property rights over the assets it owned and the right to diplomatic protection from the State in which it was constituted. The shareholders would have the right of property over the stocks and the right to diplomatic protection from the State of which they are nationals. Those two States could be different. [2]

Investment disputes, however, may not be between States. For example, a multilateral investment guarantee agency was created by the MIGA Convention[3] to protect investors from the non-commercial risks of developing countries that signed that Convention.[4] Likewise, some countries have created agencies of foreign investment protection and guarantee.[5] When the non-commercial risk against which the investor has insured itself arises, it can ask the agency for compensation; and once the agency has compensated the investor, the agency takes its place *vis-à-vis* the host State. However, these disputes—investor v. agency and agency v. host State—are generally resolved through negotiation.

Finally, the disputes might be between the investor and the host State. They can be of legal or technical nature. If they are legal in nature, the investor's typical procedural mechanism is litigation in the host State using domestic

[1] *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, 1970 I.C.J. 3, at 47, Decision of 5 February.

[2] See E.R. Hardy Ivamy, *Dictionary of Company Law*, second edition, Butterworth's London, 1985, p. 42 (indicating that a company's judicial personality and nationality has nothing to do with the stockholder's judicial personality).

[3] MIGA Convention, 24 I.L.M. 1605, 1985.

[4] See Ibrahim Shihata, *MIGA and Foreign Investment*, Kluwer Academic Publishers, Dordrecht, 1988, p. 4.

[5] In the case of the United States, there is the Overseas Private Investment Corporation (OPIC)

remedies. Arbitration may be used if the parties had agreed to it. The arbitration may be local or international. In the case of international arbitration, the parties can choose between *ad hoc* or institutional arbitration. In the latter case, there are different centers for dispute resolution. One of them is the International Centre for Settlement of Investment Disputes (ICSID).

II. Disputes between the Investor and the Host State

The different interests of the investor and the host State may be a source of disputes. For the investor, generally speaking, the investment is a means to generate profits. For the host State, the investment is usually received to foster economic development.

The legal tool that protects the investor's interests is the right of property. For the host State, it is its sovereignty.

Thus, during the foreign investment process, the dissimilar interests of the parties could converge or diverge. In the latter case, a dispute between the investor and the Government of the host State could arise. In normal circumstances, such a dispute must be resolved according to the laws and mechanisms of the host State.

In the past, and when the dispute had to be inexorably resolved according to the mechanisms of the host State, investors requested diplomatic intervention from their home States. However, this contingency took the control of the dispute away from the investor, and disputes were usually resolved according to the interests of the home State, frequently disregarding the interests of the real stakeholder: the investor.

In light of these facts, and under the sponsorship of the World Bank, a convention was signed in 1966 creating the International Centre for Settlement of Investment Disputes (the Convention, also known as the Washington Convention[6]), which under certain conditions can be a resource to settle legal disputes between a foreign investor and the host State.

ICSID can be an adequate mechanism to solve legal investment disputes between a State and an investor—when both host State and home State have signed the Convention—using arbitration or conciliation. Through ICSID, it is possible for legal disputes between investors and the host State relating to

[6] ICSID has grown from 20 Member States in 1966 to 154 in 2003, and it had up to 49 cases in 2002 and more than 60 pending cases in 2003.

investments to be resolved in a neutral forum and under relatively equalitarian conditions.

However, given the nature of the parties and conflicts and interests involved in foreign investments, it is very common that one of the parties, usually the State, is not willing to accept or doubts ICSID's jurisdiction to solve specific disputes. Therefore, Article 41 of the Convention grants the parties the possibility to object to the jurisdiction of ICSID's arbitral tribunals before those tribunals get to know the merits of the case. The Convention also provides that the tribunal is the judge of its own competence and may consider the issue either as a preliminary question or when deciding the merits of the dispute.[7]

Therefore, the decisions of the arbitral tribunals confirming or rejecting their competence constitute an excellent source of information to identify the criteria of ICSID in this field. The jurisprudence that has emerged from these decisions may be used as reference in future arbitration procedures before the Centre and also to avoid unnecessary efforts to submit non-qualifying cases.

III. Requisites for ICSID to Have Jurisdiction

Article 25 of the Convention sets the requirements for the Centre to have jurisdiction over a dispute.

A. The dispute must be of a legal nature

Technical disputes, even if they are related to the investment—dimensions of a land plot or differences over a product's technical specifications, among others—are not covered by the Convention or within the limits of ICSID's jurisdiction. Likewise, commercial or political disputes are not within its jurisdiction.

Article 36(3) of the Convention bestows authority on the Secretary-General of ICSID to reject claims that are evidently outside the Centre's jurisdiction. For example, a claim submitted to ICSID that does not clearly indicate the legal support of the dispute can be rejected immediately or its acceptance can be suspended until the claimant submits explanations whenever the Secretary-General asks for them.

[7] Article 41(2) of the Procedural Rules applicable to ICSID Arbitration Proceedings.

B. The dispute must arise directly out of the investment

Disputes that do not arise directly out of an investment are beyond the realm of ICSID. The Convention does not have a definition of disputes arising directly out of an investment.

In the *CSOB* case,[8] Slovakia argued that the dispute had not arisen out of an investment but from a second-tier agreement that guaranteed obligations of another legal entity. In its first Decision on the objections, the Arbitration Tribunal quoted the *Fedax* case:

> "It is apparent that the term 'directly' relates in this Article to the 'dispute' and not to the 'investment'. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction …" [9]

Furthermore, it stated that investments are usually operations composed of various inter-related transactions. The transactions by themselves might not qualify as an investment. However, when a dispute is brought before ICSID, the tribunal needs to look at the overall operation and not solely at the particular transaction. If the whole operation can be qualified as an investment, even if it is not a direct investment, and the dispute arises directly out of that operation through the particular transaction, then ICSID will have jurisdiction.

In the second Decision on jurisdiction in this case,[10] the Tribunal pointed out that, although it had jurisdiction over a dispute that arose directly out of an investment through a specific transaction, the jurisdiction extended only to the dispute as per the terms of the consent of the parties. Therefore, the Tribunal did not acquire jurisdiction with regard to each agreement concluded to implement the wider investment operation.

There are occasions in which the parties to an investment dispute can be parties to another dispute. However, if one of the disputes does not arise directly out of the investment, ICSID does not have jurisdiction. In *Amco v. Indonesia*,[11] the State submitted a counterclaim arguing that the investor had committed tax fraud. The Tribunal rejected the counterclaim, stating that the obligation not to commit tax fraud was a general obligation in Indonesian law which had not been specified in the investment agreement between the home State and the host

[8] *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. Slovakia*, ICSID Case No. ARB/97/4, Decision of 24 May 1999.

[9] *Fedax N.V. v. Venezuela*, Decision on Objections to Jurisdiction, 11 July, 1997, 37 I.L.M. 1378, at para. 24, 1998.

[10] Decision of 1 December 2000.

[11] *Amco Asia et al. v. Indonesia*, resubmitted case, Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 543, at 565.

State. Therefore, the Tribunal concluded that the dispute did not arise directly out of the investment.

Disputes may arise out of general economic policies that affect the investment. In *CMS*,[12] an American company, CMS, which had invested in an Argentine company, Transportadora de Gas del Norte (TGN), was affected by an alleged suspension by Argentina of a tariff-adjustment formula for gas transportation, all of which, it was argued, arose out of general economic policies.

The Tribunal held that, although it did not have jurisdiction over general economic policies taken by Argentina, it did have jurisdiction over measures of general economic policies that affect the investment, provided that they have been adopted in violation of international law or in violation of commitments made to the investor:

> "This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment."[13]

The dispute may arise directly out of a business but, if the business is not an investment, ICSID will not have jurisdiction.

ICSID Tribunals have been in need of criteria to determine what is an investment and what is not. They have relied on academic writings. Accordingly, the most typical aspects to identify an investment are:

- the project must have a certain duration;
- there must be a certain regularity in the earnings and the return;
- there is a typical element of risk on both sides;
- there is a substantial commitment to develop certain activities; and
- the operation must be significant for the development of the host State, as stated in the Convention's preamble. [14]

In the *Salini v. Morocco* case,[15] the Tribunal analyzed the objections to its jurisdiction, one of which referred to the argument that construction contracts did not qualify as investments under the Convention. The Tribunal considered the criteria generally identified by the Convention's commentators, indicating that those were: existence of contribution, certain duration and risk participation. It also added that the operation should contribute to the development of the host State, as provided by the Convention's preamble. The Tribunal found that the

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[12] *CMS v. Argentina*, 42 I.L.M. 788, 2003.

[13] Ibid., at para. 34.

[14] Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge Univeristy Press, Cambridge, U.K., 2001, Article 25, para. 86.

[15] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196, 2002.

construction contract fulfilled the criteria. Even in the risk aspect, the Tribunal indicated that a construction project that lasts several years, for which total costs cannot be established with certainty in advance, created a risk for the contractor. Thus, a construction operation could be qualified as an investment, and the disputes that arose directly out of it were susceptible to be heard by ICSID.

Expenses incurred prior to establishment of the investment are a subject that has been analyzed by ICSID Tribunals. In *Mihaly v. Sri Lanka*,[16] the two parties had been negotiating the possibility of building an electric plant in Sri Lanka. The parties had not signed a contract but had signed letters of intent in which Mihaly was given the exclusivity in the negotiation of the contracts that would be signed. However, in those letters it was also indicated that none of the parties had assumed any obligation, which in any event would have been the subject of a future contract.

Sri Lanka ended the negotiations and Mihaly sued Sri Lanka before ICSID, claiming that Sri Lanka had broken its obligations under the Sri Lanka–United States bilateral investment treaty (BIT), and requested payment of the expenses it had incurred preparing the project, arguing that there was an investment. Sri Lanka argued that such expenses did not constitute an investment.

The Tribunal found that the obligations assumed in the letters of intent never became contractual obligations and concluded that the expenses in question could not be considered an investment in Sri Lanka. Additionally, the Tribunal stated that, if the contract had taken place, those expenses could have been capitalized as part of the investment. However, in this specific case, those expenses did not constitute an investment within the context of the obligations assumed by the parties and, consequently, ICSID had no jurisdiction over that dispute.

Investment and trade are two different ways of doing business. However, investment and trade can be inter-related, as occurs when the investment has been made in order to trade, i.e. to import or to export.

In cases in which the dispute arises out of an investment related to trade, ICSID could have jurisdiction. In the *Pope & Talbot, Inc. v. Canada* case,[17] the Tribunal dealt with this issue. Canada admitted that an investment had taken place but argued that the measure against which the investor was claiming was directed toward a commercial operation, not toward an investment. The Tribunal held that its jurisdiction emerged from the dispute *prima facie,* which had been

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[16] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, 15 March 2002, 17 ICSID Rev.–F.I.L.J. 142, 2002. See also, C. Chatterjee, *When Pre-Investment or Development Costs May or May Not Be Regarded as Part of "Investment"under Article 25(1) of the ICSID Convention—The* Mihaly *Case*, 4 J.W.I. 5, October 2003.

[17] *Pope & Talbot, Inc. v. Canada*, Award on Motion to Dismiss, Re: Existence of an Investment, 26 January 2000; available at: <<http://www.naftaclaims.com>>.

submitted as an investment dispute. It also pointed out that there was no provision in the North American Free Trade Agreement (NAFTA) according to which investments and trade in goods should be treated separately from one another. It also said, responding to one of Canada's arguments, that trade measures could be applied to a particular company because that a measure is fundamentally related to trade of goods does not necessarily mean that it is not related to the investment or the investor.

In *S. D. Myers Inc. v. Canada*,[18] under similar circumstances the Tribunal sustained that a measure about goods could affect those who are involved in the trade in goods and those who have made investments related to those goods.

The jurisdiction of ICSID comes from the dispute as it has been submitted by the claimant, as the Tribunal indicated in *Amco v. Indonesia*.[19] Therefore, the claimant must be very careful on how the dispute is submitted. Under certain circumstances, the Secretary-General of ICSID may reject a claim if, according to the arbitration request, it is not directly related to an investment. An example of this occurred when ICSID rejected an arbitration request submitted in connection with a dispute that derived from a supply contract for the sale of goods.[20]

There are cases in which, even if ICSID's jurisdiction is obvious and the parties do not object, the Tribunal can make express indications that the dispute arose directly out of an investment. This happened in the case of *Kaiser Bauxite Company v. Jamaica*,[21] where the dispute resulted from a tax measure which was not in accordance with the provisions of a mining concession under which the foreign company had invested large amounts of money.

Likewise, in *Liberian Eastern Timber Corporation v. Republic of Liberia*,[22] the Tribunal did not doubt that the amounts paid to develop a timber concession and its accessories could be the bases for a dispute that emerged directly out of an investment.

Disputes arising out of investments made in shares of a local company are within the jurisdiction of ICSID. In *CMS*,[23] the claimant was a U.S. company which owned 29.42 percent of the shares of TGN, a local company. Argentina objected

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[18] *S.D. Myers, Inc v. Canada*, Partial Award, 12 November 2000, 40 I.L.M. 1408, 2001.

[19] Amco Asia et al. v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at 404-405

[20] *Asian Express v. Greater Colombo Economic Commision*. See I.F.I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Rev.–F.I.L.J. 299, at 308 and note 27, 1999. See also *ICSID Annual Report for 1985*, p.6.

[21] *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction, 6 July 1975, 1 ICSID Reports 296, at 303.

[22] *Liberian Eastern Timber Corporation v. Republic of Liberia*, Award, 31 March 1986, 2 ICSID Reports 346 at 350.

[23] *Supra*, footnote 12.

to ICSID's jurisdiction. The Tribunal held that nothing in international law prohibited investment claims submitted by shareholders independently from those of the corporation concerned. It also said that, although that rule seemed to protect majority or controlling shareholders, the prevalence of protection to all kinds of shareholders through treaty arrangements made that approach the exception.

C. The non-state party involved in the dispute must be from a contracting state other than the host state

Both the host State and the home State must be signatories of the Convention. Additionally, the investor must be from a State other than the one against which the investment dispute has arisen.

However, since 1998 ICSID has the Rules of the Additional Facility, which allow disputes that do not comply with the former requisite to be submitted to arbitration before the Centre. Therefore, disputes in which the State party to the dispute or the State whose national is party to it—but not both—is not a party to the Convention can be arbitrated by ICSID according to these rules.

The Convention provides hints as to who is a national of another Contracting State:

i) any natural person who had the nationality of a Contracting State other than the State party to the dispute at the time of the consent as well as on the date on which the request was registered;

ii) any juridical person which had the nationality of a Contracting State other than the State party to the dispute; and

iii) any juridical person which had the nationality of the Contracting State party to the dispute at the time of the consent and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State.

ICSID handles disputes between investors and States, not disputes between investors nor disputes between States. The definition of investor and State has been addressed recently by ICSID.

In the *Csob* case,[24] the Arbitral Tribunal analyzed the issue of a dispute submitted by a State-owned company. The Slovak Republic alleged that CSOB was acting as an agent of the Czech Republic and the claim had to be dismissed because the dispute was one between States over which ICSID could not have jurisdiction.

[24] *Supra*, footnote 8.

The Tribunal, quoting a Convention commentator,[25] determined that a mixed-economy company or a government-owned corporation is not disqualified *per se* as a national of another Contracting State unless it is acting as an agent of its Government or performing governmental functions. It also asserted that a State-owned corporation is not performing State functions when it takes advantage of a free-market economy or privatization policies and restructures itself to be competitive nor when it takes measures to achieve those objectives. That was the case with CSOB. Therefore, it was not considered an agent of the Czech Republic and could not be disqualified to initiate proceedings before ICSID.

In the *Maffezini v. Spain* case,[26] the Tribunal analyzed the issue from a different point of view. In this case, Spain alleged that ICSID lacked jurisdiction because the dispute was not between an individual (Maffezini) and a State (Spain) but between an individual and a corporation (SODIGA), i.e. a legal entity. The Tribunal held that to determine if an entity was a State organ and its doings attributable to the latter two tests were required: structural and functional. If, on analyzing the structure of an entity, it seems that it is not a State organ because the State has used a corporate veil, the analysis needs to be turned to the function of the entity. If the entity is in charge of State functions, then it will be considered an organ of the State. SODIGA met both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature. Thus, the Tribunal rejected the objection to jurisdiction based on this argument because the claimant had shown *prima facie* that the dispute was between an individual and an organ of the State.

A decision of a court of a State is attributable to the State**.** In the *Loewen* case,[27] the Additional Facility Tribunal was presented with the issue of whether an act of a court of a State could be attributable to the State. The Loewen Group and Raymond Loewen were Canadian investors in the funeral home and funeral insurance business. A U.S. competitor sued Loewen in a U.S. court. According to Loewen, the court that handled the trial violated different provisions of the NAFTA. The Tribunal reiterated a previous decision stating that a court is an organ of a State. Thus, its acts are attributable to the latter. However, the Tribunal held that, for an act of a local court to be challengeable at the international level as an act of the State, the act needs to be a final decision of the judiciary against which all local remedies had been exhausted.

In the same direction, in *CMS*,[28] the Tribunal found that a State could be internationally liable under a treaty for actions taken by the judiciary,

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[25] The Tribunal quoted A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 Hague Recueil des Cours 331, at 354-355, 1972.

[26] *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of 25 January 2000.

[27] *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, reprinted in 4 J.W.I. 4, August 2003, pp. 676-731.

[28] *Supra*, footnote 12, at para. 108.

administrative agencies and the executive and legislative branches of the State unless an express reservation is made in that regard when the treaty from which the responsibility arises is executed.

For ICSID to have jurisdiction, the legal investment dispute must be between a Contracting State of the Convention and a national of another Contracting State. If the dispute is between a national of a Contracting State and the same State, ICSID has no jurisdiction. Therefore, the criteria to determine when a natural person or legal entity is a national of a State are crucial. Recent decisions from ICSID Tribunals have addressed the subject.

1. *When Nationality Has Been Agreed upon by the Parties*

In *MINE v. Guinea*,[29] there was an agreement over the nationality of the investor. MINE had entered into an agreement with the Government of Guinea which contained the parties' consent to settle their investment disputes through ICSID arbitration. The agreement also provided that MINE was a Swiss national. However MINE was incorporated in Liechtenstein, a country that had not ratified the Convention at that date but it was controlled by a Swiss national.

Guinea did not object to the Centre's jurisdiction. The Tribunal heard the case, implicitly recognizing that MINE had Swiss nationality, probably based on the agreement on nationality, on the fact that Switzerland was a Contracting State of the Convention and on the fact that Guinea knew that the real interest behind the investment was Swiss.

2. *When a Natural Person has one State's Nationality and another State's Residence*

In the *Feldman* case,[30] the Tribunal said that nationality and residence were different concepts. Nationality was the main connecting factor between a State and an individual. It also said that nationality prevailed over residence in respect to *ius standing*.

Mr. Feldman was a national of the United States of America but had residence in Mexico. ICSID's jurisdiction was objected to by Mexico based on Article 201 of the NAFTA, which provides that a national is, among others, a citizen or permanent resident. If Mr. Feldman was considered a national of Mexico, he did not have standing to initiate a proceeding before ICSID. The

[29] *MINE v. Guinea*, Award, 6 January 1988, 4 ICSID Reports 61.

[30] *Marvin Roy Feldman v. Mexico*, ICSID Case No. ARB(AF)99/1, Decision of 6 December 2000.

Tribunal resolved the issue by stating that the reference of Article 201 of the NAFTA was only relevant with respect to the State party other than the one where the investment is made. Thus, a permanent resident in the United States of America who did not have U.S. citizenship could claim to have the nationality of the United States of America for purposes of NAFTA protection and initiate an arbitration proceeding before ICSID. Mr. Feldman, it was found, had the nationality of the United States of America and only that nationality. For that reason, the issue of double nationality did not arise.

3. *Nationality of an Entity when there is Foreign Control*

In *Amco v. Indonesia*,[31] the Tribunal held that the agreement between the parties to consider a local legal entity as foreign, according to Article 25(2)(b) of the Convention,[32] can be implicit.

PT Amco was a locally incorporated company but controlled by the foreign parent company Amco Asia. The arbitration clause mentioned PT Amco as a potential party in the proceedings before ICSID. Indonesia objected to ICSID jurisdiction, arguing that it had not agreed to treat PT Amco as a foreign company. The Tribunal stated that there were no formal requisites for agreements related to a local company being considered a foreign investor. It referred to the consent to arbitrate given by the parties by which the Government of Indonesia recognized that PT Indonesia was a locally incorporated company, but controlled by foreigners. It relied on the fact that the contract identified PT Amco as a "foreign business" and on the fact that the contract between the parties contained provisions that are normally applied to foreign businesses.

In *Klockner v. Cameroon*,[33] the Tribunal held that the simple inclusion of an ICSID arbitration clause presupposed and implied that the parties had agreed to consider a locally incorporated company as a foreign company subject to foreign control. In this case, the foreign investor had participated in the establishment of a company in Cameroon together with other partner named SOCAME. This company and Cameroon entered into a contract of establishment which contained an ICSID arbitration clause. Cameroon objected to ICSID's jurisdiction because SOCAME was a local company. The Tribunal rejected the objection, finding that the existence of an ICSID arbitration clause already indicated an agreement over the nationality of the investor. Otherwise, the clause would have had no sense and the Tribunal must interpret the parties' intentions in a logical way.

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[31] *Supra*, footnote 19.

[32] The parties can attribute the character of investor from another contracting State to a company registered in the host State because it is under foreign control at the date the contract was signed.

[33] *Klockner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports, 14-18.

However, the parties' agreement to treat a locally incorporated investor as foreign as a consequence of foreign control does not confer ICSID's jurisdiction *ipso iure.* In *Vacuum Salt Products Ltd. v. Ghana*,[34] there was an agreement between the Government of Ghana and Vacuum Salt which contained an ICSID arbitration clause. Vacuum Salt was a company incorporated according to Ghana's laws. On considering Ghana's objections to jurisdiction, the Tribunal indicated that, in spite of the practice of other ICSID tribunals to infer an agreement of nationality by the mere existence of an ICSID arbitration clause, it must be determined if the foreign control effectively existed. After examining the facts, it found that only 20 percent of the shares of Vacuum Salt were in foreign hands and 80 percent in local hands. The same situation was somehow reflected in the company's management. In these circumstances, the Tribunal stated that the local company was not objectively under foreign control and, as a consequence, ICSID did not have jurisdiction.

In the *Aucoven* case,[35] the Tribunal was asked to examine the issue of foreign control of a company with the nationality of the host State. The Tribunal emphasized the role of the parties' consent to submit the dispute to arbitration. The parties had consented in the concession contract to ICSID jurisdiction upon condition that the majority of Aucoven's shares were transferred to a national of a Contracting State. The Tribunal found that the parties had agreed on defining "foreign control'' by considering solely the transfer of shares of Aucoven. To determine the nationality of the company that acquired the majority of Aucoven's shares, the Tribunal used the most common criterion: place of incorporation.[36] Therefore, it concluded that ICSID had jurisdiction: Aucoven was a Venezuelan incorporated company, it was under the control of a U.S. company and the parties consented to consider this to be enough to regard the investor as a national of another Contracting State. It also indicated that ICSID usually accepts that the economic criteria reflect reality in a better way than legal criteria. However, because the parties' consent defined foreign control, the Tribunal had to distance itself from that statement and differentiated the *Aucoven* case from the *SOABI v. Senegal* and *Amco v. Indonesia* cases, where the tribunals made interpretations to determine foreign control even if, in those cases, they had arrived at different levels of control.

In *Amco v. Indonesia*, the Tribunal had to consider Indonesia's objection according to which PT Amco, the local company, was not controlled by Amco

[34] *Vacuum Salt Products Ltd. v. Ghana*, Award, 16 February 1994, 4 ICSID Reports 329.

[35] *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision of 27 September 2001.

[36] Other criteria that have been considered by other tribunals to determine a company's nationality include the place where its registered office is, if it is different from the registration place; and the place where the control or management takes place, if it is different from the registration place; see Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, ICSID Review, Vol. 15, No. 2, 2000, p. 355.

Asia, a company belonging to a national of the United States of America, because Amco Asia was controlled by a Hong Kong company which itself was owned by a Dutchman.[37] The Tribunal rejected the search for indirect control beyond the first level of control and found that the search was restricted to the immediate control of the parent company over the local company.

On the contrary, in *SOABI v. Senegal*,[38] the approach was different. The Tribunal went beyond direct control. SOABI was a Senegalese incorporated company, controlled by a Panamanian company which in turn was controlled by Belgian citizens. Panama was not a Contracting State of the Convention when the arbitration consent was given, but Belgium was. Senegal objected to jurisdiction, arguing that Panama was not part of the ICSID system. Thus, SOABI could be considered a local company under foreign control but the foreigners who controlled SOABI were not nationals of a Contracting State of the Convention and therefore could not use ICSID arbitration. The Tribunal found that the purpose of Article 25(2)(b) of the Convention was to facilitate foreign investments through locally incorporated companies so that they could qualify before ICSID. As a consequence of this interpretation, the Tribunal went beyond direct control and found that Belgian nationals in effect controlled SOABI. On this basis, it rejected the objection to jurisdiction.

Maybe successive decisions could end these different approaches. In the tradition of ICSID, it is not ambitious to predict that the emphasis will lie in the search for truth, which is to say, in search of the true investor.[39]

4. *Nationality in the Case of a Group of Companies*

In the *Banro* case,[40] the Tribunal analyzed the subject of nationality of the company from a different perspective—the company with the nationality of the other Contracting State and the company giving the consent and in connection with whom the host State gave consent to arbitrate disputes involving them were not the same. The Tribunal held that a company could transfer to a subsidiary the consent it had granted to submit a dispute to ICSID as per the terms of the

[37] *Amco v. Indonesia*, *supra*, footnote 19.

[38] *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports, 182-183.

[39] Two views seem to clash on this point. One view asserts that tribunals should search for control by a national of a Contracting State until jurisdiction is reached; see C.F. Amerasinghe, *Interpretation of Article 25(2)(b) of ICSID Convention*, in R.B. Lillich and C.N. Brower (eds.), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* Transnational Publishers, New York, 1994, p. 223, at p. 240. Another view asserts that tribunals should look at true controllers; thus entities, i.e. juridical persons, controlled directly or indirectly by nationals of Non-Contracting States or by nationals of the host State should not have access to ICSID; see Schreuer, *supra*, footnote 14, Article 25, para. 563.

[40] *Banro American Resources, Inc. and Societé Auriférе du Kivu et du Maniema S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Decision of 1 September, 2000.

agreement where consent was originally granted. However, for the consent to be transferable, it had to have been previously granted. In the case in point, the consent could not have been granted or transferred because the parent company did not have the nationality of a Contracting State. Thus, if a claimant lacked the nationality of a Contracting State, ICSID could not have jurisdiction. The Tribunal also considered the possibility of the claimant having the nationality of a Contracting State but not having granted consent and the possibility of the host State granting consent but not including disputes involving the claimant. In both such cases, the Tribunal stated that it lacked jurisdiction.

On reaching its conclusion, the Tribunal established differences with two previous cases: one where a request to submit a dispute to ICSID was submitted by a member company of a group of companies while the consent was expressed by another company of the group; and the other where, following a transfer of shares, the request to submit the dispute to ICSID came from the transferee company while the consent had been given by the company making the transfer. The Tribunal stressed that in general it tends to be less formalistic and that ICSID is more willing to work its way from the subsidiary to the parent company rather than the other way around. "Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality'," it said.[41] The Tribunal held that it did not have jurisdiction because the claimant, a group of companies, could not use diplomatic protection and arbitration before ICSID at the same time.

5. *The Nationality Must Be Continuous*

In ***Loewen***,[42] the claimant entered into a reorganization plan (better known as Chapter 11 of the United States Bankruptcy Code) and ceased to exist as a business entity. The former Canadian business was reorganized as a U.S. corporation. The rights, titles and interests under the arbitration claim against the United States of America were assigned to a newly created Canadian corporation whose only apparent asset and business was the arbitration claim. The Tribunal found that the real party in interest, i.e. the beneficiary of the claim, was a U.S. citizen, the company created as part of the reorganization plan. The Tribunal stated:

[41] Ibid., at para. 12.
[42] *Supra*, footnote 27.

"In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[43]

Had this claim been presented before a regular ICSID arbitral tribunal and not an Additional Facility tribunal, analysis of Article 25(2)(a) and (b) of the Convention would have been inevitable. The Tribunal would have dealt with the issue of time of the nationality, confronting the two different approaches provided by the Convention. Accordingly, natural persons should have the nationality of a Contracting State other than the State to the dispute both on the date of the consent and on the date of claim filing, whereas juridical persons only need to have such nationality on the date of consent. It is likely, nonetheless, that the Tribunal would have reached the same conclusion, for international law seems to be that continuous nationality to the time of resolution is still required. Thus, in the absence of express reference to the contrary by the parties to the dispute, the customary principle of international law for continuous nationality will apply. In addition, to allow the contrary for ICSID cases could damage the very foundations of the ICSID system. If a claimant who had the nationality of a Contracting State other than the State to the dispute on the date of the consent and claim filing eventually turns into a national of the State to the dispute without triggering the foreign control provision when applicable, ICSID would end up being a tribunal to settle domestic disputes. That in and by itself would be against the nature of the Centre.

D. CONSENT TO SUBMIT THE DISPUTE TO ICSID MUST BE GIVEN IN WRITING BY THE PARTIES

Consent is the cornerstone of the Centre's jurisdiction.[44] There are two types of consent:

- one on the part of two Contracting States by which they adhere to the terms of the ICSID Convention; and
- the written one given by the investor and the host State to submit the investment legal dispute to ICSID arbitration.[45]

Consent must be given in writing, but there is no indication on the mechanism that must be used for doing so. Consent can be given through a

[43] Ibid., at para. 225.

[44] *Report of the Executive Director of the International Bank for Reconstruction and Development on the Convention*, 18 March 1965.

[45] Bernardo M. Cremades, *Arbitration between States and Investors: Some Jurisdiction Issues*, Business Law International, May 2001, p. 157.

treaty, a contract, or a local law. In the *Olguín* case,[46] *CSOB*[47] and *Tradex*,[48] the tribunals referred to the possibility that the consent be given by the State in a BIT. That will not grant jurisdiction *per se* to ICSID, for the consent of the investor will be lacking. Once the investor files a claim with the Centre, however, it is considered that the two parties have consented to submit the dispute to ICSID arbitration.

In the first Decision on objections to jurisdiction in the *CSOB* case,[49] the Tribunal also referred to the possibility of the consent being granted in a local investment law. It mentioned that under some laws that consent is deemed an offer to be accepted as soon as the foreign investor files an investment application. The Tribunal concluded that, in this case, the consent had been given in a contract by incorporating the BIT's conditions by reference, even if the treaty might not be in force at an international level. It was also noted that the will of the parties should be honored. Thus, by referring to the BIT, the parties had the intention of incorporating its provisions into the contract in order to make international arbitration the chosen method for dispute resolution.

In the *Tradex* case,[50] the Tribunal also noted that consent could be given unilaterally by a Contracting State in its national laws. Consent would be effective if and when the investor files its claim with ICSID.

In the second *CSOB* Decision on objections to jurisdiction,[51] the Tribunal confirmed its jurisdiction regarding the dispute submitted by the claimant to the extent that the same arises under a second-tier obligation agreement. Therefore, the jurisdiction of the Centre could not extend beyond the consent of the parties and could not reach the principal agreement. The Tribunal based its award on the principle of the relative effects of a contract, on the fact that there was no provision for arbitration in the principal contract and on the principle of effectiveness and finality of jurisdiction.

In *SSP v. Egypt*,[52] the State had passed a law in which it was provided that investment disputes should be resolved in the manner that would be agreed upon with the investor or within the framework of the valid agreements between Egypt and the investor's home State or within the framework of the Convention. Egypt objected to the jurisdiction of ICSID, arguing that, for the Centre to have jurisdiction, a separate agreement with the investor was needed and that the reference to ICSID arbitration according to the Convention was merely

[46] *Eudoro Armando Olguín v. Paraguay*, ICSID Case No. ARB/98/5, Decision of 8 August 2000.
[47] *Supra,* footnote 8.
[48] *Tradex Hellas, S.A. v. Albania*, ICSID Case No. ARB/94/2, Decision of 24 December 1996.
[49] *Supra*, footnote 8.
[50] *Supra*, footnote 48.
[51] Award of 1 December 2000.
[52] *SPP v. Egypt*, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 119.

informative. The Tribunal rejected the argument, noting that nothing in that law indicated that an additional manifestation of consent by the State was needed for ICSID to have jurisdiction. Moreover, in the Tribunal's opinion, the local law established a mandatory and hierarchical sequence in the procedures to solve disputes; it constituted an express written consent to submit the dispute to ICSID jurisdiction in those cases where another dispute resolution method had not been agreed and no bilateral treaty was applicable.

1. *The Consent Offered by the State*

As has been noted above, in certain circumstances a State consents in advance to submit disputes to ICSID arbitration. This consent is not complete until the investor has accepted it.

In the *SPP* case,[53] the Tribunal held that the acceptance of the State's offer to arbitrate the dispute before ICSID made by a local law could be accepted expressly by the investor in a letter where he indicated his acceptance or by filing the claim with ICSID.

Likewise, in *AMT v. Zaire*,[54] the Tribunal dealt with the acceptance of an offer to arbitrate at ICSID but, in this case, the offer had been made by a State in a BIT. The Tribunal stated:

> "AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates that consent necessary to validate the assumption of jurisdiction by the Centre."[55]

The decisions of ICSID seem to point to the possibility of revoking the offer of consent so long as it has not yet been accepted and when the term during which it would be valid has not expired, if there is such a term. In the *CSOB* case,[56] the Tribunal found that the BIT between Slovakia and the Czech Republic had not come into force, even though an announcement had been published in the Slovakian Official Gazette stating its entry into force. After CSOB initiated proceedings before ICSID, Slovakia published a note correcting the previous publication and indicating that the BIT was invalid. The Tribunal held that, if the first note constituted a valid arbitration offer from Slovakia, the second corrective note asserting the invalidity of the BIT would not have any relevance because the claimant accepted the offer in his arbitration request filed before the second (corrective) note was published.

53 Id.
54 *AMT v. Zaire*, Award, 21 February 1997, 36 I.L.M. 1531, 1997.
55 Id.
56 *Supra*, footnote 8.

2. *Consent Must Be Explicit*

In *Cable TV v. St. Kitts and Nevis*,[57] the St. Kitts and Nevis Federation was not part of the agreement that contained the arbitration clause. However, the Attorney-General of St. Kitts and Nevis had initiated a proceeding against the claimant company before a local court. In this proceeding, the Attorney-General noted that the local proceeding was intended to avoid a rate increase before the dispute was resolved through ICSID arbitration. The ICSID Tribunal concluded that such reference could not be considered consent to submit the dispute to ICSID. Thus, the consent to submit a dispute to ICSID arbitration cannot be presumed nor construed, it must be explicit.

3. *Consent Must Be Expressed by the Parties Involved in the Dispute*

In the case of a group of companies, for example, when a subsidiary has given consent and the parent company files the claim, tribunals have considered those two deeds as being made by the group of companies, provided that consent had been given in writing at the appropriate time and by a national of another Contracting State or an entity considered as such.

As the *Banro* Decision showed,[58] tribunals do not accept the opinion that their competence is limited by formalities but rather base their decisions on a realistic evaluation. However, tribunals do this when the consent has been given in accordance with the Convention's requisites and when the nature and logic of the ICSID system is not affected.

According to Article (25)(1) of the Convention, any Contracting State's political subdivision or agency may give consent to ICSID arbitration if the Contracting State approves such consent or notifies ICSID that such approval is not necessary. In *Cable TV v. St. Kitts and Nevis*,[59] the arbitration clause was part of an agreement between an agency of the St. Kitts and Nevis Federation, Nevis Island Administration (NIA) and Cable TV. The Tribunal found that NIA was an agency of the St. Kitts and Nevis Federation but it was not authorized before ICSID according to Article 25(1) of the Convention nor had the consent been approved by the Federation. Therefore, the Tribunal found that it had no jurisdiction over the dispute as submitted.

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[57] *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Rev.–F.I.L.J. 328, at 354-361, 1998.
[58] *Supra*, footnote 40.
[59] *Supra*, footnote 57.

4. *Consent Need Not Be Recorded in a Single Instrument*

In *Amco v. Indonesia*,[60] the investor had requested an authorization to use a local company to execute an investment operation brought before the government investment agency, the Indonesian Foreign Investment Board, which contained a provision that stated that disputes arising thereof should be submitted to ICSID. The request was authorized. The Tribunal heard the objection to jurisdiction posed by the State but indicated that written consent did not need to be expressed in a solemn, ritual and unique formulation. The Tribunal rejected the objection to jurisdiction based on this argument.

5. *The Most-Favored-Nation Clause of a BIT Can Be Used to Extend ICSID Jurisdiction*

In *Maffezini v. Spain*,[61] the Tribunal analyzed the most-favored-nation (MFN) clause in the Argentina–Spain BIT in connection with the provisions of the Chile–Spain BIT, which did not require a certain time period before filing a claim with ICSID. The Tribunal noticed two principles: *res inter alios acta* and *ejusdem generis*. According to the first, treaties are valid among the parties; according to the second, the effect of a treaty can be extended via its MFN clause to treaties of the same nature. The Tribunal ruled that, in the absence of express provisions to the contrary, the provisions of investment disputes of another treaty of the same nature can be extended to an investor of a third country because the purpose of the BITs is to protect foreign investors and their rights and because the provisions of investment dispute settlement are inextricably related to investment protection. The Tribunal also stated some exceptions to the ruling, such as when consent to arbitration is conditioned to exhaustion of local remedies, when the parties have the option to choose between local remedies or international arbitration and when the parties have chosen an institutional arbitration.

6. *Conditional Consent Is Possible*

In the *Aucoven* case,[62] ICSID did not have jurisdiction until a condition subsequent had been satisfied. The parties, through agreement, established the condition and the criteria to determine its fulfillment. The Tribunal decided in

[60] *Supra*, footnote 19.
[61] *Supra*, footnote 26.
[62] *Supra*, footnote 35.

favor of the parties granting consent to submit a dispute to the jurisdiction of ICSID upon condition of the investor being subject to foreign control. The parties defined foreign control as the holding of a majority of shares of the investor's local company by nationals of a Contracting State.

7. *Consent Can Be Given either before or after the Dispute Has Arisen*

The parties to an investment dispute, that is the investor and the host State, can consent to submit the dispute to ICSID at any moment. However, the consent is effective once the requisites related to jurisdiction have been met. In one case, both the host State and the investor's home State were not Contracting States at the time of consent. In *Holiday Inns v. Morocco*,[63] Morocco was the host State and the investor was a Swiss national. At the date of the consent, neither State was a Contracting State of the Convention. Later on, both States ratified the Convention. This happened before the investor submitted the dispute to arbitration. Additionally, at the date of the consent, one of the corporate entities that was part of the dispute had not been created. The Tribunal considered that the consent of the parties was effective from the moment in which the conditions were satisfied. In this case, that occurred at the moment in which both States, host and home, were Contracting States of the Convention and the corporate entity that was part of the dispute was incorporated, but not before. Consequently, the Tribunal's jurisdiction was only possible from that moment on, because the consent had been suspended until both States had ratified the Convention. In other words, even if a State consents to ICSID arbitration, if the State is not party to the Convention, the dispute does not fall under ICSID.[64]

E. ADDITIONAL OR COMPLEMENTARY CLAIMS

The parties can add additional or secondary claims to ICSID, if the parties had not consented to the contrary and if the additional or secondary claims are within the limits of the parties' consent and the Centre's jurisdiction. In the *Feldman* case,[65] the Arbitral Tribunal stated that, for a secondary claim to be within ICSID's jurisdictional framework, this must be within the realm of the parties' arbitration consent and it must be brought, in principle, no later than the counterclaim.

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[63] *Holiday Inns v. Morocco*, Decision on Jurisdiction, 12 May 1974; see P. Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 British Year Book of International Law 123, at 142-143, 1980.

[64] An exception to this would be arbitration as per the Additional Facility Rules. However, at least one of the States (the Host State or the State of nationality of the investor) needs to be a Contracting State.

[65] *Supra*, footnote 30.

However, the test to determine when a dispute is additional or ancillary was not provided by the Convention. In *CMS*,[66] the Tribunal held that different measures that violate the rights of the investor and that are about the same subject-matter, although originated by different sources or at different times, do not make the disputes arising thereof separate and distinct. The Tribunal then said:

> "What the Tribunal has to look at is the nature of the dispute or disputes; their background may be different but again, what counts is whether the rights of the investor have been affected or not and whether the claims arise directly out of the same subject-matter."[67]

It then concluded by stating that, in the case of disputes related to the same subject-matter, it was impractical and inefficient to handle different claims, regardless of the fact that some of the disputes arose before or after submission of the original dispute, provided that the ancillary claims are made before the reply.[68]

IV. OTHER RELEVANT JURISDICTION ISSUES

A. *RATIONE TEMPORIS*

In order for ICSID to have jurisdiction, the claim has to be submitted after the date the other party consented, provided the dispute arose after the date the parties consented. In the Decision on objection to jurisdiction in the *Feldman* case, the Tribunal of ICSID's Additional Facility[69] held that its jurisdiction was extended to that dispute as per the consent of the parties. The NAFTA governed that case. Accordingly, ICSID or its Additional Facility had jurisdiction only to acts or omissions that had occurred after the NAFTA entered into force, not to previous acts or omissions. If the acts or omissions are a continuation of previous acts or omissions, however, the Tribunal might have jurisdiction on the part of those that occurred after the NAFTA's date of entry into force.

[66] *Supra*, footnote 12.
[67] Ibid., at para. 111.
[68] Ibid., at para. 125.
[69] *Feldman*, *supra*, footnote 30. Mexico is not a Signatory of the ICSID Convention. Thus it is not bound by the Convention but can agree to settle disputes as per the Additional Facility Rules of ICSID.

In the *Maffezini v. Spain* case,[70] the Tribunal established a difference between dispute and claim. The Tribunal quoted the International Court of Justice on the *East Timor* case and concluded that a dispute is a disagreement over a legal or factual point able to be submitted as a specific claim. Subsequently, the Tribunal stated that, as per the terms of the BIT governing that investment, i.e. the Argentina–Spain BIT, disputes and claims that arose before its entry into force would not be subject to ICSID. The Tribunal then pointed out that the critical date separated the dispute from previous events that were not a dispute of legal content or of legal interests. It eventually found that the dispute arose after the BIT entered into force and confirmed its jurisdiction.

In the first Decision in the *CSOB* case, the Tribunal stated that:

> "… it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted."[71]

The Tribunal found that the claimant had instituted its claim prior to an assignment of rights, which arguably would have affected ICSID's jurisdiction.

In *Tradex*,[72] the Decision on objection to jurisdiction addressed the issue of the timing of the dispute. The Tribunal decided that disputes usually arise before a claim. If the date of the claim filing is previous to the date of the consent to arbitration, the Tribunal does not have jurisdiction. In this case, the consent of the Republic of Albania was given in a local law. Thus, the date of entry into force of that law was relevant. However, the Tribunal established differences between dispute and claim. The former could arise before the law entered into force and that should not impact ICSID's jurisdiction if the claim was submitted in a timely manner. It was stated that, since there was a need to try to settle the dispute amicably before the claim could be filed, the dispute necessarily had to arise before the claim. Therefore disputes and claims had different timing. The Tribunal also interpreted the intention of the local legislature to conclude that the local law where consent to ICSID jurisdiction was granted was a continuation of previous investment laws that tended to protect foreign investments. Hence, it would not make sense to interpret the law in question against ICSID's jurisdiction on disputes that arose before its entry into force. Likewise, the Tribunal also analyzed a specific provision of the local law that abrogated any other provisions within laws or decisions of the Government of Albania that conflicted with it and found that, if the local law was applicable only to disputes that had arisen after its entry into force, both Tradex and the Republic of Albania had the option to submit disputes simultaneously to two different arbitration proceedings. That would have been illogical and contradictory to the perceived intention of the local legislature.

[70] *Supra*, footnote 26.
[71] *CSOB*, *supra*, footnote 8, at para. 31.
[72] *Supra*, footnote 48.

Thus, the Tribunal found that it could extend jurisdiction to disputes that arose before the local law entered into force provided that the claim was submitted after its entry into force.

B. EXHAUSTION OF LOCAL REMEDIES

In *Maffezini v. Spain*,[73] the Tribunal stated that, according to Article 26 of the ICSID Convention, a Contracting State could condition its consent to ICSID arbitration on prior exhaustion of domestic remedies. However, if the State has not conditioned its consent on that requirement, it will not be applicable and disputes can be submitted to ICSID arbitration with no need to previously exhaust local remedies. The Tribunal also mentioned that, if the requirement to exhaust local remedies was a condition for ICSID's jurisdiction, its absence did not prevent the dispute from being submitted to ICSID. The parties only needed to satisfy that condition before taking a claim to the Centre.

In *Amco v. Indonesia*,[74] Indonesia had objected to the jurisdiction of ICSID, arguing that the general rule of international law required exhaustion of local remedies. The *ad hoc* committee that heard the annulment claim of the Arbitral Award indicated that, by acceptance of ICSID jurisdiction without making reservations under Article 26 of the Convention related to a right to require prior exhaustion of local remedies, the State was waiving this right. Thus, the claim could be submitted to ICSID arbitration without exhausting local remedies. In this sense, the ICSID rule is the reverse of the general rule of international law: the exhaustion of internal remedies is applicable only if the Contracting State has required so at the time of signing the Convention as a condition for its consent to ICSID arbitration.

A related principle of international law is the one of judicial finality. In *Loewen*, the Tribunal held that the local remedies rule and the rule of judicial finality were similar in content but served two different purposes. The former serves a procedural purpose whereas the latter serves the purpose of ensuring that the State has an opportunity to amend its own wrongdoings through its judiciary.[75]

The same Tribunal also pointed out that the rule of local remedies was intended to provide the claimant with adequate and effective remedies. Thus, remedies that were futile, impractical, ineffective or inadequate will not hinder the

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[73] *Supra*, footnote 26.
[74] *Supra*, footnote 11.
[75] *Supra*, footnote 27, at para. 158.

claimant to international law actions since the rule is not “purely technical or rigid”.[76]

C. THE PRINCIPLE OF EFFECTIVENESS AND FINALITY OF THE JURISDICTION

In the *CSOB* case,[77] the second Decision on objections to jurisdiction addressed the principle of effectiveness and finality of jurisdiction. The Tribunal admitted that the principle of effectiveness and finality of jurisdiction implied that when a tribunal has jurisdiction over a matter it could be extended to secondary or incidental questions, provided this is necessary to adjudicate the dispute over which it has jurisdiction. However, the Tribunal pointed out that that principle cannot override the basic rule that arbitral jurisdiction is based on consent of the parties. In the *CSOB* case, the consent of the parties only extended ICSID’s jurisdiction to disputes between certain parties related to a specific agreement.

The Tribunal also held that, if the parties to the dispute do not state otherwise, consent to ICSID’s jurisdiction is exclusive of any other remedy, including local remedies.

A subject related to this is the interpretation of consent. Frequently, ICSID Member States indicate that the consent must be interpreted in a restrictive way. ICSID Tribunals have opted to interpret consent according to the common will of the parties, taking into consideration objective criteria, and in good faith. In *Amco v. Indonesia*,[78] in face of the objection to jurisdiction based on the argument of restrictive interpretation of consent, the Tribunal indicated that consent to arbitration could not be construed restrictively or in an ample or liberal way. According to the Tribunal, consent must be interpreted in such a way that would help find and honor the common will of the parties. Moreover, the Tribunal stated that a general principle of law is the one of interpretation in good faith, according to which consideration should be given to all the consequences that the parties, reasonably and legitimately, could have envisaged when they assumed their commitments.

In *SPP v. Egypt*,[79] the argument of restrictive interpretation was also considered. The Tribunal noted that the jurisdiction instruments could not be interpreted restrictively nor expansively but objectively and in good faith.

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[76] Ibid., at paras. 165, 166 and 170. The Tribunal also quoted the *Norwegian Loans* case, (1957) I.C.J.R. 9, at 39, per Lauterpacht J.

[77] *CSOB*, *supra*, footnote 8.

[78] *Supra*, footnote 19.

[79] *Supra*, footnote 52.

ICSID Tribunals seem inclined to interpret the consent to arbitration in tune with the objectives of the Convention: the strengthening of international co-operation for economic development and the protection of private foreign investment therein.

D. INCOMPATIBILITY WITH DIPLOMATIC PROTECTION

In the *Banro* case, the parent company, a national of Canada, had used the mechanism of diplomatic protection while an American subsidiary submitted the dispute to ICSID. The Tribunal stressed that:

> "…once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor's home State no longer has the right to grant the investor diplomatic protection."[80]

Furthermore, it was pointed out that it would be against the purpose and aim of the Convention to expose the host State at the same time to both diplomatic intervention and arbitration. On ruling in that direction, the Tribunal stated that a group of companies cannot avail itself of both diplomatic protection through its parent company and arbitration through a subsidiary.

E. THE EXCLUSIVITY OF ICSID

Arbitration at ICSID is exclusive of any other remedy. In *CMS*,[81] the Tribunal faced an objection to its jurisdiction raised by Argentina based on the argument that TGN had the option of a separate local dispute mechanism. The Tribunal stressed that, as per Article 26 of the Convention, consent to ICSID jurisdiction is to the exclusion of any other remedy. It quoted *Lanco*:

> "…when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum, domestic or international, and it therefore presupposes the non-interference of any other forum with the ICSID arbitration proceeding once such proceeding has been instituted."[82]

[80] *Banro*, *supra*, footnote 40, at para. 15.
[81] *Supra*, footnote 12.
[82] *Lanco v. Argentina*, Award of 8 December 1998, at para. 36, as cited ibid., at para. 72.

F. THE "FORK IN THE ROAD"—LOCAL REMEDY OR ARBITRATION

In some BITs, it is provided that the investor can submit the investment dispute to local courts or to international arbitration. If the former is chosen, it precludes the initiation of international arbitration.

In *CMS*,[83] Argentina objected to ICSID jurisdiction because TGN appealed a judicial decision and sought other administrative remedies, for which reason it was argued that CMS could not submit the same dispute to arbitration.

The Tribunal pointed out that contractual claims are different from treaty claims. Treaty claims can be submitted to arbitration even if contractual claims are submitted to local courts. If a claimant renounces its right to arbitrate a treaty dispute by resorting that dispute to local courts, then the "fork in the road" rule would have been triggered if it was provided for in the relevant treaty. In that event, the selection would have been binding. The Tribunal found that none of those were the circumstances in *CMS*, since the company had not filed a treaty claim in local courts.

G. APPLICABLE LAW FOR JURISDICTION

Article 42 of the Convention provides that, in the absence of agreement by the parties, the dispute shall be decided in accordance with the law of the Contracting State and rules of international law as applicable.

In *CMS*,[84] Argentina argued that the jurisdiction of ICSID should be decided according to its own law. The Tribunal said that the provisions of Article 42 of the Convention are applicable to the resolution of the disputes on the merits. It pointed out that the issues of jurisdiction are governed by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable.

[83] *Supra*, footnote 12.
[84] Ibid.

H. AUTHORIZATION TO INVEST

In the *Olguín* case,[85] the Tribunal stated that an investment dispute was within its jurisdiction because, among other reasons, the relevant BIT did not have any provisions that required that the investments must be previously authorized by the host State. In this case, it was decided that the investment existed, that it did not need to be previously authorized and that a dispute that arose from it could be submitted before ICSID.

There are circumstances in which the consent to arbitrate is granted through licences or investment authorizations that are given to the investor.[86] Such authorizations can include consent to ICSID arbitration. If the licence to invest is not granted—which can happen because the granting is a discretional State act—it will be considered that the offer to ICSID arbitration had not been given and the Centre could not have jurisdiction. However, this was not the case in *Olguín*, where there was no BIT provision that indicated that foreign investors had to obtain an authorization or licence though which the State would offer its consent to ICSID arbitration.

I. UMBRELLA CLAUSES

In *SGS v. Pakistan*,[87] a Swiss company, SGS, had entered into a contract with Pakistan to provide pre-shipment inspection services with respect to goods to be exported from certain countries to Pakistan. Subsequently, Pakistan notified SGS that the contract was terminated. Both Pakistan and SGS initiated separate legal actions in Switzerland and Pakistan for breach of contract. SGS also filed a request for ICSID arbitration, alleging that Pakistan had breached the contract and had also violated the BIT between Switzerland and Pakistan.

Pakistan objected to the Tribunal's jurisdiction, *inter alia*, because the dispute as submitted by the claimant had arisen out of actions and omissions with respect to a contractual arrangement between Pakistan and SGS which had a choice of forum provision different from ICSID.

SGS argued that, by virtue of an arguable umbrella clause (Article 11) in the relevant BIT,[88] a breach of contract was elevated to a violation of a BIT. Thus,

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[85] *Supra*, footnote 46.

[86] For example, under the Tanzanian National Investment (Promotion and Protection) Act, 1990, Article 29.

[87] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, International Arbitration Report, Vol. 18, No. 9, September 2003.

[88] Article 11 of the Switzerland–Pakistan BIT provided: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

when the contract was breached, SGS had two actions against Pakistan, one for breach of contract and one for violation of the BIT.

The Tribunal appeared to be the first ICSID Tribunal facing the issue of whether a BIT provision could transform a purely contractual claim into a BIT claim. It held that, "under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law."[89] The Tribunal then stated that:

> "…it is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and be treated as breaches of the BIT."[90]

However, in *SGS* the Tribunal found that this was not the intention of the parties to the BIT, for which reason it rejected SGS's argument about Article 11 of the BIT. The Tribunal pointed out that the Article contained an obligation to constantly guarantee the observance of the commitments the State has entered into with respect to the investments of the investors of the other Contracting Party. Those commitments could imply implementing rules to give effect to contractual or statutory undertakings or could preclude a State from taking actions short of denial of justice.

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

V. CONCLUSION

Foreign investments are necessary for economic development. Understanding this has led many countries to provide a favorable investment climate for private business. In a world where local regulations tend to be more favorable to investments, it is reasonable to envisage more interactions between the parties involved in foreign investments in the time to come.[91]

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[89] *SGS*, *supra*, footnote 86, at para. 167.

[90] Ibid., at para. 173.

[91] According to the United Nations Conference on Trade and Development, *World Investment Report, 2003*, United Nations, New York and Geneva, 2003, direct foreign investments in 2003 fell to the lowest level since 1998. However, foreign investment levels are still higher than 1980s and early 1990s levels. Thus, it is possible that we will not see again the sudden growth of foreign direct investments of the late '90s and its high levels. Nonetheless, as the world economic recovers, it is possible that the coming years will show a tendency toward a slower yet more stable growth.

On one hand, more and new legal frameworks will arise, either more bilateral investment treaties or multilateral ones focusing exclusively on investment. On the other hand, new and more complex relationships between the different parties involved in the foreign investment process should be expected. Those relationships may flow smoothly or could be the source of disputes. In the latter case, it is predictable that the relevance of ICSID will be enhanced.

However, there are different kinds of investment disputes. ICSID can only have jurisdiction over investment disputes between investors and host States. Even in that case, not all investment disputes between investors and host States fall under ICSID. The requirements of the ICSID Convention need to be satisfied:

- the disputes need to be of a legal nature;
- they need to arise directly out of an investment;
- they need to be between a State party to the Convention and a national of another State party to the Convention or someone considered so; and
- both parties need to consent to ICSID arbitration.

In spite of those requirements being known, investment disputes that might appear to fulfill them are frequently challenged. The decisions of ICSID's tribunals have been useful to clarify those requirements and to avoid the filing of non-viable claims and groundless objections to jurisdiction.

This has been the case with the definition of investment; the identification of when a dispute arises directly out of an investment; the determination of when an investor is an investor of another Contracting State, along with the issue of foreign control and continuity of nationality; the identification of when a private entity controlled by the State is considered an organ of the State; the holdings on consent; and other relevant issues such as *ratione temporis*, exhaustion of local remedies, the "fork in the road" and umbrella clauses.

On examining the decisions of ICSID tribunals, one can conclude that ICSID's presence has been good for all the parties involved in foreign investments. For host States, ICSID has "depoliticized" the investment relationships, discouraging attempts to solve disputes as per the interests of the home State. For the foreign investor, ICSID has been positive because it has provided a neutral forum to solve investment disputes with sovereign States.

Perhaps ICSID's success can be credited to at least two factors:

- respect for the consent of the parties; and
- preference to the economic reality as compared to the legal formality when trying to approach the truth.

Accordingly, if the element that brings the investment dispute to ICSID is the parties' consent, the lack of definition of certain concepts when that consent is granted is what brings in ICSID's interpretative authority.

This combination of respect for the will of the parties and eagerness to reach reality also brings about caveats for the parties. Therefore, the parties must, in general, be very aware of both what they consent to and the things that they do not define. A State, for example, must pay close attention to the fact that, under certain circumstances, its own companies may be considered to be the State's agents under ICSID jurisdiction and their actions or omissions attributable to the State. Likewise, States should be aware that, if it is so agreed, a company that is incorporated in its own territory could be considered a foreigner for purposes of ICSID. The same attention should also be paid to the inversion of the general rule of public international law on the subject of exhaustion of local remedies.

Investors must be alert, for instance, as to how they consent, particularly when the consent has been offered by the State. Investors must also be careful not to abuse ICSID's powers. The use of diplomatic protection and arbitration before ICSID are incompatible, for example. Thus, the use of different entities in an extended economic group in order to have both diplomatic protection and arbitration will not be accepted.

The impact of many of the issues to which the parties involved in the foreign investment phenomenon must be alert can be minimized if they know in advance what would be the consequences of their consent to arbitration and are able to thoroughly design it. That is another reason why it is important to study the ICSID decisions.

However, besides the benefits of being informed of the Centre's arbitral awards, the evidence presented in these decisions shows that ICSID has been achieving its objective: by protecting private foreign investment, it has promoted economic development. In doing so, it has made a difference in the world, creating judicial certainty in an area where it hardly existed before.

Perhaps certain things within ICSID must be modified; perhaps its proceedings must be reformed; but the work done so far has been definitely laudable.