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**- INTERNATIONAL ARBITRATION -
PROTECTION OF FOREIGN DIRECT INVESTMENTS
AND FOREIGN INVESTMENT DISPUTE
SETTLEMENT UNDER ICSID AND BILATERAL
INVESTMENT TREATIES**

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town 15 February 2007

Lars Glowinski

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II. Abbreviations

BIT	Bilateral Investment Treaty
DIS	Deutsches Institut für Schiedsgerichtsbarkeit; German Institution of Arbitration
FDI	Foreign Direct Investment
FIAC	Frankfurt International Arbitration Centre
FILJ	Foreign Investment Law Journal
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IHK	Industrie- und Handelskammer Chamber of Industry and Commerce
IIA	International Investment Agreement
MFN	Most-Favoured-Nation
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America

III. Considerations

INTRODUCTION

This thesis shall represent the arbitration regime under the International Centre for Settlement of Investment Disputes (ICSID) in connection with protection mechanism of Bilateral Investment Treaties (BITs). It shall analyse the achievements of ICSID and BITs and their influence of foreign direct investments, investors and the host country. Finally, this thesis will try to assess the achievements in this area and discuss advantages or disadvantages for the involved parties.

Individuals and corporations are interested in foreign direct investments (FDI) to exploit new markets, to realize or to sell business ideas, and to raise their market value or personal wealth. Under an economical point of view, money or investments always found its way to the most efficient places on earth which were able to be reached in any century to produce a better or the same product or service for a better price. The raising of profit margins was the driving force to explore new markets; also foreign governments tried to attract investors from all over the world to create new jobs and import new technology for their economies to raise the capacity to compete on an international level. In the early nineteenth century the prevalent form of foreign direct investment was that carried out through loans and government bonds. In contrast, modern foreign investment is more characterized by direct investment on the spot: the building of infrastructure, like railroads or telephone networks, and the establishment of joint-ventures in the car industry, to name but two examples.

Investment abroad also means to play in a new and unknown playground. Investors have to place their money in a foreign environment under different laws, different rights and duties, and with unknown future protection of their investments. This makes foreign direct investments an

uncertain game, and uncertainty did always keep investors from direct investments in a foreign and unknown country.

Furthermore, not only the unknown environment is an investment obstacle, investors also were faced with problems with governments in the foreign market. First foreign governments promoted foreign direct investments to raise their economic power. Large infrastructure projects had an important effect on the countries where they were constructed: they were the basis for a faster growing economy. Later the same governments or new political powers changed government positions regarding foreign investment and they restricted investment related money transfers of investors out of the investment area or they initiated measures and laws to expropriate the property of investors without financial compensation. The big infrastructure investments were seen as a necessity for the welfare of the citizens and as a security of the host state. Many host countries felt that these projects should be controlled by the government and not by foreigners.

The treatment of aliens by governments was, and still is, dependent on political theories and influences. A change of the investment climate, the "political risk", can be a huge uncertainty for foreign direct investments. Every investor has to ensure that the investment is lucrative and that he has the possibility to reduce risks and cost in case of changes of the investment climate. In the past foreign investors had no direct way to enforce investments claims against a foreign state for its sovereign acts or for breach of customary international law. Instead, investors had to rely upon their own government taking up the claim on their behalf and try to solve the dispute by diplomatic measures. This dependence on others was inconvenient and unpredictable, and therefore dissatisfying for alien investors.

The settlement of foreign investment disputes in the past was a question of political influence and economic power. Individuals or corporations had to influence their governments to take up their case on the state's behalf.

This was only possible for very important and influential investors. The investor's state then sent warships to threaten the offending state until reparations were paid. This "gunboat diplomacy" was exercised frequently by European powers until the early twentieth century, for example when faced with Venezuela's default on its sovereign debt in 1902, the governments of Great Britain, Germany and Italy sent warships to the Venezuelan coast to demand reparation for the losses incurred by their nationals.¹

The need for security and predictability for foreign investments was one of the main reasons to establish diplomatic relations with other states. Various ideas from the point of view of money receiving and money spending states were discussed and realized, from the Calvo doctrine - where contracts between the host state and foreign investors included an agreement in which the latter agreed to confine himself to the available local remedies without relying on diplomatic interference of his own state² - to the principle of diplomatic protection - where a state espouses the claim of its nationals as a claim on its own behalf. With the Second International Peace Conference of The Hague in 1907, states agreed to a framework for the conclusion of bilateral arbitration treaties which were the basis for independent arbitration tribunals in case of a dispute between two states arising out of particular interests of its national investors.³

The right of diplomatic protection as mentioned above was still inadequate to promote foreign investments: the Latin American countries relied upon the Calvo Doctrine, which denied the possibility of interference under diplomatic protection principle. Also, the breach of investment treaties by states was still not sanctioned by public international law. Only expropriation was recognised quite early as a possibility for diplomatic protection claims. Furthermore diplomatic protection was only accessible for nationals of the claiming state. Questions arose what happens if

¹ Law and Practice of Commercial Arbitration, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, 2004, Chapter 11, No. 11-01, at www.kluwerarbitration.com.

² International Law, A South African Perspective, John Dugard, 3rd Ed., 2005, p 295; also Völkerrecht by Knut Ipsen, 4. Ed., 1999, p. 658.

³ Supra note 1, Chapter 11, No. 11-02.

transnational corporations claim protection? The obstacle for investors to convince their government to claim diplomatic protection for its nationals was very high and unpredictable to foresee. Also a claim against the home state to exercise diplomatic protection does not exist.

Today, in our small world, where businesses are moved from the United States to India, industrial production is transferred from Europe to China, or new infrastructure projects are started in Central Africa, one cannot imagine international business without FDI. Foreign direct investments need security, investors need security. Security is necessary to promote foreign investment which is recognized as one of the driving forces in supporting development in developing and least developed countries. Investors want to know their rights regarding their investments and they want to enforce their rights directly in a fast and cost-effective way.

The need for protection is the reason for various measures introduced by governments to secure investments. In the following the system of foreign dispute settlement under the International Centre for the Settlement of Investment Disputes (ICSID) in combination with Bilateral Investment Treaties (BITs) shall be highlighted. The ICSID is the result of the investor insecurity mentioned above. ICSID shall also support FDI in the developing countries. The focus shall be on the increased interest for BITs and the therefore increased interest in ICSID arbitrations. Why do states use BITs? Did the establishment of a neutral venue for investment dispute settlement reach its goal to depoliticise disputes? Is it used by investors, and what is protected? Do BITs play an important role in the system of dispute settlement and why? And how do they work together with the ICSID system?

A) THE HISTORY OF ICSID

1. Creation of the ICSID

The inability of investors to claim their rights against foreign and sovereign states encouraged the World Bank, as the leading instrument for development aid in the world community, to establish the International Centre for the Settlement of Investment Disputes – ICSID -. In 1965 the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Convention) was created and came into force on 14 October 1966.⁴ The World Bank conceived the Convention based on the earlier efforts by the Organization for European Economic Co-operation and Development (OECD). The OECD produced in 1962 the OECD Draft Convention on the Protection of Foreign Property. As a result of the OECD Draft the international community realised, especially regarding the question of the level of compensation for expropriation of foreign investments, "...that the best way to provide a legal structure to promote international private investments flows would be by providing an effective procedural framework for dispute settlement under the roof of an impartial organization and an impartial Convention rather than by constantly seeking multilateral agreements on the establishment of general substantive standards."⁵

The World Bank staff prepared a draft in 1964 of the Convention for the Board of Executive Directors of the Bank. The Executive Directors approved the text in March 1965 and presented the Convention to the member states. On October 14th 1966, the mandatory minimum of 20 states had signed the Convention and it came into force. Since this date foreign investors have a direct possibility to claim against foreign states to protect their property.

⁴ <http://www.worldbank.org/icsid/about/about.htm>.

⁵ Foreword by Prof. Sir Elihu Lauterpacht, in *The ICSID Convention: A Commentary* by Christoph H. Schreuer, 2001, p. xi.

Over the years, the ICSID Convention's membership grew to 143 contracting states, the latest signatory was Syria.⁶ Members are developed both and developing countries which can be interpreted as a success of the idea and the system of ICSID. A legal framework for dispute resolution on an international level is recognised by the majority of states.

The ICSID today is an international impartial organization under public international law. It is closely linked to the World Bank which finances the ICSID organization out of the Banks budget.⁷ Its headquarters are in Washington D.C., USA. Recently the ICSID started to establish branches for dispute settlement outside of its headquarters. Since December 2005 ICSID arbitrations can be carried out in cooperation with the Frankfurt International Arbitration Center (FIAC), Frankfurt am Main, Germany. The FIAC is a cooperation between the German Institution of Arbitration (DIS) and the Frankfurt chamber of industry and commerce.⁸ The increase in the number of cases under the Convention and the recognition and authorization of branches, where dispute settlement can take place, underline the importance and necessity for ICSID arbitrations. The process of international ICSID arbitration as a dispute settlement process for private investors has just started.

“The ICSID Convention is, for the first time a system under which non-State entities can sue states directly; in which state immunity is much restricted; under which international law can be applied directly to the relationship between the investor and the host state; in which the operation of the local remedies rule is excluded; and in which the tribunal's award is directly enforceable within the territories of the states parties.”⁹

⁶ Annual Report ICSID 2006, p. 3,

at http://www.worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf.

⁷ <http://www.worldbank.org/icsid/about/about.htm>.

⁸ Chamber of industry and commerce Frankfurt am Main, Germany, ICSID-Schiedsverfahren im Frankfurt International Arbitration Center von DIS und IHK Frankfurt – FIAC, at <http://www.frankfurt-main.ihk.de/recht/streitbeilegung/schiedsgericht/icsid/>.

⁹ Foreword by Prof. Sir Elihu Lauterpacht, in *The ICSID Convention: A Commentary* by Christoph H. Schreuer, 2001, p. xi.

2. Intentions of the ICSID Convention

Under the influence of the increasing need for foreign direct investments, especially in the developing countries and under the international awareness of for example expropriation, especially in newly independent countries, the Convention was created as a framework for the protection and promotion of international investments. The establishment of an investment climate of mutual confidence between investors and states should increase the flow of foreign direct investments to developing and least developed countries.¹⁰ The dispute settlement promoted more a partnership between investor and host state rather than an additional obstacle. The Board of Executive Directors emphasized in its report to promote the Convention:

“...the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

[...] experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the dispute covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgement carried out according to rules known and accepted in advance by the parties

¹⁰ The International and Comparative Law Quarterly, Vol. 36, No. 1 (Jan., 1987), Adeoye Akinsanya, International Protection of Direct Foreign Investments in the Third World, pp. 58-75, p. 71, at www.jstor.org.

concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

[...] adherence to the Convention by a country would provide additional inducement and stimulate a large flow of private international investment into territories, which is the primary purpose of the Convention....”¹¹

Therefore ICSID’s goal is to promote international investment. For this the ICSID Convention provides a forum for resolving investment disputes. Under the Convention the host states and the investor have confidence that their case will be resolved efficiently and finally in accordance to the legal and economic merits of the case. Neither the investor nor the host state need worry themselves about the self-interested actions of the other party.

The ideas and intentions during the drafting process also find expression in the preamble of the Convention. Every member state of ICSID declared with its signature to support and adhere to the preamble. The preamble of the Convention underlines and describes the intention of the contracting states as a neutral dispute resolution forum:

“The Contracting States

***Considering** the need for international cooperation for economic development, and the role of private international investment therein;*

***Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;*

¹¹ International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), ICSID Reports No. 1, 1993, pp. 23-33, p. 25.

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:¹²

The Convention is a step forward to harmonize international investment dispute settlement. After a slow start, during the last decade the number of cases brought under the Convention has increased dramatically. From 1966 until 1993 only 27 cases under the ICSID Convention were registered. Since 1998 on average every month a new case is registered under the Convention.¹³ In 2006 the ICSID Centre administered 118 cases in the course of a single fiscal year; the number of cases registered by the Centre since its inception reached an all time high in 2006 with 210 cases, including 26 new arbitration proceedings for the fiscal year 2006.¹⁴

¹² Preamble ICSID Convention, at <http://www.worldbank.org/icsid/basicdoc/partA-preamble.htm>.

¹³ *Arbeitspapiere aus dem Institut für Wirtschaftsrecht, Universität Halle-Wittenberg, "Grundstrukturen und aktuelle Entwicklungen des Rechts der Beilegung internationaler Investitionsstreitigkeiten"*, Heft 10, 2003, by Prof. Dr. Christian Tietje, p. 5, at <http://scholar.google.com/url?sa=U&q=http://www.jura.uni-halle.de/INSTITUT/Heft10.pdf>.

¹⁴ Annual Report ICSID 2006, p. 5, at http://www.worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf.

Where does the increase in the number of proceedings come from? Once the Convention was in place, treaty drafters saw the possibility to include a neutral dispute settlement forum into Bilateral Investment Treaties (BITs). These treaties became the new way for states to protect their national investors regarding foreign investments. As one will see below, BITs contain investment protection clauses and offer ways for dispute resolution, usually in connection with ICSID arbitration or conciliation. BITs are the new way to protect investments. They are an indicator of the increased interest in foreign investment. A decade ago, approximately 500 BITs were in place whereas today approximately 2,495 BITs are concluded.¹⁵ Almost every BIT includes an arbitration clause and many of them in favour of the ICSID system. 21 of the new 26 ICSID arbitration proceedings in the fiscal year 2006 were based on bilateral/multilateral investment treaties.¹⁶ The inclusion of the ICSID dispute resolution system in BITs shows the need for a neutral foreign investment dispute resolution forum. The intention or the goal of the ICSID became true by using the facility by member states and by in-corporation into BITs.

3. Structure of the Organization

The ICSID has two acting bodies: the Administrative Council and the Secretariat. The Administrative Council supervises the operations of ICSID, controls the work of the Secretariat, and is chaired by the President of the World Bank.¹⁷ Each member country has one vote in the Council which is usually exercised by the finance minister of the member state.

The other permanent organ is the Secretariat. It is responsible for the day to day work of the Centre. The Administrative Council elects the Secretary-General and its Deputy as the head of the Secretariat. The Secretary-

¹⁵ Developments in international investment agreements in 2005, IIA Monitor No. 2 (2006), p.2, at <http://www.unctad.org/Templates/Download.asp?docid=7468&lang=1&intItemID=3766>.

¹⁶ Supra note 14, p. 5.

¹⁷ The Settlement of Disputes in International Law: Institutions and Procedures, V. Lowe & J. Collier, 2000, p. 61.

General administers the ICSID Secretariat, keeps the ICSID records, and provides administrative support.¹⁸ He also exercises power and duties under the Additional Facility Rules. The Secretariat gives institutional support for arbitration for example by keeping arbitrator lists, assisting in the constitution of arbitral tribunals or drafting new model arbitration clauses. Each arbitration tribunal has a Secretary for administrative support, as arrangements of hearings or transmission of written submissions.¹⁹

Every member state can nominate four persons to work as arbitrators for the Centre. According to Article 14 (1) of the Convention arbitrators have to be “of high moral character and recognized competence in the field of law, industry or finance, who may be relied upon to exercise independent judgement”. The Chairman of ICSID can also nominate ten additional arbitrators for the Centre.

The ICSID Convention contains three different procedures for dispute resolution. The main procedure is the normal ICSID arbitration under the Convention as mentioned above. Furthermore ICSID offers arbitration under its “Additional Facility Rules”. This procedure is applicable if one party of the dispute is not an ICSID member. Both proceedings are compiled to resolve the conflict with a final and binding award. The third procedure is the conciliation process. This process shall end with a non-binding recommendation for the parties by a conciliation commission. The conciliation procedure is not subject of this thesis.

4. Additional Facility Introduction

The ICSID Convention with all its regulations and intentions is only applicable to member countries of the Convention. Member countries

¹⁸ International Centre for Settlement of Investment Disputes (ICSID), S. Jagusch and M. Gearing, Arbitration World 2004, The European Lawyer Limited, p.60.

¹⁹ Guide to ICSID Arbitration, L. Reed, J. Paulsson, N. Blackaby, 1st Ed., 2004, p. 9.

cannot force non-members to accept regulations of the Convention. These conditions were unsatisfactory for promoting foreign direct investments because in the beginning of the ICSID system not many countries joined the Convention. It took a while until the idea of ICSID reached and convinced governments and lawyers, and until politicians decided to ratify the Convention.

Because of the lack of ratification by a number of countries in the beginning of ICSID and other possibilities of dispute resolution without ICSID membership and outside the scope of the ICSID Convention the World Bank created in 1978 the ICSID Additional Facility. The Additional Facility is an extension of the availability of ICSID arbitrations which would not fall under the scope of the ICSID Convention. The Additional Facility is a part of the arbitration centre of the ICSID and is also administered by the Secretariat and the Administrative Council. Proceedings under the Additional Facility are guided by the Additional Facility Rules, the Administrative and Financial (Additional Facility) Rules and the Arbitration (Additional Facility) Rules. These rules are independent from the ICSID Convention but include the similar principles. The ICSID Convention is not applicable to the Additional Facility.

Arbitration proceedings under the Additional Facility are possible where either a state party to the dispute or the state whose national is a party to the dispute, is not a member of the Convention.²⁰ This is the case for example with countries like South Africa, Canada, Mexico or Brazil as non-signatory countries of the Convention. Under the Energy Charter Treaty (Article 26) and the North American Free Trade Agreement (NAFTA) the Additional Facility arbitration is an established dispute resolution method. Especially under NAFTA (Chapter 11) - the United States is an ICSID Convention member and Mexico and Canada are non-members – the Additional Facility plays an important role for dispute resolution. Between NAFTA members, investment disputes usually fall outside of the scope of

²⁰ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules), Article 2 (a).

the ICSID Convention because two of the three NAFTA parties are non-members of the ICSID Convention. The Additional Facility is also incorporated in many BITs as dispute resolution method if the ICSID Convention does not apply to one of the contracting parties. One example is the BIT between Germany and South Africa which explicitly refers to the Additional Facility under its Article 11 (2).²¹

Additional Facility arbitrations depend on the consent of the General-Secretary. According to Article 4 of the Additional Facility Rules any agreement providing for arbitration proceedings as dispute resolution requires the approval of the General-Secretary. Therefore any arbitration agreement will be examined by the General-Secretary and gives the parties not a 100% confidence to be admitted to the ICSID Additional Facility. This examination is necessary to prove successful the establishment of the jurisdiction of ICSID and to avoid establishing jurisdiction over non investment disputes. ICSID arbitration shall not be used for commercial dispute resolutions which are usually handled by private organizations like the ICC, Swiss Chamber of Commerce, or the London Court of International Arbitration. Article 4 (3) Additional Facility Rules gives the General-Secretary the power to register non investment dispute cases if they can be distinguished from ordinary commercial transactions.

Therefore the Additional Facility extends the scope of ICSID and includes even non-ICSID Convention members if they agree to the applicability of the Additional Facility Rules. Almost every BIT includes an Additional Facility arbitration clause in case one contracting party is not an ICSID member.

²¹ Germany-South Africa BIT, at http://www.unctad.org/sections/dite/ia/docs/bits/germany_southafrica_gr.pdf.

B) ICSID Arbitration

1. The way to ICSID Arbitration

In the mind of any investor is always the question how one can secure the invested money. Therefore investors are always looking for legal protection of their possessions abroad. In the past, this was never an easy task because host countries may change their national investment laws. Such changes could affect investments that have already been made and protection might be denied in local courts.

Because of these matters investors who seek to protect their possessions against changes in the law of the host country may enter into formal investment agreements with the host country in which the host country commits itself to treat the investment in a specific way, as mentioned in the contract. The investment contract establishes, inter alia, the modalities of investing, the contribution to long-term economic development in the host country, the repatriation of profits, the reinvestment policy, and the ownership of the local enterprise.²² Usually these kinds of contracts are agreed for specific investment projects with a special amount of importance for the host country. This way of protection is very slow and inconvenient for investors. They have to negotiate any project and its protection directly with the host government.

Investment contracts are one base for ICSID arbitration. They often include a dispute settlement clause which is generally not within the jurisdiction of the host state and often provide an arbitration clause in an international forum, for example ICSID. The arbitration clause within an international forum gives the investor the security that the case will be settled in a neutral venue without political interference.

Other common ways to include ICSID arbitration are to agree to Multilateral or Bilateral Investment Treaties. These treaties also prescribe

²² The Law of International Trade, Hans van Houtte, 2. Ed., London 2002, p. 238.

how the host country shall treat foreign investments and include an arbitration clause which very often refers to ICSID. Compared to investment contracts multilateral or bilateral investment treaties are not agreements between the host state and the investor. These treaties are agreements between the host country and the home country of the investor. Because of this fact one can say that these treaties create a non-contractual ICSID arbitration because there is no direct link, regarding an arbitration agreement, between investor and host state, there is only an indirect arbitration agreement thru the treaty – the agreement between host state and home state of the investor. BITs and MITs create a legal frame for investment protection and dispute resolution, which investors can easily rely on if their investments fall under the protection scope of the treaty.

The preconditions for ICSID arbitration under the Convention shall be described below. Preconditions of non-contractual arbitration based on BITs and the protection provisions of BITs shall be described afterwards further down.

2. ICSID Jurisdiction

First of all ICSID arbitration needs a legal basis to establish jurisdiction. As an additional dispute resolution body to domestic courts and to private arbitration organizations, ICSID needs to set out its scope of jurisdiction. In Article 25 of the Convention ICSID outlines its jurisdiction as follows:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the

*parties have given their consent, no party may withdraw its consent unilaterally.*²³

Article 25 of the Convention clearly sets out that dispute resolution between an investor and the host state under ICSID is only possible if:

- a) the parties agree in writing to submit their dispute to ICSID,
 - b) the dispute arises out of an investment dispute
- and
- c) the dispute involves a Contracting State or its agency and as opponent a national of another Contracting State.

Dispute settlement under ICSID is therefore only possible if the requirements of the Convention are fulfilled, otherwise the arbitration Centre has no jurisdiction to resolve a dispute in a legally binding way.

a) Written Agreement

The consent of the parties to submit a dispute to ICSID arbitration (Article 25 (1) ICSID Convention) is the heart of any dispute resolution system outside of the legal system of state courts. The parties' agreement to submit the dispute to ICSID, the expression of the declaration of intention, constitutes the jurisdiction of ICSID over the dispute. The parties agreed to submit their dispute to another venue than the local courts. An agreement to arbitrate is the only possibility of the parties to leave the jurisdiction of a state's court and to establish jurisdiction of another tribunal. The jurisdiction of ICSID occurs only from the parties' autonomy to decide which court or organization should solve their dispute. Like in any other arbitration proceedings the jurisdiction of the arbitration tribunal is based on an agreement of the parties to submit their claim to the tribunal; it is based on the parties' autonomy.

²³ ICSID Convention, Article 25 (1).

Both parties have to express explicitly that they accept the jurisdiction of ICSID arbitration. The common way to express this consent is to include arbitration clauses into contracts or treaties or to agree to separate arbitration agreements recorded by exchanged letters or faxes. This consent may be expressed in general terms to cover any future dispute or it may be expressly limited to actual disputes.²⁴ In contractual ICSID arbitration the host state and the investor consent in a direct written agreement to arbitrate. In non-contractual agreements the host state usually agreed within the scope of a treaty to ICSID arbitration and the investor's consent to ICSID arbitration is established by requesting arbitration from ICSID. He accepts the offer of the host state to arbitrate by requesting ICSID arbitration.

aa) Scope of Consent

Because of the autonomy of the parties to decide about their dispute resolution options the parties can also restrict the scope of the arbitration before ICSID. The agreement can limit the availability of ICSID arbitration to specific categories of disputes. As mentioned above the whole arbitration process is based on the parties' autonomy, the parties' power to transfer power to the arbitration tribunal.

Furthermore Article 25 (4) ICSID Convention allows limitations to arbitration agreements by contracting states:

“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre....”

Limitations are made by a few countries for example regarding investments relating to minerals, oil or other natural resources or

²⁴ International Trade Law, M. Rafiqul Islam, 1. Ed., 1999, p. 390.

expropriation. In this regard, with ratification of the Convention China informed the Centre about its explicit reservation, that only expropriation and nationalization are open for a dispute settlement under ICSID.²⁵ However, later China signed a BIT with The Netherlands, in force since August 2004, and reversed its reservation regarding the favourite investors in the BIT.²⁶ Whether or not this renegotiation of the BIT will have any effect to other BITs under the most-favoured-nation clause in BITs will probably be decided by ICSID tribunals in the future when this question arises. Investors should always be aware of reservations by states.

bb) Consent irrevocable

The consent to arbitrate under ICSID is not unilaterally revocable. This is a fundamental protection of the ICSID system. Neither party can withdraw its consent unilaterally once the consent has been validly given. In *Alcoa Minerals of Jamaica Inc. v. Government of Jamaica*, an ICSID panel unanimously assumed jurisdiction over an investment dispute and confirmed that a valid consent given by the host state is irrevocable.²⁷ In that case the government of Jamaica and the investor agreed to ICSID arbitration concerning bauxite mining. The later submission of Jamaica not to use ICSID regarding natural resources (Article 25(4) Convention) and the change of domestic legislation towards contractual investments agreements did not enable the government of Jamaica to withdraw its consent to ICSID arbitration.

Therefore investors can rely on ICSID arbitration without fear that any other party tries to solve the dispute within other national or international options.

²⁵ Resolving disputes in China through arbitration, Freshfields Bruckhaus Deringer, 2006, p.53, at <http://www.freshfields.com/publications/pdfs/2006/14706.pdf>

²⁶ Supra note 25, p. 53 et seq.

²⁷ ICSID case no. ARB/74/2(1975), Decision on Jurisdiction and Competence, 4 Yearbook Commercial Arbitration 206 (1979).

cc) Consent exclusive

Finally the valid consent to ICSID creates an exclusive arbitration forum. Article 26 of the Convention states: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed to be such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." According to the autonomy of the parties to decide whether or not they want to submit their dispute to ICSID the parties also have the power to limit the exclusivity of their consent by insisting on the use of local courts.

b) Investment Dispute

The second requirement for ICSID arbitration is the necessity of an investment dispute. As mentioned above ICSID is not available for common commercial disputes. The ICSID Convention is only applicable if the dispute arises out of an investment. The term investment is not defined in the Convention. The application of investment disputes under the Convention has been rather flexible.²⁸ With the wide interpretation of this term a full area of protection of the Convention can be guaranteed. ICSID tribunals have found that projects with a significant duration, which provide a measurable return to the investor, which involve an element on risks on both sides, which involve a substantial commitment on the part of the investor, and which are significant to the state's development can be accepted as investments under the Convention.²⁹ Wide varieties of projects are recognized as investments and are the reason for a wide protection under the ICSID regime. Investment disputes can occur out of infrastructure projects or service contracts. Even public loans have been held to constitute an investment.³⁰

²⁸ Arbeitspapiere aus dem Institut für Wirtschaftsrecht, supra note 13, p.10.

²⁹ Guide to ICSID Arbitration, supra note 19, p. 15.

³⁰ Fedax N.V. v. Republic of Venezuela, ICSID case no. ARB/96/3(1997), 24a Yearbook Commercial Arbitration 39 (1999); 5 ICSID Report, p.184 et seqq. (2002).

c) Contracting State and National of another Contracting State

The last essential necessity for jurisdiction of ICSID arbitration is the question of when is a state a contracting state and when has an investor the nationality of another contracting state. In the most cases the question of “*contracting state*” can be answered easily. With ratification of the Convention by the competent organ of a state the state becomes a contracting state to the Convention. When the investor negotiates directly with the state or its Ministries no doubt can arise about the question whether or not a state is a contracting state if that state did ratify the Convention.

Also subdivisions of governments can be recognized as parties under the Convention. If the investor negotiates investment contracts with subdivisions of governments it is necessary to check whether the subdivision is designated to ICSID arbitration by its state, Article 25 (1) Convention, or whether the host state has approved the consent of the subdivision or waived its approval right, Article 25 (3).

Some states have designated specific subdivisions under Article 25 of the Convention and other states have waived the need to approve consents by subdivision to investment contracts with ICSID arbitration clauses by alienating general power of representation to the subdivisions. Whether or not subdivisions have the power of representation should be checked with ICSID and the state concerned.

A national of a contracting state can be a natural person or a juridical person. According to Article 25 (2)(a) of the Convention any natural person has to have

“[...]the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit

*such dispute to [...] arbitration as well as on the date on which the request was registered[...].*³¹

Therefore the country of citizenship is the fact to rely on whether or not this criterion is fulfilled. Neither at the time of conclusion of the contract nor at the time of the request for arbitration from ICSID, the natural person should have the same nationality as the other party of the dispute. This also applies to dual nationalities.

For juridical persons Article 25 (2)(b) of the Convention applies. A juridical person has to have another nationality than the state party to the dispute on the date of consenting to ICSID or if it has the same nationality, the juridical person has to be under “[...] foreign control [...]” and “[...] the parties have agreed (the juridical person) should be treated as a national of another Contracting State[...].”³² Another nationality can depend on the seat of the company or on the law which governs the establishment of the juridical person.

In the case where the question of nationality is in dispute the Convention and the case law recognizes the realities of investment project structures. That means if the investor carries out a project with a corporation organized under the law of the host state, the special purpose company, it will be considered as a national of another contracting state if the parties agreed to treat that corporation as foreign because of the foreign control by the foreign investor.³³ The definition of nationality is usually finally determined in investment contracts and BITs.

³¹ ICSID Convention Article 25 (2)(a).

³² ICSID Convention Article 25 (2)(b).

³³ e.g. Amco Asia Corporation and others v. Republic of Indonesia, ICSID case No. ARB/81/1, Decision on Jurisdiction (1983), 1 ICSID Report 389 (1993).

3. Additional Ways to include ICSID

Dispute settlement arising directly out of an investment contract as mentioned above is one possibility of ICSID arbitration. Another much more common way is the possibility to establish ICSID arbitration out of a Bilateral Investment Treaty (BIT) or Multilateral Investment Treaty (MIT, like NAFTA). Private investors have the opportunity to initiate ICSID arbitration against the host state arising out of non-contractual agreements or better direct agreements between the host state and the investor's home state which guarantee investment protection for investors. BITs are invented by money exporting countries to protect investment abroad and to guarantee a minimum standard of legal rights for investors against host states.

The first known BIT was concluded in 1959 between Germany and Pakistan. Almost all other developed countries followed soon and improved the BIT agreements. BITs are an indicator of the increased interest in foreign investment for developed countries. Not only developing countries are looking for money to improve their infrastructure, but also investors in developed countries are looking for ways to invest money to increase their turnover and profit. Therefore governments of developed countries saw a need for protection of their nationals against losses in host countries which were not related to the usual commercial risk. The establishment of a legal framework for FDI made investments more calculable which was one of the main reasons for investment protection and promotion. The risk of expropriation or the change of investment laws in host countries without compensation for investors could have a major impact on the financial situation of the investor and is always an obstacle for FDIs.

Today approximately 2,495 BITs are signed between states. 1,718 of these BITs are also ratified by the contracting states and therefore in

force.³⁴ Almost all of the 2,495 concluded BITs include an arbitration clause and many of them in favour of the ICSID system. 21 of the new 26 ICSID arbitration proceedings in the fiscal year 2006 were based on bilateral/multilateral investment treaties as mentioned above.³⁵ Only the remaining five cases were based on ICSID arbitration provisions contained in investment contracts.³⁶

The first BIT ICSID arbitration was filed in 1987. In the *Asian Agricultural Products Ltd v. Republic of Sri Lanka* case the foreign investor from Hong Kong claimed damages from the government of Sri Lanka under the United Kingdom – Sri Lanka Bilateral Investment Treaty after government security forces destroyed the investor’s shrimp farm. Under the award Sri Lanka had to pay compensation for failing to afford full protection and security of the possession of the investor.³⁷

Many other ICSID arbitrations based on BITs followed. Today more than two-thirds of all ICSID arbitrations are based on BITs.

a) Basis for BIT Arbitration under the ICSID regime

The basis for ICSID arbitration is Article 25 of the Convention as mentioned above. Article 25 describes the scope of jurisdiction of the Centre. The Centre has jurisdiction if both parties consent in writing to ICSID arbitration. Once more the agreement between the parties is the cornerstone of any arbitration. According to the described autonomy of the parties it stands in the power of the parties to agree to ICSID arbitration. Neither the Convention nor other regulations define how such an agreement has to be made. Mutual consent in writing is enough for ICSID arbitration.

³⁴ Recent Developments in International Investment Agreements, IIA Monitor No.2 (2005), p. 7, at <http://www.unctad.org/Templates/Download.asp?docid=6294&lang=1&intItemID=3766>.

³⁵ Supra note 14.

³⁶ Supra note 14.

³⁷ *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID case No. ARB/87/3, Award (1990), 4 ICSID Reports 245 (1997).

Under BITs the means of establishing consent is different than that for regular ICSID arbitrations. Usually both parties would agree in a contract at the same time to submit their dispute to ICSID. As mentioned above under the regime of BITs no direct negotiations arise about dispute settlement between the host state and the investor. If a dispute arises usually the investor tries to rely on the BIT to secure its possession and very often the host state denies the applicability of the arbitration clause of the BIT or the BIT at all in favour of the investor. Over the years the jurisdiction of ICSID is accepted over arbitrations arising out of arbitration clauses agreed in BITs or MITs without further negotiations between the parties. It is acceptable that the host state consent to ICSID arbitration by ratifying BITs including an ICSID arbitration clause. The investor can accept the arbitration offer from the host state by writing to the host state or by filing a request to arbitrate to ICSID. Therefore under BITs investors have the power to finally initiate arbitration proceedings under the ICSID regime.

b) Intention of BITs

BITs were invented by developed countries. These money exporting countries were seeking to establish comprehensive protection of the investment of their nationals in the host country. Today BITs give comprehensive protection under international law and offer the possibility to the investor to resolve disputes with the host state within a neutral dispute resolution forum like ICSID. Many states have developed model BITs to simplify the agreement process and to standardize BITs. BITs are usually short, not longer than 15 pages and reflect the negotiation goals of every country. The preamble of any BIT illustrates the goal of the treaty as the Canadian model BIT shows:

*“Canada and -----, hereinafter referred to as the
“Parties”,
Recognizing that the promotion and the protection of
investments of one Party in the territory of the other Party will
be conducive to the stimulation of mutually beneficial
business activity, to the development of economic cooperation
between them and to the promotion of sustainable
development,
Have agreed as follows.”³⁸*

The BIT between the government of the People’s Republic of China and Germany illustrates the practical application of the model treaty:

*“The People’s Republic of China and the Federal Republic of
Germany
(hereinafter referred to as the “Contracting Parties”),
Intending to create favourable conditions for investment by
investors of one Contracting Party in the territory of the other
Contracting Party,
Recognizing that the encouragement, promotion and
protection of such investment will be conducive to stimulating
business initiative of the investors and will increase prosperity
in both States,
Desiring to intensify the economic cooperation of both States,
Have agreed as follows.”³⁹*

To sum up, BITs guarantee investors reciprocal minimum protection regarding their investments. If a host state breaches a substantive protection of the treaty and this breach affects the investor, the latter may commence proceedings against the host state. Usually the investor may claim compensation directly from the host state.

³⁸ Model BIT Canada, at <http://www.sice.oas.org/investment/NatLeg/Can/2004-FIPA-model-en.pdf>.

³⁹ BIT between People’s Republic of China and Germany (2003), at http://www.iisd.org/pdf/2006/itn_germany_china_bit_2003.pdf.

Bilateral investment treaties are the result of negotiations between two sovereign states. Their contents vary constantly according to the goals, needs and bargaining power of every single government. Top seller of BITs is the world's export champion Germany with more than 120 signatories to BITs, followed by China, Switzerland and the United Kingdom.⁴⁰ The majority of BITs are concluded between developed and developing countries. But also treaties between developing economies are getting more and more common. In 2004 one-fourth of BITs were concluded between developing countries, especially with China, which shows a recent increase in development strategies in developing countries as well as the emergence of some developing countries' firms as global players.⁴¹

c) Who is protected under BITs?

Once a bilateral investment treaty is in place the question for potential users arises who is protected under the BIT. Usually every BIT defines the scope of application regarding protected investors. In the case of the Germany-China BIT, for example, the treaty defines its scope of protected investors as follows:

"[...] the term 'investor' means

(a) in respect of the Federal Republic of Germany:

- Germans within the meaning of the Basic Law for the Federal Republic of Germany,

- any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of

⁴⁰ statistics end 2005, supra note 15, p. 3.

⁴¹ Supra note 34, p. 3 et seq.

*Germany, irrespective of whether or not its activities are directed to profit; [...]*⁴²

Therefore investors covered by protection of investment treaties can be divided into natural persons and legal entities.

aa) Natural persons

Almost all BITs establish the nationality of a natural person by reference to the domestic law of the respective contracting state. Therefore the protection of a natural person under the respective treaty depends on domestic law of the contracting state. Only nationals of the contracting state may rely on the BIT.

bb) Legal entities

More important, because of the economic importance, is the protection of legal entities. All BITs include juridical persons into their legal protection. But also only nationals of one contracting state can rely on treaty protection. Many BITs determine the nationality of companies by reference to the domestic law concept of incorporation or constitution. Therefore a company takes its nationality from the state in which it is incorporated. Other BITs, like the example Germany-China, use the concept of the seat of the company management. The seat of the company management determines the nationality of the company.

Finally almost all BITs extend protection to entities incorporated in the host state of the investment provided that they are controlled by nationals or entities incorporated in the other contracting state. For example the Germany-China treaty states that:

⁴² Supra note 39.

“[...] ‘investment’ means every kind of asset invested directly or indirectly of one Contracting Party in the territory of the other Contracting Party, [...] (b) shares, debentures, stocks and any other kind of interest in companies; [...]”⁴³.

Therefore the connection between the definition of “investor” and “investment” in the BIT extends the scope of protection of BITs. Also domestic companies which are usually established to carry out an investment in a host country may rely on the treaty if these companies are controlled by nationals of the other contracting state. These facts may enable minority shareholders in the local entity (usually many local investors) to obtain indirect relief through treaty arbitration.⁴⁴ In the *CMS v. Argentina* case the ICSID tribunal found that the minority shareholder’s interest was an investment under the US-Argentina BIT and the minority shareholder could claim under the specific BIT.

d) What is an investment?

Investors who want to rely on bilateral investment treaties must establish that they have made a protected investment. The ICSID Convention does not offer a definition of the term “investment”. The result of this intentional gap in the Convention gave the treaty drafters the important possibility to define investment within the treaty itself and to adjust the term investment to the specific needs of every single BIT or relationship between the contracting parties.

Almost every BIT contains a definition of what both parties agree constitutes an “investment”. Many BITs have a non-exhaustive list of the

⁴³ Supra note 39.

⁴⁴ *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction (2003), ICSID case No. ARB/01/8, at http://www.worldbank.org/icsid/cases/CMS_Decision_english.pdf.

kind of investment the treaty and the parties intends to cover. For example the model BIT of the UK defines investment as follows:

“[...] ‘investment’ means every kind of asset and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property right such as mortgages, liens or pledges;*
- (ii) shares in and stock and debentures of a company and any other form of participation in a company*
- (iii) claims to money or to any performance under contract having a financial value;*
- (iv) intellectual property rights, goodwill, technical processes and know-how;*
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources [...].⁴⁵*

This definition is very broad and gives various opportunities to subsume different types of investments under the protection of the treaty. Similar broad definitions are found in most BITs. The kind of open-ended definition allows for the inclusion of different types of investment which perhaps did not exist during the negotiation process. The definition is very dynamic and may evolve over time. Some authors have attempted to define investment under specific qualities. These qualities may be: certain period of time, regular profit or income, investment risk, certain amount of money involved, and certain significance for the development of the host country.⁴⁶ But all these qualities can only be a basis for interpretation of the prevailing treaty. They cannot be regarded as a final definition of an investment under BITs.

So far, the definition of “investment” has evolved. In the literature during the past decades many discussions about investment were held.

⁴⁵ Model UK Bilateral Investment Treaty, supra note 19, p. 167.

⁴⁶The ICSID Convention: A Commentary, Christoph H. Schreuer, 2001, Article 25, No. 122.

However, the case law of ICSID has tried to clearly define the term investment. And ICSID followed the intention of the contracting parties and the wide investment interpretation. Investment today covers direct and indirect investments and also modern contractual transactions having economic value.⁴⁷ As mentioned above, in the *Fedax v. Venezuela* arbitration, the ICSID tribunal held that promissory notes acquired by the claimant from the original holder in the secondary market were an investment under the Netherlands-Venezuela BIT.⁴⁸ The tribunal saw an investment as completed under the BIT by putting money into business ventures to produce revenue or income.

On the other hand tribunals denied an investment in the *Mihaly International v. Sri Lanka* arbitration. The tribunal held that spending money by the claimant for planning the financial and economic modelling of a project following execution of a letter of intent by Sri Lanka was not an investment under the applicable BIT.⁴⁹

To sum up, determining whether or not an investment is protected under a BIT is done on a case-by-case basis. The definition in the treaty is the most important basis for interpretation of the parties' intentions. It lies in the hand of the parties to determine classes of disputes which they would consider submitting to ICSID. But in the end, the tribunal tends to interpret the term "investment" very widely and generously.

e) Key features of BITs

Once a BIT is in force it offers rights and duties to the contracting parties and to the protected investors. Investors will often find their investments protected by BITs and every investor should be aware of the rights which

⁴⁷ Supra note 1 ,Chapter 11, No. 11-10.

⁴⁸ Supra note 30.

⁴⁹ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID case No. ARB/00/2, March 15, 2002, 17 ICSID Review FILJ 142 (2002).

BITs may offer to him. As mentioned above, BITs are important documents that provide a real measure of protection to investors. Bilateral investment treaties grant investors a minimum standard of protection for their assets in a foreign country. Very often BITs grant the investor more than the minimum standard of protection offered under customary international law; indeed, this was the goal of the invention of investment treaties. Investment treaties are regarded as *lex specialis* between the parties, because of the parties' agreement; they even may supersede any inconsistent customary international law by including or excluding specific topics into the treaty which are important to the parties regarding their treaty goals.⁵⁰ The power of party autonomy is the driving power for bilateral investment treaties.

General obligations undertaken by the governments of states often require them to provide investments with fair and equitable treatment, national and most favoured nation treatment, and full protection and security. Also a key feature is to promise not to expropriate possessions of investors without prompt, adequate and effective compensation, and not to hinder the free transfer of funds of investors. These obligations shall stabilize the relationship between host states and investors and shall make repayments easier in case of breaches of contracts. The following subsections shall explain the main protections in BITs for investors without giving a detailed discussion which would be beyond the scope of this thesis.

aa) No expropriation without compensation

Expropriation: one of the biggest problems foreign investors faced during the last decades. Host countries can change investment policies, or new governments may influence and control specific part of the economy, however, nationalization of key industries of a state combined with the driving out of investors which are invested in this area is a major issue in

⁵⁰ Foreign Investment Disputes – Cases, Materials and Commentary, R. D. Bishop, J. Crawford, W. M. Reisman, 1st Ed., 2005, p. 1007.

ICSID arbitrations. BITs tried to face that problem and included provisions to make expropriation uneconomical for host countries.

Indeed, it is an accepted principle under public international law that expropriation is allowed and results either from a direct act of taking or from an indirect taking which usually deprives the investor of the use or results of its investment.⁵¹ Expropriation is the withdrawal of property which means the loss of the power of use and disposition over the property.⁵² Government actions can be very various regarding expropriation. They can manifest as environmental regulations, the revocation of licenses, or changes within taxation.

Under public international law expropriation is only lawful if the act fulfils certain preconditions. Provisions in BITs which are usually based on the principles of public international law determine the expropriation problem in the Canada model BIT, Article 13, for example, as follows:

“(1) Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect to nationalization or expropriation [...], except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.”⁵³

Almost all BITs resemble each other in this provision. Some BITs regulate expropriation and especially compensation in more detail. The short provision in the Canada model BIT shows all the necessary points regarding expropriation under public international law and the protection of interest of any investor. Regarding the sovereignty of any state, expropriation under the treaty is possible but only for public purposes and in accordance with prompt, adequate and effective compensation.

⁵¹ Völkerrecht, Knut Ipsen, 4. Ed., 1999, p. 658 et seqq.

⁵² Multinational Enterprises and the Law, Peter Muchlinski, 1999, p. 501.

⁵³ Canada model BIT, supra note 38.

Compensation usually shall take place to a fair market value of the former property of the investor.

ICSID decisions on expropriation are various and the case law is developing. Whether or not a state did expropriate foreign property and has to pay compensation is a matter for case-by-case decisions. In the Santa Elena case the ICSID tribunal held that:

“Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state takes in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”⁵⁴

Another arbitration tribunal (not ICSID) held in the CME case the government of the Czech Republic did expropriate the investor’s property by interference in the economic and legal basis of the investment which destroyed and ruined the commercial value of the investment.⁵⁵

To sum up, expropriation is allowed but not welcome. Public international law and BITs try to avoid expropriation by erecting high preconditions for the host country and expensive compensation rights for the investor. Expropriation shall become uneconomical for the host state and the property of the investor shall be under a high protection level.

⁵⁴ Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID case No. ARB/96/1, Award (2000) paras 71-72, at http://www.worldbank.org/icsid/cases/santaelena_award.pdf.

⁵⁵ CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Partial Award (2001), at http://www.mfcr.cz/cps/rde/xbcr/mfcr/PartialAward_pdf.pdf.

bb) Fair and equitable treatment

Almost every bilateral investment treaty includes the promise of the host state to treat investments fairly and equitably. This standard of protection and its significance for the contracting parties is often shown in the placement of this agreement in the first Articles of the treaty. For example, Article 3 of the Germany-China BIT provides under its headline “Treatment of Investments”:

“(1) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.”⁵⁶

Other BITs, e.g. the USA model BIT in its Article 5, determine more specifically the fair and equitable treatment:

“[...] The concept of ‘fair and equitable treatment’ [...] do not require treatment in addition to ... (the minimum standard of protection under customary international law) and do not create additional substantive rights [...] (a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;”⁵⁷

It is difficult to determine a legal obligation out of this treaty agreement. The concept behind this treatment is to review the fairness of government actions in the light of circumstances and facts of the case.⁵⁸ Therefore it is always a case-by-case decision of the arbitral tribunal to decide what is included under this agreement. The treaty language will be important for deciding this question and as one could see, differences between NAFTA investment treaties (USA model BIT which only relies on minimum

⁵⁶ Germany-China BIT, supra note 39.

⁵⁷ USA model BIT, 2004, at

http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

⁵⁸ Charles Bower, “Investor-State Disputes under NAFTA: the Empire Strikes Back”, (2001) 40 Columbia Journal of Transnational Law 43, p. 56.

international standard) and other BITs like the Germany-China BIT will be the basis for different tribunal decisions regarding the concept of fair and equitable treatment.

However, despite the different wording within treaties the fair and equitable treatment standard requires the host state to maintain a reliable or predictable investment environment: the investor shall find stable investment conditions to develop reasonable investor expectations. In the *TECMED v. Mexico* case and the *Maffezini v. Spain* case the ICSID tribunals held that a violation of this obligation took place if in the light of good faith under international law the host state acted against the legitimate and basic expectations of the investor.⁵⁹ Also the failure to ensure transparency in the function of public authorities is a breach of this obligation.⁶⁰ These cases give an impression what the fair and equitable treatment includes.

cc) Full protection and security

Full protection and security is also a very common provision in almost every BIT. This provision is very closely linked to the fair and equitable treatment principle. Therefore both principles are often mentioned in connection with each other. The USA model BIT determines full protection and security under the minimum standard of customary international law within its Article 5 (b) as:

“(b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”⁶¹

⁵⁹ Técnicas Medioambientales TECMED SA v. United States of Mexico, ICSID case No. ARB(AF)/00/2, Award 2003, at <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

⁶⁰ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID case No. ARB/97/7, Award 2000, at http://www.worldbank.org/icsid/cases/emilio_AwardoftheTribunal.pdf.

⁶¹ Supra note 57.

The Germany-China BIT determines within its Article 2(2), on the other hand, once more this provision much wider and less constrained to the customary international law:

“(2) Investments of the investors of either Contracting Parties shall enjoy constant protection and security in the territory of the other Contracting Party.”⁶²

Once more, almost every BIT does not give a definition of its protection provision. Only the scope of protection is more broadly or narrowly determined. Therefore only practical applications can describe the scope of this obligation.

Full protection and security is not a guarantee for the investor that his property will be safe against any damages, but full protection and security offers a minimum standard to the investor’s property against physical damages caused by the armed forces, local police, or civil riots. The host state has to fail to take reasonable protective actions to prevent physical damages of the investor’s property to violate this obligation. As mentioned above in the *AAPL v. Sri Lanka* case the government violates this obligation if it does not take any measures that fall within the normal exercise of a government to impose law and order and which could help to protect the investor’s property.⁶³

Full protection and security does not mean that a state is always liable for damages by armed forces. Instead, it imposes a duty on a government to exercise reasonable care to protect investments. This principle of reasonable care can also be violated by withdrawal of a governmental authorization vital for the operation of the investment.⁶⁴ Therefore not only physical damages can be a breach of the full protection and security treatment.

⁶² Supra note 39.

⁶³ Supra note 37.

⁶⁴ *Antoine Goetz and others v. Republic of Burundi*, ICSID case No. ARB/95/3, Award 1999, ICSID Review-Foreign Investment Law Journal (2000), No. 2, Volume 15.

dd) National and most-favoured-nation treatment

The provisions for national and most-favoured-nation-treatment have the effect of prohibiting discriminatory treatment against foreign investors. Under the national treatment provision the host state must treat foreign investors and their investments no less favourably than investors of the nationality of the host state or the investments of its own nationals. Under the most-favoured-nation principle (MFN) the host state shall not treat one foreign investor or its investment less favourably than investors and their investments from another foreign country. BITs, e.g. the Canada model BIT, determine these standards as follows:

“Article 3 National Treatment

- (1) Each Party shall accord to investors of the other party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other dispositions of investments in its territory.*
- (2) Each Party shall accord to covered investment treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to [...].*

Article 4 Most-Favoured-Nation Treatment

- (1) Each Party shall accord to investors of the other party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to [...].*
- (2) Each Party shall accord to covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to [...].⁶⁵*

The Germany-China BIT offers a shorter and broader version of national and most-favoured-nation treatment in its Article 3 subsection 2 and 3:

⁶⁵ Supra note 38.

“(2) Each Contracting Party shall accord to investments and activities associated with such investments by the investor of the other Contracting Party treatment no less favourable than that accorded to the investments and associated activities by its own investors.

(3) Neither Contracting Party shall subject investments and activities associated with such investments by the investor of the other Contracting Party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.⁶⁶

As mentioned above for the other protection obligations in BIT, also the national and most-favoured-nation treatment can not be defined out of context as, it is a relative standard of protection and can only be defined on a case-by-case basis. As one can see on the examples above, NAFTA treaties like the Canada model BIT contain a more narrow provision of national and MFN treatment because of the expression “like circumstances” than other BITs like the Germany-China BIT. Once more it is very important to examine the treaty and probably additional agreements in connection with the treaty to identify the intention of the parties and to subsume the right obligations of the host country under this treaty provision.

Usually the MFN provision is relied on as a substantive right. One example can be, if the host state guarantees special investment conditions to Spanish investors in a specific industrial field, but it would not apply these conditions in case of a South African investor, then the South African investor could rely on the MFN provision and claim the same treatment or compensation for his loss.

An extension to include also procedural rights was only made as an exception. In the Maffezini case for example, the Argentine investor Maffezini claimed under the Spain-Argentina BIT which determines to

⁶⁶ Supra note 39.

submit the claim to a local court in advance before demanding ICSID arbitration. Maffezini relied on the MFN provision in that BIT in connection with another BIT, Chile-Spain, which did not require submitting the dispute to a local court before ICSID arbitration. The ICSID tribunal held that under the MFN provision in the Argentina-Spain BIT the Argentine investor could rely on the most-favoured-nation provision of the Chile-Spain treaty.⁶⁷

The possibility to rely on a MFN clause by investor may extend the obligations of the host state but extensions of investor's rights under the MFN clause in a BIT should be handled with care. MFN provisions should always be examined in the light of the Plama case decision where the tribunal stated: "[...] an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."⁶⁸

ee) Free transfer of funds related to investments

Another main provision of almost every BIT is the free transfer of money related to investments. This is one provision which is very important to investors. They can withdraw their invested money at any time without unforeseen interference of the host state. Usually foreign investors are entitled to claim for compensation if they are affected by acts of the host state which includes currency control regulations or other acts that effectively freeze the funds of the investor. The Germany-China BIT determines in its Article 6 the free transfer provision as followed:

⁶⁷ Supra note 60.

⁶⁸ Plama Consortium Limited v. Bulgaria, ICSID case No. ARB/03/24, Decision on Jurisdiction (2005), paragraph 223, at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

“(1) Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

- (a) the principal and additional amounts to maintain or increase the investment;*
- (b) returns;*
- (c) proceeds obtained from the total or partial sale or liquidation of investments or amounts obtained from the reduction of investment capital;*
- (d) payments pursuant to a loan agreement in connection with investments;*
- (e) payments in connection with contracting projects;*
- (f) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.⁶⁹*

The free transfer provision normally includes all kinds of transfers and its scope is very broad. There are no limits regarding the invested funds, interests, profits or dividends. That makes this provision a pearl for any investor regarding the flexibility of the invested money. On the other hand any host state is confronted with the risk of huge drain away of invested money at any time or under any circumstances. To avoid extreme situations of money withdrawal by investors some treaties provide exceptions to the free movement of funds by allowing the host state to restrict transfers during unusual periods of low foreign exchange or balance of payments problems.⁷⁰

f) The new BIT generation

As mentioned above, BITs cover specific key issues like fair and equitable treatment or most-favoured-nation treatment. However, during the last few

⁶⁹ Supra note 39.

⁷⁰ Protocol attached to the USA-Egypt BIT, para. 10, at http://www.unctad.org/sections/dite/ia/docs/bits/us_egypt.pdf.

years a new generation of BITs emerged. These new BITs expand their content and scope. The new BIT generation, initiated by the USA and Canada, include investment chapters which define exactly the scope of the protected investments and include other clarifications within the relationship between the contracting parties.

With the intention to clarify treaty provisions for both contracting parties some new BITs models have deviated from the traditional open-ended definition of investment. The goal of this innovation is to find a better balance between comprehensive investment definitions and yet not to cover assets that are not really intended by the parties to be covered investments. The new Canada model BIT for example has replaced the broad investment definition with a comprehensive and finite definition of investments. The Canada model BIT defines the term “investment” very exact by describing the protected kind of investment and by excluding specific kinds of investments:

*“[...] but investment does not mean,
(X) claims to money that arise solely from
(i) commercial contract for the sales of goods or services [...]
(ii) the extension of credit in connection with a commercial
transaction [...].”⁷¹*

New BITs try to describe exactly the parties’ intention regarding an investment. Other BITs, as the USA-Uruguay BIT, include all assets of the investor under the investment term but extend the BIT protection only to investments which include specific investment characteristics such as *“...the commitment of capital or other resources, the expectation of gain or profits, or the assumption of risks.”⁷²* With this new way to determine exactly the scope of protected investments the contracting parties try to introduce certainty into their BITs and to avoid an endless and unintentional extension of investment protection for investors.

⁷¹ Supra note 38.

⁷² USA-Uruguay BIT, at http://www.unctad.org/sections/dite/ia/docs/bits/US_Uruguay.pdf.

Further reforms within BITs are the inclusion of Annexes after the main BIT provisions to clarify and reflect the parties' intentions. As mentioned above, the USA-Egypt BIT has a protocol as an Annex to its regular provisions within which the parties clarify their intentions regarding the free transfer treatment.⁷³ These Annexes may also regulate exceptions regarding actions of one contracting party to legitimate protection of public welfare such as public health care, safety and environmental issues.

Annexes may extend the wording of BITs but clarify and determine more specifically the intention of the parties which can help to avoid disputes or to settle disputes much easier. It also creates more room for the host country to introduce regulations especially in the field of public health care or environmental issues which became necessary to reach political targets or to move up to new scientific standards. The better description of protected investments in BITs gives host countries more flexibility to design their domestic law and free themselves from stiff and inflexible investment protection in the past.

g) Similarities of BITs

As one could see, almost all BITs include the same protective features. Of course not all BITs are the same, but all have similarities in their main features. Differences lie in the details of the treaty, the interpretation by the parties and arise from negotiations between the parties, their negotiation goals, negotiation power and specific economic and political conditions of the contracting parties. No model BIT exists which can be regarded as a guideline for all BITs. BITs are always influenced by the economic policy of each contracting party. Therefore the result of any negotiation process between states is characterized by different goals and political considerations. However, after reviewing different BITs, it can be

⁷³ Supra note 70.

determined that all BITs try to regulate the whole field of economic relationship between the contracting parties to establish the best protection of investments.

The majority of case law under ICSID and BITs has been generated by the NAFTA member states. Because of their deep economical interconnection and their law which determines ICSID as dispute settlement body many decisions and interpretations of treaty provisions arise out of these connections. Result of the decisions is that the model BITs of the USA or Canada are much more detailed and descriptive than other BITs. That can avoid misinterpretations by an arbitration tribunal or by treaty users.

4. BIT arbitration clauses with members and non-members of ICSID

Finally, almost every BIT includes dispute settlement clauses for the investor-host state relationship. These clauses are important to depoliticize conflicts between the parties. The dispute settlement clause in BITs opens up the possibility for the investor to submit the dispute to a neutral conciliation or arbitration tribunal. It is very common in these clauses to refer to ICSID or UNCITRAL as dispute resolution bodies. For example, the Germany-China BIT in its Article 9 includes a dispute settlement clause as followed:

“(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

[...]

(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement on Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to

be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.”⁷⁴

Under the new Germany-China BIT any dispute can be submitted for arbitration under the ICSID system. Article 9 (3) offers the parties this way of dispute settlement. This is the stage where usually BITs and the dispute settlement under ICSID come together. BIT arbitration clauses allow investors to submit their dispute directly to a neutral venue. Apart from the fact that BITs also include cooling off periods (a three to six month wait and negotiation time between the parties) and some times also stipulate to submit the dispute to the local courts before submission to ICSID, BIT arbitration clauses are additional ways to include ICSID arbitrations within the parties. Without the explicit determination that ICSID arbitration is the preferred dispute settlement in BITs the parties would have to agree to a dispute settlement system the moment the dispute arises. Therefore, with BIT ICSID arbitration clauses, it is not necessary for the investor to negotiate a direct contract with the host state or the government of a province of the host state to include an arbitration procedure. BIT arbitration clauses in general open up a way for investors to claim compensation for treaty breaches by the host country without a direct agreement with the host state or the necessity to rely on diplomatic interference by their home countries.

Furthermore BIT arbitration clauses also include non-member states to the ICSID Convention to the ICSID arbitration facility. An arbitration clause between an ICSID Convention member country and a non-member country can be found, for example, in The Netherlands-South Africa BIT, Article 9 (2):

“(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

⁷⁴ Supra note 39.

(a) the International Centre for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States [...] when each State Party to this agreement has become a party to said Convention. As long as this requirement is not met, each party agrees that the dispute may be submitted to arbitration in accordance with the Rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceeding of the ICSID;[...].⁷⁵

This kind of arbitration clause opens up the submission of a dispute to the Additional Facility of ICSID. As mentioned above, the Additional Facility works under its own rules but is largely similar in the arbitration process under the Convention. The result of BIT additional facility arbitration clauses is that even countries which did not ratify the ICSID Convention can be faced with ICSID arbitration under the Additional Facility. That means, under BITs investors can claim directly against host countries whether or not they are ICSID Convention members because of the wide arbitration clauses. The result for the host states is that they face international enforceable ICSID awards even if they did not sign the Convention because of the enforceability of awards under the New York Convention (see below). Dispute settlement clauses in BITs therefore are very convenient for investors. These clauses try to give investors as much power as possible to protect their investment and expand current concessions of host countries which are not ICSID Convention members.

With the increase of BITs and their ICSID arbitration clauses for ICSID members and for non-members the ICSID dispute settlement under the Convention and the Additional Facility Rules became more and more important within the investor-host state relationship. BITs raised the

⁷⁵ The Netherlands-South Africa BIT, at http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_southafrica.pdf.

importance of ICSID enormously within international commercial arbitration.

C) Recognition and Enforcement of ICSID Awards

Arbitration under ICSID and BITs is heavily dependent on the result of their procedures. Under an economical view any arbitration is only worth being carried out if the result of this process is useable and not worthless. Therefore international commercial arbitration depends to a great extent on the effectiveness of its awards. Awards have to be final and easy to enforce to make them economically interesting to investors. Claimants in an arbitration proceeding have always to bear in mind what happens if the other party does not comply with the award voluntarily. The questions like recognition, enforcement and execution have to be answered. How much support or assistance can the claimant expect from local courts regarding enforcement of the award, e.g. ordering attachment of assets of the debtor, or do national courts recognize the award at all? Are there ways for an appeal or review of the award whether by the national court or the ICSID tribunal?

Under most national systems there is no review procedure for arbitration awards. Nevertheless local courts at the place of arbitration can have the power to set aside awards under specific and very limited circumstances. Very important in this connection is the New York Convention from 1958. Under the New York Convention arbitral awards issued in the territory of the Convention's member states (about 140 countries) benefit from facilitated recognition and enforcement. The New York Convention also determines circumstances within which an arbitral award can be set aside by a competent authority.

Compared to the New York Convention the ICSID Convention is even more favourable to recognition and enforcement of ICSID awards. The

ICSID Convention does not accept any ground for refusing recognition and enforcement of its awards. The Convention requires national courts to recognize and enforce awards immediately. National courts shall consider ICSID awards as if they were final judgements of that state. The review of awards is only possible under very limited grounds and only by another ICSID tribunal. There is no procedure for national courts to set aside ICSID awards.

The following section shall describe roughly the nature, recognition and enforcement of ICSID awards, including ICSID Additional Facility awards and agreements within BITs.

1. Nature of ICSID Awards

The nature of ICSID awards can be described as final and binding. Finality and the binding nature of awards are key features for successful enforcement. Article 53 (1) of the ICSID Convention determines these features as follows:

“(1) The award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for this Convention....”⁷⁶

ICSID awards are therefore binding for the parties of the dispute. The losing party has to comply with any decision made by an ICSID tribunal. Only final awards are binding for the parties. An award is final when it dealt with every question submitted to the tribunal.⁷⁷ Therefore orders e.g. regarding provisional measures of the tribunal are not final awards.

Furthermore once an award has been issued it is regarded as a final decision without any possibility for an appeal under ICSID or any other

⁷⁶ ICSID Convention Article 53 (1).

⁷⁷ ICSID Convention Article 48 (3).

forum, like other arbitration tribunals or domestic courts.⁷⁸ The parties can not seek a remedy on the same dispute in another forum.

The binding nature and the finality of ICSID awards give investors the confidence to receive a consistent or resistant judgement.

2. Recognition and Enforcement

All member states of the ICSID Convention have the obligation to recognize and to enforce ICSID awards. Article 54 (1) of the Convention determines the obligation as follows:

“(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”⁷⁹

Regarding monetary ICSID awards recognition and enforcement can not be stopped by member countries. The Convention prohibits member states from reviewing monetary ICSID awards under national or other laws. Therefore competent authorities of a Convention member state have to recognize and to enforce monetary awards like final decisions of their own court. Regarding non-monetary awards the Convention requires the recognition of the award from every member state without reviewing the result. Enforcement of these awards is not determined in Article 54 of the Convention. So far, ICSID tribunals have only imposed pecuniary obligations in their awards but it is not unlikely that future awards will

⁷⁸ UNCTAD, Dispute Settlement, ICSID, 2.9 Binding and Enforcement, p. 5, at http://www.unctad.org/en/docs/edmmisc232add8_en.pdf.

⁷⁹ ICSID Convention Article 54 (1).

provide specific performance from the defeated party with the result that those awards are still binding even though the enforcement procedure determined in Article 54 Convention does not apply.⁸⁰ Non-monetary awards, whether or not they ever will be issued by an ICSID tribunal, can be enforced under the rules of the New York Convention, if it applies, or under other international agreements.

3. Execution of Awards

Recognition and enforcement are the first steps for the prevailing party to receive payment of the ICSID award. But to receive anything out of a monetary award the judgment has to be executed. Execution is the second step to fulfil the imposed obligation in an ICSID award. This procedure has to be distinguished from recognition and enforcement. While recognition and enforcement are covered by the Convention and no review under domestic laws is accepted, execution of ICSID awards can only be carried out under the domestic laws of the state in which execution is sought. The Convention stipulates in its Articles 54 (3) and 55:

“(3) Execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of the State or of any foreign State from execution.”⁸¹

This means, member states of the Convention have to recognize and to enforce ICSID awards immediately but they may execute any award under the applicable domestic law. If a member state under its domestic laws

⁸⁰ Supra note 78, p. 14.

⁸¹ ICSID Convention Article 54 (3) and Article 55.

denies execution of a judgment, because of the sovereign immunity another state's assets, then the execution of ICSID awards may be refused by this country. ICSID tribunals can not execute their awards.

Regarding execution of ICSID awards, ICSID depends on the cooperation of national courts. Therefore a successful party may face difficulties with execution of an ICSID award under the sovereign immunity topic but non-compliance with the award is still regarded as violation of the Convention and does not affect the award at all.⁸² Generally, the parties to a dispute comply voluntarily with ICSID awards in respect of the judgement and only a small number of cases (approx. four) were challenged with the sovereign immunity objection.⁸³

Therefore the prevailing party in a dispute can be very optimistic that award obligations will be carried out by the other party.

4. BIT agreements

The recognition, enforcement and execution of ICSID awards which are carried out based on a BIT agreement are similar to the described procedure under the ICSID Convention. Many - if not all - BITs refer to the ICSID Convention to determine how arbitration awards shall affect the parties. The Germany-China BIT for example stipulates that:

"[...] Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law."⁸⁴

⁸² Supra note 78, p. 18.

⁸³ Limits to Enforcement of ICSID Awards, E. Baldwin, M. Kantor, M. Nolan, Journal of International Arbitration, Volume 23 (2006), 1-24, p. 1, at http://www.milbank.com/NR/rdonlyres/CF3F1236-AA39-405F-8086-A1E60AD104B2/0/0106_Nolan_Journal_of_Intl_Arbitration.pdf.

⁸⁴ Supra note 39, Article 9(4).

This clear reference to the ICSID Convention shows that BITs adopt the provisions of the Convention. Awards shall be binding and final. Recognition and enforcement of awards can not be denied by domestic courts. In the Germany-China treaty the procedure for enforcement shall be carried out in accordance with domestic law. This means that the prevailing party has to fulfil procedural requests regarding domestic law but it does not change the enforceability of ICSID awards under Article 54 of the Convention. All awards will be enforced as if they were a final judgement of a national court. Only exceptional and specific circumstances like violation of substantial law provisions or disregarding the facts of the case could be the basis to refuse enforcement. Execution will be treated as well as mentioned above.

5. Additional Facility

Awards ruled under the provisions of the Additional Facility Rules of ICSID are treated differently from ICSID Convention awards. Regardless of the fact that arbitration proceedings under the Additional Facility Rules are almost the same as those under the Convention, the Additional Rules contain two main differences. As mentioned, the ICSID Convention is not applicable under the Additional Facility. The Additional Facility has its own rules and guidelines.

The first main difference is contained in arbitration Additional Facility Rule 19. Under the Convention arbitration proceedings can take place in any jurisdiction because recognition and enforcement is guided by the Convention. Proceedings under the Additional Facility have to take place in a country that is a party to the New York Convention.⁸⁵ Recognition and enforcement of additional facility awards is not determined by the Additional Facility Rules. There is no automatic regime of recognition and enforcement like under the Convention. This is understandable because if there were also an automatic enforcement regime then it would make no

⁸⁵ Arbitration (Additional Facility) Rules, Schedule C, Article 19.

difference to be a member of the Convention or not. States sometimes do not want to become ICSID members because of their duties and loss of control regarding ICSID awards. Awards issued in the territory of member states to the New York Convention benefit from facilitated recognition and enforcement, and enable the prevailing party in a dispute to impose the obligations determined in the award. On the other hand awards are subject to non-enforcement under the reasons determined in Article V of the New York Convention. Further explanation about the New York Convention is not content of this thesis.

The second main difference is the possibility of interference by domestic courts within the arbitration proceedings or the final award. Under Additional Facility Arbitration Rule 46 (4) *"[...] the parties may apply to any competent juridical authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate [...]"*⁸⁶

Therefore both parties to the dispute can submit interim measures to a domestic court without prejudicing the arbitration. Under the Convention the parties could not request interim measures from national courts, unless expressly and mutually agreed. Furthermore the Additional Facility Rules do not contain a rule excluding the review of the awards by a domestic court.⁸⁷ This gives the parties the chance to appeal against the Additional Facility award. Therefore Additional Facility awards are much more contestable than awards under the Convention. The missing obligation regarding recognition and enforcement gives domestic courts more power to refuse enforcement and brings more insecurity for the prevailing party regarding imposing the award's obligations.

⁸⁶ Supra note 85, Article 46 (4).

⁸⁷ Supra note 78, p. 5.

D) Assessment of the Achievements of ICSID in Connection with BITs

After representation of the ICSID arbitration regime in connection with BITs and their protection obligations this thesis will try to assess whether or not the goals of ICSID and BITs were achieved and whether or not this way of investment protection brought advantages or disadvantages to the involved parties. It shall be highlighted whether or not ICSID and BIT are the future for international investment dispute settlement.

1. Realization of the Goals from ICSID and BITs

To assess the necessity and practicability of ICSID and BITs the question whether or not they reached their goals should be answered. It is difficult to assess the results of ICSID and BIT regarding their arbitration regimes because the application of this regime started to kick off only a few years ago. The use of ICSID by states was very small since the Convention came into force 40 years ago. In the 1970s and 1980s only a few cases were administered by ICSID. Since the establishment of ICSID just more than 200 cases was administered by the Centre, most of them in the last decade. This is not much for a time period of 40 years and gives still enough space for extensive change in the future.

Additionally, the strongest improvement or use of ICSID only started within the last 10 to 15 years. Since the rapid increase of bilateral investment treaties with their reference to ICSID arbitration for dispute settlement the arbitration regime of the Centre became more and more important within foreign investment dispute settlement. The last years show a steady increase of ICSID arbitration in connection with BIT arbitration clauses. An increase of FDIs was the reason for the increase of investment disputes. A thicker web of BITs, including better investor protection, was the reason for the increase of ICSID arbitrations. The increase of BITs, the further

increase of new BITs and the steady increase of foreign investments by capital exporting countries around the world will be the reason for a further increase of ICSID arbitration procedure within the next years.

This further increase will bring many new ICSID tribunal decisions which will sharpen the whole arbitration process and the judgements of ICSID tribunals, just as it was during the last decade. This future development, especially the increase of ICSID arbitration cases, will make an assessment easier and will give the chance to assess the whole process in more detail. It will give the chance to evaluate how BITs cases will affect foreign investments and the ICSID procedure itself. Today, with the experience of ICSID and BITs, the answer to whether or not ICSID and BITs have fulfilled their goals is positive. Until the late 1980s there were only a few ICSID arbitration cases and ICSID clauses in international investment contracts were not prevalent. Since the proliferation of BITs and their ICSID arbitration clauses a constant framework for dispute settlement is available to investors. BITs pushed the application of the ICSID arbitration regime. The new negotiations of BITs still show that states believe to need further investment protection for their investors and that a membership to the ICSID Convention or a BIT can improve the investment climate.

As one can observe, the framework set out by the Convention and BITs gives reason to believe that they are not insignificant for stabilizing practices within the world of foreign investments and for the development within the settlement of foreign investment disputes.

a) Depoliticising of Conflicts

After the last 40 years of ICSID and its arbitration regime one can clearly state that conflicts between investors and host states are depoliticised. The ICSID Convention did create a neutral venue for settlement of

investment disputes. As mentioned in the Report of the Executive Directors of the ICSID in 1965 the “*desire to strengthen partnership*” and “*promoting mutual confidence*” between states the ICSID Convention was established to carry out “*independent judgements*” which have to be recognised and enforced by the parties.⁸⁸ Neither investor nor the host state should be worried about self-interested actions by the other party. Under the auspices of the World Bank an independent dispute resolution body was created which applied international methods of dispute settlement.

The ICSID arbitration process is self-contained and absolutely delocalized. Arbitration proceedings are usually carried out at the headquarters in Washington or the branch offices. The Centre supervises the appointment of the arbitrators, ICSID tribunals handle interim measures, the awards are final and binding and the parties have to recognise and to enforce the awards. The Convention does not allow any appeal or review by national court. These qualities of the ICSID regime secure the intention of the drafters to create an independent and neutral forum. No interference by states is allowed and can disturb the arbitration process or can obstruct the enforcement of obligations within awards.

The World Bank as independent international organization guarantees the financial and administrative independence of the ICSID.

Furthermore the ICSID Convention suspends the right of diplomatic protection for investors or its home state. When the defeated party complies with the obligations of an ICSID award or when this party follows the ICSID procedure then the recourse to diplomatic protection is blocked for the other party. This is an additional factor to keep states out of investment dispute settlement.

Additionally the ICSID Convention established a direct way for investors to claim compensation from a host state in case of non-compliance with given promises or expected behaviour. ICSID is the first system under

⁸⁸ Supra note 11.

which non-state entities can sue other states directly. This opportunity created for the first time a way to impose obligations against states without interference of other states. Private investors are able to impose claims especially for damages against host states in a direct way. This is also supported by the fact that awards are final, binding and enforceable almost around the world. Therefore investors do not have to rely on their home states to impose claims or awards.

Finally, with the creation of the Additional Facility the Centre also established an opportunity to handle cases out of the scope of the Convention. This extension of jurisdiction of ICSID by mutual agreement of the parties brought the possibility to investors to claim against non-members of the Convention without having to rely on governments. Despite the fact that the parties can submit interim measures to domestic courts, that awards can more easily be set aside by local courts or recognition and enforcement is not under an automatic regime the Additional Facility still opens a way to settle disputes without interference by states. It opens a way to avoid diplomatic protection claims or procedures and is therefore a reason for the depoliticising of conflicts.

Since the ICSID regime and BITs are in force states reduced their interference with investment disputes. Investors could protect their investments in a better and more effective way. In the history of ICSID states did not interfere within ICSID proceedings successfully nor had the chance to avoid awards. The independent ICSID tribunal found juridical decisions away from any argument by home states of investors. States and government were not so much involved in investor state relationships as in the days before ICSID.

b) FDI increase

Another major goal for ICSID and BITs was to increase foreign direct investment. The Executive Directors of the ICSID in 1965 stated that an atmosphere of mutual confidence should “*stimulate larger flow of private international capital*”.⁸⁹ Also the preamble of the Convention describes a direct connection between the “*need for international cooperation for economic development, and the role of private international investment*”.⁹⁰ Finally BITs like the Canada model BIT also state in their preambles that the “*promotion and protection of investments*” will be a “*stimulation of beneficial business activities*” and a “*promotion of sustainable investments*”.⁹¹ The intention of BITs and the ICSID is therefore clearly to promote foreign investments.

As mentioned above investors did always fear expropriation or other interventions by host states regarding the investor’s investment. Foreign investment always included the risk that host governments changed investment policies which could made the investment worthless and the investors did not have enough possibilities to claim compensation under domestic law.

With the established ICSID system in connection with the ratification of BITs investors’ worries were heard and became a forum. Rules on investment protection under customary international law seemed to become unclear in the post-colonial era as a result of the effort of new independent countries to get control over foreign investments, e.g. to control their natural resources.⁹² The system of new norms within the developing world became contrary to the system of norms which developed countries preferred. The new development of BITs gave the

⁸⁹ Supra note 11.

⁹⁰ Supra note 12.

⁹¹ Supra note 38.

⁹² The International Law of Foreign Investments, M. Sornarajah, 2nd Ed., 2004, p. 212.

parties, capital importing and exporting countries, the chance to define norms that would apply to foreign investments.⁹³

Host states granted investors within BITs various rights regarding their investments. On the one hand states committed themselves to respect rights which were already incorporated into customary international law, e.g. to grant adequate compensation in case of expropriation. Even if this principle was challenged by capital importing countries most states recognized and followed this principle. On the other hand states additionally granted further rights to investors which went much further than under public international law. Free transfer of funds related to investments or the national and most-favoured-nation principle are only two examples of investor rights under BITs which go further than customary international law. These principles were demanded by capital exporting countries but were not uniformly recognized by states. Exceptions and different opinions about the application of most of the BIT protection provisions under customary international law were the result.

At the end of the day, states granted investors various rights within BITs that gave investors a much better position to protect their investments. States also agreed to state-investor arbitration within BITs which can be regarded as giving up parts of their sovereignty, the right of the host state to settle investment disputes finally within the national courts of the host country.

All this can be regarded as a huge achievement for the investor. But did this also increase the inflow of foreign direct investments within the states which agreed to ICSID and BITs? So far, it is not ascertainable that a direct connection between BITs or ICSID and foreign direct investments exists. An increase in the attractiveness to foreign investors is not discernible. For example Japan as the second largest capital exporting

⁹³ Supra note 92, p. 213.

country has only signed 12 BITs⁹⁴; the latest eight treaties within the last 8 years. China as one country of the largest capital inflow has no BIT with the USA as one of the biggest investors within China. Furthermore Brazil one of the biggest capital importers worldwide signed 14 BITs but has not ratified a single one yet because of political reasons.⁹⁵ On the other hand countries which signed and ratified many BITs especially in Africa did not score a success with FDIs. They did not record a significant increase of investments.

The final assumption of this is either there are different ways to protect investments (e.g. government guarantees) or the protection of investments is only one of many issues in the mind of investors. Other factors like the magnitude of the market, skilled labour, infrastructure or political stability are much more important than only the protection of an investment.⁹⁶ All the factors have to come together and to mount up to an interesting mix for investors. Investment protection with BITs and ICSID can therefore only be one part for the increase of foreign direct investment. BITs have no significant independent impact in determining foreign direct investment flows.⁹⁷ In the future it is possible that BIT protection becomes more important if investors discover the outcome of the ICSID arbitration cases, the awarded obligations and the guaranteed protection under these treaties. But today only the reference to BITs or ICSID is no forceful argument to increase foreign direct investments.

⁹⁴ Statistic UNCTAD 2006, at

<http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>.

⁹⁵ The Entry into Force of Bilateral Investment Treaties (BITs), UNCTAD, IIA Monitor No. 3(2006), p. 3, at

<http://www.unctad.org/Templates/Download.asp?docid=7579&lang=1&intItemID=3766>.

⁹⁶ Bilaterale Investitionsabkommen (BITs) der Bundesrepublik Deutschland, J. Ceysens, N. Sekler, Universität Potsdam, 2005, p.53, at

<http://opus.kobv.de/ubp/volltexte/2005/612/pdf/BITSSStudie.pdf>.

⁹⁷ UNCTAD (2003b): World Investment Report 2003, FDI Policies for Development: National and International Perspectives, p. 89, at http://www.unctad.org/en/docs/wir2003light_en.pdf.

2. Advantages or Disadvantages for the Parties

As one can see, ICSID and BITs measured up partly to their goals. Regarding this result the question whether or not ICSID and BITs brought advantages/disadvantages for the parties should be asked. Does treaty signing or ICSID membership give developing countries a better opportunity for growth? Are BITs a tool for capital exporting countries to extend control over assets or natural resources of capital importing countries?

a) General Advantages

There is no straightforward answer to whether or not ICSID and BITs brought advantages or disadvantages. It can be stated that BITs have the advantage of allowing states the freedom of choosing their partners to enter into business relations and treaties. As mentioned above under ICSID and under BITs precondition to an agreement and to arbitration is always the consent of the parties, either in general (treaty) or in connection with a specific conflict. The direct negotiations between the contracting parties allow developing tailor made agreements which are matching exactly to the specific situation of the two parties. BITs offer states the flexibility to design their networks of international agreements, conclude treaties with key investors, grant advantages to nationals of countries which have important influence in the economic situation of the host country, and avoid concluding treaties with less important countries or states which may insist on unwanted provisions.⁹⁸

One example of this could be Botswana. Botswana has been an ICSID member country since 1970. During the last 10 years Botswana negotiated and signed a few BITs with capital exporting countries. So far only one treaty is ratified. The Switzerland-Botswana BIT is the only treaty

⁹⁸ Supra note 97, p. 93.

in force since the year 2000.⁹⁹ All other BITs are not in force yet. Why did Botswana ratify this particular treaty? Well, this was a decision of politicians and if one takes a closer look to the economic situation of Botswana an interesting picture arises.

Botswana is one of the biggest diamond producers in the world. The country works together with the De Beers Group, the world's largest miner and vendor company for diamonds. The De Beers Group is owned by the DB Investments of Luxembourg.¹⁰⁰ DB Investments again owns the De Beers Centenary AG which is located in Switzerland.¹⁰¹ The government of Botswana and the De Beers Centenary AG together mine diamonds within Botswana and have equal shares in the Botswana diamond mining company Debswana.

Today, Debswana is one of the most important companies in Botswana. Not only that the company employs many people and therefore is an important economic factor, no, the company also contributes a big amount of the annual income of foreign money into Botswana's budget. The export of diamonds accounts for approximately 75% of total foreign exchange earnings and creates 33% of the GDP of Botswana.¹⁰² The diamond industry is the most important one in Botswana and the basis for economic growth.

Therefore one could say Botswana did want to strengthen their network with the most important business partner for the country, the key investor. The new BIT with Switzerland includes the usual investment protection rights and gives therefore favours to the Swiss De Beers Centenary AG. The investor is protected against renegotiations of concessions or changes in the mining policies of Botswana. De Beers Centenary AG does not have to agree to any changes because the BIT with its above

⁹⁹ UNCTAD statistic 2006, at

<http://www.unctad.org/Templates/Download.asp?docid=7579&lang=1&intItemID=3766>.

¹⁰⁰ http://www.mine.mn/Placer_Stockfile_De_Beers.htm.

¹⁰¹ Supra note 100.

¹⁰² Government Botswana, at

http://www.gov.bw/index.php?option=com_content&task=view&id=62&Itemid=81.

described obligations protects the investor's engagements within Botswana.

On the other hand one could also conjecture that Switzerland wanted to protect its national investor with the new BIT as an additional protection to all other contractual agreements. The new BIT came just before an extension of the mining concession, extended in 2006 until the year 2029, was concluded between the parties. An additional investment protection under the roof of a BIT to secure the diamond flow can not be excluded. Which reason prevailed lies in the dark. The former cooperation between Botswana and De Beers was satisfactory also without a BIT. Except for problems during the start of diamond mining in the late 1960's, where the new independent and inexperienced government sold the mining concession to De Beers for about 20 million US-Dollars which reportedly returned 60 million US-Dollars profits a year and only after new diamond field discovery a renegotiation of the concession was possible¹⁰³, serious problems within the partnership between the parties did not exist. Why now of all times the parties ratified a BIT can only be answered by the governments.

b) Actual Advantages

The flexibility to choose key investors and to build networks as mentioned above looks more like the theory. In practice more external influences are interfering with treaty negotiations and have effect on the parties' decisions.

At first, there is the general need of developing countries to import capital for the development of their domestic economy. Therefore it is very dubious whether or not capital importing countries can really choose their contracting partners or if they desperately sign any offered treaty with the

¹⁰³ Joseph Stiglitz, Globalization and its Discontents, 2002, p. 39.

hope to improve the investment climate and to attract foreign direct investments. Furthermore BITs and ICSID are voluntary. Consent between the parties is the most important precondition for both regimes, as mentioned above. Neither for ICSID nor for BITs does evidence of coercion exist but because of the desperate need of investments and the unequal spread of bargaining power (mentioned below) it is just possible that the signing of BITs is made conditional on the granting of loans, trade preferences, or aid.¹⁰⁴

BITs are considered to be an improvement of market economy and a sign to respect investor's rights by capital exporting countries. The consent to ICSID and BITs is regarded as an indicator for the promotion of a steady legal framework for foreign direct investment. In the eyes of capital exporting countries the combination of trade preferences and development aid with the ratification of BITs is therefore not regarded as coercion. It is rather an expression of future reliability of the capital importing country.

Secondly, the need for foreign direct investment to improve the economy on the one hand (capital import) and the possibility to invest money and know-how abroad (capital export) on the other hand is the reason those treaty negotiations are made between unequal partners. Capital exporting countries do not need money; they are able to spend it. Of course, even capital exporting countries need new markets and ways of investing money to guarantee steady increase of economic power but capital importing countries are much more dependent on capital inflow to develop their economy and to finance social systems. The economy of capital importing countries alone is not strong enough to guarantee or increase prosperity. Therefore capital importing countries are more dependent on investment treaties and the inflow of foreign investments. This fact causes asymmetries in bargaining power and puts weaker economies at a disadvantage in BIT negotiations.¹⁰⁵

¹⁰⁴ Supra note 92, p. 208.

¹⁰⁵ Supra note 97, p. 93.

Result - of the unequal bargaining power within treaty negotiations and practical no flexibility of choosing key investors - are BITs which grant more advantages to investors and capital exporting countries and including important concessions by the host countries. The flexibility to choose key investors could not be observed. The other side of the flexibility to design networks and treaty obligations is that capital importing countries enter into BITs with a broader scope because the other party has more bargaining power.¹⁰⁶ Host countries may promise wider investment protection than they would do under equal bargaining preconditions. The designers of BITs are capital exporting countries. They dominate negotiations either with their economic power and the expected capital flow or with other economic measures as better market access or granting of loans for the other contracting party.

So far, it can be stated that obligations in BITs are much in favour of investors and capital exporting countries. The described protection obligations, like no expropriation without compensation, the most-favoured-nation provision, full protection and security, or the free transfer of funds related to investments and the ceded sovereignty by the host state regarding investment dispute settlement, the isolation of dispute settlement from local laws and courts, shift all advantages of BITs to the investor's side. The described decisions under BIT rights above are very wide and awarded huge investor protection. BIT obligations go beyond former investment protection. The treaty agreement implements stronger protection for investors and prevents the refusal of treaty obligations by host countries. The host state on the other hand gets only the hope of an increase in investments but no BITs include for example the duty of investments. There is no obligation on capital exporting countries to ensure the flow of foreign direct investments.

Foreign investors get a reliable system of protection. This avoids arguments in case of a dispute whether a right of investors is protected or not. Without BITs states could always deny their duty to grant full

¹⁰⁶ Supra note 97, p. 93.

protection and security for example because rights under customary international law are controversially discussed and not always clear. But under a BIT rights such as full protection and security become an enforceable reality.¹⁰⁷ The described rights within BITs are treaty obligations which are much more easily enforceable than rights under public international law. The treaty obligation is like a *lex specialis* between the parties which determines the duties within the parties' relationship.¹⁰⁸ This is the reason why BITs have been very successful within the last 15 years and why capital exporting countries try to develop a close web of investment treaties. The distinctive investment protection within various investment scenarios under BITs protects investors and is therefore an advantage for investors. Only when capital importing countries become capital exporting countries they will enjoy the reciprocity of BIT and their investors will be protected as well.

But even if almost all advantages of BITs are on the side of investors or capital exporting countries also host states can have advantages under these treaties.

First, they establish a reliable system of investor protection with a solution for dispute settlement. Especially countries with a record of nationalisation, e.g. former socialist countries, or countries with unreliable political regimes in the past can show their efforts to establish a reliable framework for foreign direct investments. And indeed, investors appear to regard investment treaties as part of a good investment framework.¹⁰⁹ These treaties are one part of a strategy to improve the investment climate.

Second, within a legal framework for investments host states have the certainty of what they are allowed to do and what not. Unexpected diplomatic interference by foreign governments is reduced and political pressure by other states can be evaded by reference to the treaty or to the dispute settlement under ICSID. Countries with weaker economies would

¹⁰⁷ ICSID case AAPL v. Sri Lanka, supra note 37.

¹⁰⁸ Supra note 92, p.206.

¹⁰⁹ Supra note 97, p. 91.

have much more problems to enforce their rights and opinions in a direct confrontation with an economical strong country. Therefore a reliable framework can also be an advantage for host countries because it reduces obstacles and promotes a clear treatment or procedure in case of disputes.

c) ICSID and BIT more Disadvantages?

The agreement to settle investment dispute under the regime of ICSID and the granting of concessions under BITs could be regarded more as a disadvantage for capital importing countries. BITs especially express in their wording the goal of the parties to intensify the economic cooperation to increase prosperity in both states. Usually BITs are designed for a two way flow of investments. Protection provisions under BITs are granted to any investor either contract parties. BITs engender the picture of mutual advantages in any direction but as mentioned BITs usually work only in one direction. In reality the flow of capital, when it really occurred, goes only in one direction, from the capital exporter to the capital importer, and therefore only one contracting party will have more advantages arising out of the treaty because advantages or protections are only granted for investors. Capital importers make a profit from BITs mostly beside the treaty; they can promote the positive investment climate in their countries.

This unequal spread of rights out of investment treaties could be regarded as a disadvantage for capital importing countries. These countries bound themselves to restrictive treaties with broad obligations. Usually BITs do not include exceptions in case of national emergencies. Host countries lose their sovereign rights to change investment policies because of investment protection in a BIT. Of course, governments could still change laws and policies but they have always to consider that these changes could be regarded e.g. as expropriation or nationalization under a BIT and therefore they had to pay compensation under the agreed treaty.

The problem of restrictive treaties occurred in the case of Argentina during its financial crisis of 2001. In 1999 Argentina's economy entered into recession; the GDP dropped by 4% and no new impulses for growing in the country were recognised by investors. The result of this trend was that investors quickly lost confidence in the economy of Argentina and withdrew their money. During the crisis Argentina was faced by a huge flight of capital from investors which increased the economic crisis as well. The money withdrawal devaluated the Argentine currency. The Argentine government tried to stop the flight of capital and decrease of the economy by imposing control measures and emergency laws for money transfer and exchange rates. These measures had direct effect on foreign direct investments.

For example in the *CMS v. Argentina* case, Argentina tried to change contractual arrangements with foreign investors to reduce effects of the financial crisis for the state. Some investors disagreed with the measures and refused to recognise the later changes by the government about contractual conditions. The investor CMS suffered losses from imposed emergency laws by Argentina and submitted its claim to ICSID under the USA-Argentina BIT. In the end the tribunal held Argentina liable for breach of the fair and equitable treatment under the USA-Argentina BIT because of interference in the required stability and predictability of business environment.¹¹⁰ Any exceptions under the rule of "state of necessity", exceptions because of the especially deep economic crisis and the situation of government finances, were denied. Elements of "necessity" were partially present but were not cumulatively satisfied.¹¹¹

The Argentina crisis in connection with ICSID and BITs shows that rights of investors are well protected and even within special circumstances as in the case of Argentina exceptions from the treaty obligations are hardly possible. BITs so far did not show enough flexibility in case of a country's

¹¹⁰ Supra note 44, p. 82.

¹¹¹ Supra note 44, p. 96.

emergency. Today, Argentina faces the biggest amount of ICSID arbitration cases, 42 claims against Argentina, mostly arose out of its financial crisis.¹¹² Compared to the total number of ICSID case with a little bit more than 200 one can see how much pressure rests with the Argentine government. Almost all arbitration cases arose out of or were based on BITs.

But on the other hand BITs and ICSID can also be a powerful tool for defence against unreasonable investor claims. It is clear that the home countries of investors support claims of their nationals to prevent its investors incurring losses. With the depoliticized ICSID arbitration regime and defined host state obligations the capital importing countries can defend themselves effectively against unfounded or excessive investor claims without political interference of the investor's home country. It is no rarity that host states can fend off claims of investors under ICSID. For example, Paraguay defeated ICSID claims out of a local financial institution bankruptcy by demonstrating that its supervision did not breach required standards.¹¹³

Furthermore, in another ICSID tribunal decision from 2006 Argentina partly defeated a claim of investors with its "necessity of state" defence; the tribunal exempted Argentina from the payment of compensation for losses within a specific time period during its financial crisis.¹¹⁴ This decision contradicts the described CMS decision above but shows that argument and the facts of every single case are the basis for any independent judgement of ICSID. It is not inconceivable that Argentina would have worse chances to win cases like this without the independent ICSID tribunals which protect it from political interference of strong economical countries.

¹¹² UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 4 (2006), Annex 1.

¹¹³ Eudoro A. Olguín v. Republic of Paraguay, ICSID case No. ARB/98/5, Award 2001, at <http://www.worldbank.org/icsid/cases/Olgun-award-en.pdf>.

¹¹⁴ LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID case No. ARB/02/1, Award 2006, at http://www.worldbank.org/icsid/cases/pdf/ARB021_LGE-Decision-on-Liability-en.pdf.

Finally, the amount of money awarded to claimants differs greatly from the claimed amount of money. In terms of damages and litigation the losing party faces huge amount of payment. Usually investors claim extraordinary amounts of money from host states. The latest interesting claims are against the Russian Federation under the Energy Charter Treaty. A series of three arbitrations in connection with the Yukos Corporation bankruptcy involved payment claims of the amount of 33 billion US-Dollars.¹¹⁵ Claims involving huge amounts of money are an enormous risk for the stability of capital importing states in the case they cannot defeat these claims.

Payments of these magnitudes can easily be the reason for budget deficits of governments and have a serious impact on the countries' financial flexibility or stability.

But so far it can be stated, that ICSID tribunal are very careful with their decisions about damages. Very often states have only to pay a small amount of the original claim. The awarded amount of money within the last 21 disputes which were decided by ICSID in 2006, either rejecting the claim or awarding damages, amounted to 241 million US-Dollars out of a total amount of 1.63 billion US-Dollars claimed by investors; this is more or less only 15% of the claimed amount of money.¹¹⁶

Result of these facts is that BITs and ICSID are not a disadvantage for capital importing country. These systems are rather a challenge for those countries. BITs and ICSID create the base for future economic cooperation. Only BITs and ICSID did make it not easier for host countries to attract investments; but these tools can be one stone in a combination of investment preconditions to increase FDI. Furthermore BITs are the reason for more administrative work for the host country, but once new laws are in place and BIT provision are recognised within the administrative bodies of the government investment climate improves dramatically.

¹¹⁵ UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 4 (2005), p. 6.

¹¹⁶ Supra note 112, p. 6.

Another point is the marginal participation of capital importing countries from treaty based investor protections. BITs and ICSID develop their full potential only if capital importing countries become capital exporters. The investor protection has reciprocal effect and protects any investment either from capital exporting countries or mostly capital importing states.

Therefore as soon as capital importers become more capital exporters the advantages of BITs will be noticeable. Furthermore from the date of the ratification of the treaty all investments from mostly capital importing countries are protected as well.

The vulnerability of capital importing countries is only based on their small negotiation power during the negotiation process, limited technical capacity to handle disputes, potential high procedure cost and juridical know-how. Support seems to be required to enable these states to manage effectively investment disputes and to incorporate treaty obligations into their domestic law to avoid disputes.

ICSID and BITs create a framework for investment protection and dispute settlement. This framework does not force countries to admit FDI. ICSID and BITs cover only the post-establishment stage of investments. Admission and establishment of investments at all are still in the hand of the host country. The host country can determine autonomously the admission and the establishment of investments. Therefore concessions for mining of natural resources or acceptance of a tender for development projects are in the power of decision of the host country.

This is the reason why BITs cannot be regarded as a new colonialism of the capital exporting countries. Investment treaties do not give access for example to natural resources of a country. The power of the host states to determine admission rules for investments and grant concessions gives access to these resources. If pre-investment decisions are based on wrong facts, or the lack of knowledge about world market situations like in the mentioned Botswana case in the early stages of independence, then BITs and ICSID codify investment conditions which are unfavourable for

the host country. Reason for the unfavourable conditions is not the BIT it is the wrong decision by the government regarding the concession. One cannot blame BITs or ICSID arbitrations for a bad economic development or unfair investment protection. BITs and ICSID influence investments only a second level, only pre-establishment.

Usually BITs want to codify the legal framework for the treatment of investments and not for establishing investments. Once a state did admit an investment under specific conditions then the government should be bound on this decision. Ordinary interference by governments is not welcome within the world of business. BIT and ICSID arbitration are not a disadvantage for capital importing countries. It is a balanced mixture of right and duties and gives advantages to all parties. Most advantages of BITs and ICSID lie in the hands of investors wherever they come from and not in the hand of states.. A steady legal framework for foreign direct investments through BITs and ICSID supports also capital importing countries.

d) Improvement and Support

BITs contain obligations which, by their very nature, limit the autonomy of the contracting parties. To reach the goal of BITs, create prosperity, a need for a certain degree of flexibility with investment treaties seems to be necessary. Especially developing countries should be able to react flexibly to their specific needs for development. This does not mean, that developing countries should get the possibility either to withdraw licences or to nationalise foreign assets whenever they like. Providing a stable, predictable and transparent environment for foreign investment means to meet commitments and to avoid political interference. But it also means to have the ability to interfere in the case of a national emergency to protect the country and avoid political instability caused for example by riots because of an unacceptable economic and social reality.

It is recognized, that economies of developing countries are not strong and huge fluctuations or even destruction of these economies is possible because they are not resistant against changes within the investment climate. Small changes on the world market or political uncertainty can have huge and negative effects on these economies. Therefore investment treaties should include opening clauses in case of e.g. national emergencies of a host country. Host countries, especially developing countries, need to retain sufficient policy space to react on critical economy situations, without undermining the BIT. The Argentina case is a great advert for the need for flexibility. Unfortunately, not many BITs offer opening clauses or recognize national emergency situations. But as one could see in the *LG&E v Argentina* case an ICSID tribunal recognized the emergency situation of the country and the imposed emergency measures were admissible.

Furthermore BITs also need more flexibility, without undermining their effectiveness, regarding new imposed state policies as e.g. environmental measures. A host state can be limited in its autonomy regarding introducing progressively environmental measure because this could harm or damage investments. The planned environmental measure on the other hand can be helpful to protect national animal and plant life or could increase the environmental standard of a country.

At the end of the day a country could be obstructed from introducing progressive measures, to support renewable energy producers by obliging normal energy producers, only because it faced damage claims by investors out of a BIT. So far, there is no opening clause for environmental measures or other measures. Only clauses which forbid the decrease for example of environmental standards (Canada model BIT) to promote investments are included in BITs.¹¹⁷ It will be the task for treaty drafters to include opening clauses or flexible clauses into new model BITs.

¹¹⁷ Supra note 38, Article 11.

Additionally to the improvement of BITs host countries, especially developing countries, have integrated BIT provisions into their domestic economic development policies and into their domestic law. Investment host countries have to establish policies in coherence with the number of interacting BITs they have signed. They should bring domestic laws and practises in conformity with treaty commitments and informing and training local officials to apply BIT obligations.

New BITs should be negotiated and reviewed carefully to ensure that they match with development strategies and the domestic law or policies. Too extensive treaty obligations which can harm domestic industries, like immediate and complete market liberalization, should be converted into more progressive obligations, e.g. progressive market liberalization.

Therefore developing countries need the capacity to analyse treaties, to understand the interaction between treaties (MFN clause) and the understanding of the other contracting party that more balanced investment treaties increase economic development, prosperity and stability for all parties of a BIT.

Finally, developing countries should be still supported by the World Bank to get legal training and financial or legal assistance regarding ICSID arbitration proceedings. It is a fact, that ICSID arbitration proceedings need experienced legal advisers as well as the financial ability to finally carry out the proceedings. The complexity of BITs, their protection obligations and the increasing number of ICSID arbitrations which represents the development of legal opinions within interpretation and application of BIT obligations is the reason for the need of permanent observation of the juridical development. This is only possible with enough financial background and legal experience which usually only developed countries can afford. Developing countries therefore need support from outside to negotiate in ICSID proceedings eye to eye to transnational and financially strong companies.

E) Conclusion

After reviewing duties and rights under BITs in connection with the dispute resolution regime under ICSID it can be stated that ICSID and BITs are the future for foreign direct investments and their dispute settlement. The explosion of BITs and ICSID procedures shows the importance of these vehicles within the business world. Various rights are granted in BITs. Investor protection is more successful with BITs because the granted rights are enforceable under the treaty. Host states cannot refuse recognition of investor rights, as it is possible under customary international law, when these states did agree to the BIT. The treaties establish a mutual agreement between the parties about treatment of investors and foreign investments. The treaty obligation is a serious commitment for both parties which cannot be questioned as easily as customary law or sporadic statements in connection with treatment of investments.

The legal protection of the granted rights and their enforcement is guaranteed by a neutral forum without influence by politicians. ICSID arbitration so far can be seen as fair, reliable and closely related to economic interest by using experienced arbitrators. Arbitration under ICSID is a success. So far every arbitration process could be brought to an end, either by mutual consent of the disputing parties or by an ICSID verdict.

Even when BITs have been rather a protection than a promotion for foreign direct investments so far, the potential of these treaties in connection with the ICSID arbitration regime is enormous. BITs force host countries to create stable and reliable conditions for any kind of investments. The arbitration clauses in investment treaties guarantee a depoliticised and fair treatment of investment disputes and a legal control of state measures by a neutral and highly qualified ICSID tribunal. The application of BITs and ICSID is an advantage for all contracting parties. BIT and ICSID arbitration established a new legal framework for foreign

investments and their dispute resolution. Enforcement of investor protection is not longer dependent on the support of sovereign states, neither the host nor the home country of the investor.

Finally, capital importing countries as the weaker contracting parties do not face unfair treatment or disadvantages out of BITs and ICSID arbitrations. Protected are investors wherever they come from. Host states have still the power to admit investments and to negotiate investment condition. Only if host countries did agree to investments they are bound to their commitments under BITs and ICSID. This promotes a steady and sustainable framework for foreign direct investments.

ICSID arbitration will be the dominant vehicle for resolving investor-state investment disputes. It will become much more important when more parties become aware of the opportunities of a neutral dispute settlement venue and the outcome of the ICSID arbitration proceedings.

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