JURISDICTIONAL ISSUES RELATING TO INTERNATIONAL INVESTMENT- SPECIAL REFERENCE TO ICSID

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ABSTRACT

Foreign investment is a primary part of global economy.[1] In developing countries, major infrastructure projects and the exploitation of natural resources often require financing by and technical know-how from private foreign investors.[2] In developed countries also a huge portion of GDP comes from foreign investments.

Investment arbitration, nowadays, has become one of the primary elements of present-day legal practice for arbitrators, government officials and counsel.[3] This has also lead to the establishment of institutions like The International Centre for the Settlement of Investment disputes (ICSID) because of increasing requirement of arbitration institutes.

Jurisdiction is the most primary issue in arbitration. Initial jurisdictional issue takes years to be solved. The paper discussed about various issues which is important for validating or refusing jurisdiction of ICSID. The paper also briefly analyses the issue of requirement of consent to bind the state parties to adhere to ICSID jurisdiction and how it is different from "compulsory jurisdiction of International Court of Justice. The Paper also mentions the issue of nationality, both natural and corporate which is one of the most disputed aspect in case of jurisdiction.

KEYWORDS: Foreign Investment, Jurisdiction, Arbitration , ICSID

INTRODUCTION

[1] Ignacio D'Alessio, "ICSID Jurisdictional Issues: Problems, Solutions and Recommendations for a Better Understanding in International Commercial Relations" (2008) International Investment Arbitration, Economic Development <http://ssrn.com/abstract=1153988> Accessed on 15 December 2014
[2] Ibid
[3] Francisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014

Foreign investment is a primary part of global economy.[4] In developing countries, major infrastructure projects and the exploitation of natural resources often require financing by and technical know-how from private foreign investors.[5] In developed countries also a huge portion of GDP comes from foreign investments.

Investment arbitration, nowadays, has become one of the primary elements of present-day legal practice for arbitrators, government officials and counsel.[6] This has also lead to the establishment of institutions like The International Centre for the Settlement of Investment disputes (ICSID) because of increasing requirement of arbitration institutes, like the LCIA[7], the ICC[8] and the Stockholm Center for the settlement of investment related disputes. Similarly, there is a growing requirement of arbitral regimes like UNICITRAL rules.[9]

The International Centre for the Settlement of Investment disputes (ICSID) is one of the most efficient mechanisms for the resolution of disputes arising out of international investments, between a state and foreign investor under the Convention for the Settlement of Investment Disputes between States and Foreign Investor.[10]

Though development happened gradually since the initial years of its existence but it became popular in 90's and eventually became one of the pivotal Alternative Dispute Resolution Mechanism favoured by investors around the world.[11]

ICSID flourished in recent times due to various reasons. Two most important reasons are :

- The effectiveness, tidiness, high moral levels and efficacy with which ICSID's administrative staff and arbitrators have worked so far (that resulting in trust, the key factor in business and investment matters).[12]

- Increase of Bilateral Investment Treaties (hereinafter referred to as "BITs") which choose ICSID as the "chosen forum",[13]

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[4] Ignacio D'Alessio, "ICSID Jurisdictional Issues: Problems, Solutions and Recommendations for a Better Understanding in International Commercial Relations" (2008) International Investment Arbitration, Economic Development <http://ssrn.com/abstract=1153988> Accessed on 15 December 2014

[5] Ibid

[6] Francisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014

[7] Ibid

[8] *Ibid*

[9] Ibid Many a time, developing countries are only parties to the Multinational Treaties which governs investments, partly or fully, for instance, MERCOSUR Protocols1, the ASEAN Investment Agreement 21 or some Free Trade Agreements. see MERCOSUR, 1994 Colonia and Buenos Aires Investment Protocols. See Also ASEAN Agreement for the Promotion and Protection of Investments, 1988.

[10] Ignacio D'Alessio, "ICSID Jurisdictional Issues: Problems, Solutions and Recommendations for a Better Understanding in International Commercial Relations" (2008) International Investment Arbitration, Economic Development <http://ssrn.com/abstract=1153988> Accessed on 15 December 2014

[11] Ibid

[12] *Ibid*

[13] ibid

The huge amount of money related cases dealt by ICSED and their intriguing judgments speaks about the success of the efficacy of the mechanism. Some of the cases dealt with matters that they were truly to jeopardize some developing countries' budgets.[14]

Jurisdiction is the most primary issue in arbitration. Initial jurisdictional issue takes years to be solved. In the case of *Pacific Rim v El Salvador* (ICSID Case No. ARB/09/12) is a recent decision by the International Centre for Settlement of Investment Disputes (ICSID). The arbitration was brought under the Dominican Republic — Central America — United States Free Trade Agreement (CAFA) and Investment Law of El Salvador. . Its decision on jurisdiction is hundreds of pages long, broken up into seven sub-parts, each individually and separately numbered. The jurisdictional decision comes after several days of hearings just on the jurisdictional issues held in 2011.[15] The paper speaks in details various intricacies of jurisdictional aspect of ICSID disputes

METHODOLOGY:

The researcher is opting for a descriptive and qualitative research methodology. This study is doctrinal in nature. As secondary source books, articles, and working party reports on this said topic have been referred. The material from decided cases of courts of different Sates, International Court of Justice and ICSID has been referred to.

OBSERVATIONS

Article 36(2) of the International Court of Justice Statute speaks of "compulsory jurisdiction" of the International Court of Justice but there is a requirement of consent of the state parties as they may agree to it or may not agree.[16] In many a cases like Nacaragua Case, states can refuse to consent to the jurisdiction of the International Court of Justice. When the parties give their consent then the decision of the Court is binding to them only in relevant case and between those parties. It does not have any binding jurisdiction on the parties in any subsequent cases. So we can say that "compulsory jurisdiction" is not truly compulsory.[17]

Article 25 of ICSID essentially deals with jurisdiction that the parties have consented to while they were contracting with each other, that is the jurisdiction by the consent of the parties.

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[14] ibid

[15] Louis M. Solomon, ICSID Arbitration Ruling Decides Initial Jurisdictional Issues (Cadwalader International Practice Law Blog 8 June 2012) http://blog.internationalpractice.org/international-practice/icsid-arbitration-ruling-decides-initial-jurisdictional-issues.html accessed on 15 December 2014

[16] Article 36(2) of the International Court of Justice Statute states that,

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

[17] www.icj-cij.org/documents/index.php% ,last visited on 16th December 2014

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Article 25 of ICSID Convention similar to Article 36(2)[18] provides for consent of parties and the consent to be submitted in writing. The *Report of the Executive Directors of the World Bank on the ICSID Convention* states that consent is "the cornerstone of the jurisdiction of the Centre"[19]. The jurisdiction is dependent upon ICSID Convention and the expressed consent of the parties.[20]

Similar to ICJ jurisdiction, ICSID also provides for separate consent for both the parties. There is a specific need of a 'compromis' in the Bilateral Investment Treaty regarding dispute of resolution by arbitration.[21] States accepts jurisdiction only when a treaty is regarding "pactum de contrahendro" in which specific and additional "compromis" is there. As a result of BIT network which provides for overall expression of consent in writing from the States regarding disputes that might arise with foreign investors; this position is primarily changed in context of investment dispute arbitration. Consent can be at the same point of time or one party submitting consent prior to the other.[22] Advance consent for arbitration of disputes with the foreign investor is included in the investment treaty only.[23]The arbitration agreement is once complete at the moment the aggrieved investor consents to the arbitration and thereafter, submits the dispute to arbitral forum.[24]

Similar result is available when a general offer of submission of jurisdiction is made to ICSID arbitration in domestic law. In case of direct investment agreement between the State and the foreign investor; investors being not a party rather beneficiaries of rights conferred upon them directly under international law and domestic law they express their consent under separate instrument.

There is no complexity when the State consents to the jurisdiction and makes an offer to the investor.[25] Recently, there was difficulty regarding the reasoning delivered by the tribunal when question arise regarding change of nationality particularly when it was a consent from a foreign national investor when he made the investment at the time he was a national of the host State against whom the dispute is going on.[26] ICSID tribunals have on such instances shown concern about such a matter by not accepting the modalities that are far more remote than the purview of a proper consent.

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[18] Article 25(1) of the International Center for Settlement of Disputers states that,
"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."

[19] *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, Preliminary Objections, 1998 ICJ REP. 275 (June 11) [45]

[20] International Bank for Reconstruction and Development, *Report of the Nationals Executive Directors on the Convention on the Settlement of Investment Disputes between States and of Other States* (IBRD, 18 March 1965), para.2

[21] Such a practice was followed till early 20th Century as an international custom.

[22] *Ibid*, Report of the Executive Directors, para. 24

[23] Christoph H. Schreuer,, *The ICSID Convention A commentary*, (2nd edn, Cambridge University Press, 2009) paras 24, 35, 256, 319

[24] Aron Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1972) 136 RECUEIL DES COURS 331, 361

[25] Report Prepared for the Centennial of the First International Peace Conference, Frits Kalshoven: The Centennial of the First International Peace Conference, Francisco Orrego Vicuña and Christopher Pinto, "Peaceful Settlement of Disputes, Prospects for the 21st Century", Reports and Conclusions, 2000, 261, 418

[26] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (Jurisdiction), ICSID Case No. ARB/05/15

In the case of *Cable TV* v. *St. Kitts and Nevis*, the tribunal ruled that references to an ICSID clause in domestic proceedings did not amount to consent to arbitration.[27] Tribunals are generally strict while it comes to allowing a host State who has expressed in writing to avoid any obligation with respect to foreign investors. In *CSOB* v. *Slovakia*, Tribunal held that it has jurisdiction when an ICSID clause is included in Bilateral Treaty entered into by the parties in a direct investment but it has not yet come into force.[28] The Tribunal also held that when an treaty provides that the dispute would be submitted to the Center it does not mean that an additional agreement is needed to make the State's consent valid. The parties need not make the submissions jointly.[29] Hence the tribunal rules out the "pactum de contrahendo" approach and observed that "Arbitration without privity" rule is valid not only for BITs but also for multinational treaties.[30]

The jurisdiction of ICSID arbitration tribunals depends on the terms agreed upon by the parties.[31] This depends on the consent submitted and terms and conditions of the treaties agreed upon by the parties of the arbitration.[32] As a result of "advance consent" or "general offer" or "standing invitation"[33], by the states, investors only need to initiate the arbitration proceedings by providing their consent. As Geneviève Burdeau explains, States that have included ICSID clauses in investment treaties are in a very particular situation: private foreign investors can bring them before ICSID by filing a unilateral complaint before an ICSID tribunal in relation to all sorts of disputes that those States have not anticipated in advance.[34]Unpredictability and vulnerability of ICJ jurisdiction is also seen in ICSID jurisdiction. So Respondents mostly complain that they are "sitting ducks"[35]

Although Article 25 provided restriction on unilateral withdrawing of consent, it cannot be said to be compulsory in nature. Once consent is granted then it is decision of ICSID tribunal is final on the parties who has made themselves binding by submitting written consent.[36] Hence, the principle the ides of flexible compulsory jurisdiction common to ICJ is also applicable to ICSID.[37]

According to Article 27(2) of the ICSID convention diplomatic exchanges which are directly related to help dispute settlement are generally not considered as diplomatic protection. Incase where ad- hoc arbitration is required then the proceedings initiated by private investor is put to hold till that arbitration resolves. Diplomatic exchanges take place more often so it is a scope for defendant states to avoid obligation towards foreign investors by taking a defense of existing inter- state dispute. Such a practice would result in a complex and lengthy ICSID jurisdiction;

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[27] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4
[28] *Cable TV* v. *St. Kitts and Nevis*, (ICSID Case No. ARB/95/2)
[29] J. Paulsson: "Arbitration without Privity", [1995] 10 Foreign Investment Law Journal, 232.
[30] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: *Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru*)
[31] Geneviève Burdeau, Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les Etats, 1 Revue de l'arbitrage (1995), 3, 15 (referring to the consent granted by States in investment treaties as "une offre générale, permanente et non-individualisée" ("a general, permanent and non-individualized offer")).
[32] *Ibid*
[33] Francisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014
[34] *Ibid*
[35] www.icsid.worldbank.org/ -,last visited on 19th December 2014
[36] *Ibid*
[37] *Ibid*

hence affecting foreign investors. In addition to it, the class of dispute is very different when it comes to investor's right in a BIT rather than a dispute between parties in which inter- state procedure is applicable. Therefore, in practice stay on such ground is not acceptable by tribunals.[38] Such situations are explained in Article 64 of the Convention and its negotiation history.[39]

A new development was followed in a few decisions on the issue of jurisdiction in disputes of investment.[40] Most favored nation clause, provided in Article 1 of WTO agreement, plays a pivotal role when it comes to protection of foreign investors in treaties regarding commerce and navigation. This development is uninterrupted for protection of foreign investor rights in the modern system. In the case of *Siemens AG v. Argentine Republic (Jurisdiction)*[41] the clause was applied and decided on the jurisdiction issue.[42] This clause is not applicable in highly institutionalized dispute settlement arrangements where procedural aspects have been built as an essential requirement of jurisdiction and admissibility or in other situations where the parties have specifically agreed to more limited arrangements.[43] The wording of the treaty was also crucial as it applied the clause to all matters under that treaty.

While some decisions have relied on the concept,[44] but in a few cases application of the clause in case procedural question has not been accepted.[45] This concept has been taken up by various recent treaties.[46] The parties in case of such arrangements are at their liberty to restrict the application and scope of the clause in a few specific matters. In case there is some contrary intent the clause is useful in harmonizing treatment of investors of other nations and avoiding discrimination among them.[47]

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[38] In *Ambiatelos Case* (United Nations, Reports of International Arbitral Awards, 1963, p. 107), the defendant State came up with a different view regarding registration in ICSID of an investor's request for proceeding in arbitration under a BIT because there had been diplomatic demarches by the State of the investor's nationality in support of the investor's right to take the dispute to arbitration. The Defendant State argued a State to state dispute has to be settled by an ad- hoc arbitration which is provided in case of dispute between states in case of investment disputes. The tribunal in the case refused to grant a stay of the proceeding while inter-State arbitration was resorted to by the defendant State, an initiative that ultimately did not materialize.

[39] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No.ARB/97/7

[40] *Siemens AG v. Argentine Republic (Jurisdiction)*, ICSID Case No. ARB/02/8

[41] ICSID Case No. ARB/02/8, 2004;

[42] In the case of *Siemens AG v. Argentine Republic (Jurisdiction)* an Argentine investor proceeding against Spain applied directly to the Centre not taking his claim first to Spanish courts, which had an eighteen-month period to decide the dispute as provided for in the Argentine-Spain investment treaty. The justification for this application was that under the Chile-Spain investment treaty direct recourse to the Centre was allowed, what was argued meant a more favorable treatment to Chilean investors in Spain and hence should be extended under the clause to the Argentine investor. The ICSID Tribunal, after carefully examining the treaty practice of both Argentina and Spain, concluded that the eighteen-month period did not amount to a requirement of exhaustion of local remedies, which can be made under the ICSID Convention. On that basis, it decided that the clause was applicable to this procedural question and hence affirmed jurisdiction.

[43] Francisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014

[44] *Ibid*

[45] *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan* (Jurisdiction), ICSID Case No. ARB/02/13; *Plama Consortium Ltd. v. Republic of Bulgaria* (Jurisdiction), ICSID Case No. ARB/03/24

[46] Ruth Teitelbaum: "Whose Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses",(2005) 22 Journal of International Arbitration, 228, 229

[47] *Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2

Time is one of the important aspect which is taken into account while affirming or dismissing jurisdiction in a investment arbitration. In *Tradex* v. *Albania*, for example, the tribunal rejected jurisdiction on the basis that an investment treaty had not yet entered into force.[48] In the case of *Holiday Inns* v. *Morocco*, at the time of the investment agreement containing the consent to arbitration the pertinent States had not yet ratified the ICSID Convention, but these requirements were satisfied before proceedings were actually instituted.[49] The tribunal held that it was the date when conditions were satisfied that should be deemed to constitute the date of consent and, accordingly, affirmed jurisdiction as the request for arbitration was made after this date.[50]

Mostly in BITs, where time is of the essence, allow submission to arbitral proceedings even the treaty came into force after the investment is made. Though disagreements and discussion are there between the State and the investors but the Tribunal is to decide only on the time of dispute and jurisdiction. The test was elucidated in the *Maffezini case*[51], where the tribunal held that disagreements and difference of observations might extend for a period of time, even before the entry into force of the treaty, but what matters is the moment in which there is a claim with a legal meaning in respect of rights and obligations of the parties concerning the investment.[52] In case of *Lucchetti*,[53] however, the tribunal observed that a dispute that arose between the parties before the entry into force of the Treaty concerning construction permits was the same as an expropriation dispute that arose after the Treaty had entered into force, considering that one was just the continuation of the other, thus declining jurisdiction on this understanding.[54]

State is at liberty to take up the issue of safeguard in investment disputes. The States mostly doesn't resort to safeguards available under a BIT, for instance they can exclude from investment treaties some classes of disputes of disputes, but these exclusions re much limited than they appear. According to Article 24(4) of ICSID convention a State has the power to notify the Center regarding the exclusions which neither works as consent nor it has capability to change any consent provided in the instrument. This helps the prospective foreign investors about their expectations from a dispute but mostly treaties include wider expressions of consent. When dispute arises regarding a broadly defined treaty then limited expressions of consent provided in national legislation is not relevant.

The term "Investment" is not defined in the Convention[55] and left to the consent of the parties in BITs and other agreements. Hence parties are free to define investment but it should not go against the meaning of Convention and reasonable definition of the term. Mostly there is no doubt in case of investment related disputes but in a few cases where doubts were there General Secretary of ICSID refused registration as they were beyond the jurisdiction of the Center.

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[48] *Tradex* v. *Albania*, ICSID Case No. ARB/94/2
[49] *Supra Note 43*
[50] *Holiday Inns* v. *Morocco*, Unpublished, Reported in Lalive: "The First 'World Bank' Arbitration", 1980, British Year Book of International Law, 51, 123.
[51] *Supra Note* 43
[52] *Ibid*
[53] *Supra Note* 43
[54] *Fedax* v. *Venezuela*, ICSID Case No. ARB/96/3
[55] *LETCO* v. *Liberia*, ICSID Case No. ARB/83/2

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Gradually with the development of ICSID jurisprudence clarity came regarding the term. Taxation inconsistent with mining contracts,[56] the development of a timber concession,[57]construction contracts[58] and other activities have been identified as a pertinent investment under the relevant treaties. In the case of *Mihaly* v. *Sri Lanka* it was observed that, negotiations on a construction project that had not materialized in a contract were held not to constitute an investment.[59]

In the case of *Amco* v. *Indonesia* the dispute was concerning a bank grarantee relating to the same of mining machinery.[60] The tribunal held that the contract in question and the equipment envisaged related to a purely commercial operation, just as the guarantee was a normal commercial instrument, and thus that it could not qualify as investment for the purpose of the Convention.[61]

The exhaustion of local remedies is anothe available safeguard.[62] This is a rather common feature of traditional international claims that found its way into Article 26 of the ICSID Convention.[63] As noted in the Annulment Decision in *Amco* v. *Indonesia*, this requirement must be made in an express manner and certainly before consent is perfected.[64] Also, as noted in *Maffezini*, other procedural provisions, such as a submission to local courts for a certain period of time, are not equivalent to a requirement to exhaust local remedies.[65]

Another issue which came in case of investment arbitration dispute is locus standi at the time of examining jurisdiction of the Tribunal in the case. On such an issue both interpretation of Article 25 of the Convention and interpretation of investment agreements and treaties is reqruired. Firstly, confusion arises when status of a constituent division or agency of a State are parties to the proceedings before the tribunal. Such divisions or agencies require accent of the State when the State has not notified that approval is not necessary. Mostly state deny any such approval to divisions or agencies when a foreign investor initiate a proceeding against some commission or omission of any activity by them. But when any such activity is done by divisions or agencies, being part of central government or not, which include local governments, it is the responsibility of the State. Convention gives designation to divisions or agencies only when they are approved by the State.[66] It was thus held in *Cable Television* v. *St. Kitts and Nevis*[67] that an investment agreement made with a constituent subdivision of that State that included an ICSID clause could

[56] *SOABI* v. *Senegal*, ICSID ICSID Case No. ARB/03/28
[57] *Salini* v. *Morocco*, ICSID Case No. ARB/00/4
[58] *Mihaly International Corporation* v. *Sri Lanka*, ICSID Case No. ARB/00/2
[59] *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11
[60] *Amco* v. *Indonesia*, ICSID Case No. ARB/81/1
[61] *Ibid*
[62] Francisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014
[63] *Ibid*
[64] *Lauder* v. *Czech Republic*, Final UNCITRAL Award of September 2001; *Corporation* v. *Canada*, UNICITRAL Award on Jurisdiction of June 24, 1998, [74], [88]
[65] *Supra Note 63*
[66] *Supra Note 63*
[67] *Supra Note* 63

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not determine the jurisdiction of the Centre as that entity had not been designated by the State in accordance with Article 25.[68]

When dispute is regarding a BIT or multinational treaty where State is a party and approved division or agency and also designated to participate in proceedings of ICSID, the State has the responsibility under Article 4 of Draft Articles of State Responsibility. Article 4 of the Draft Articles on State Responsibility adopted by the International Law Commission, which on this point unequivocally reflects customary international law, is very precise in establishing the responsibility of the State for acts or omissions of its organs.[69]

This question was particularly observed in the case of *Compagnie Générale des Eaux* (or *Vivendi*) v. *Argentina*, where existence of a contract of concession between an Argentine province and an foreign investor it was held the fact that, the province in question cannot escape jurisdiction of ICSID just because it had not been designated to participate in ICSID proceedings. The jurisdiction is established due to a bilateral investment treaty between Argentina and France whose provisions governed the rights and obligations of the Republic of Argentina and foreign investors in its territory.[70]

Nationality of investor is an important concept related to ICSID jurisdiction. In case of participation of natural persons as claimant in ICSID cases and when question of nationality arises then, the rules of international law are applicable, including the test of effectiveness of nationality in case of disputed facts as decided by the International Court of Justice in the *Nottebohm* case.[71] In the case of *Soufraki, Hussein Nuaman v. United Arab Emirates* concerning mostly issues of dual nationality or change of nationality. Normally, nationality is determined according to the domestic law of the land but in case of dispute Tribunal can decide upon the matter of nationality and nationality certificate of State is the *prima facie* proof of nationality.[72] In the case of *Champion Trading Co. and Ameritrade International Inc. v. Arab Republic of Egypt* it was observed by the Tribunal that when a defendant invokes one nationality and later argues having nationality of a different state, jurisdiction in such a case is rejected on the ground of dual nationality of the claimant.[73]

In the case of *MINE* v. *Guinea* there was a question of alleged change of nationality in *Siag*, where the claimant argued that because he had acquired Lebanese nationality he had lost his Egyptian nationality and having also alleged that he had acquired Italian nationality because of marriage he could claim on this basis under a Treaty between Egypt and Italy. Hence it was also argued that jurisdiction could not be excluded on the ground of dual nationality. While the Tribunal upheld jurisdiction on such argument, a separate opinion took the contrary view noting that the claimant was a national of the defendant State at the time the investment was made, continued to benefit from that nationality and the later expression of consent to arbitration by

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[68] *Supra Note* 63
[69] James Crawford, *The International Law Commission's Articles on State Responsibility Introduction, text an Commentaries*, (2002, Cambridge University Press) 94, 99.
[70] *Compañía de Aguas del Aconquija et al.* v. *Argentina*, ICSID Case No. ARB/97/3
[71] I.C.J. Reports 1955
[72] *Soufraki, Hussein Nuaman v. United Arab Emirates* (Award), ICSID Case No. ARB/02/7 [55]
[73] *Champion Trading Co. and Ameritrade International Inc. v. Arab Republic of Egypt* (Jurisdiction), ICSID Case No. ARB/02/9 [36]

such claimant could not abrogate the fact that he was a national of that State at the time the latter expressed is own consent in the treaty.[74]

There are different views regarding persons who can claim before ICSID or other arbitral mechanism due to complex structure of corporate and investment. The nature of the functions of a corporate entity, public or private, is considered when clarifications regarding jurisdiction of concerned. When there is a claim from a private entity against a state then the claim is valid but not any claim of public entity against the State.

In the case of *CSOB v. Slovakia*[75], the plaintiff who happened to be a State agency of the Czech Republic commenced an arbitral proceeding against the State of Slovakia. The respondent objected to the jurisdiction because the claimant is a state agency and cannot claim against a state. Tribunal took an interesting view in this case and upheld its jurisdiction over the case. Reasoning given by the Court behind such an opinion was that, though the claimant was owned by state was involved in banking activities which was privatized and was commercial in nature. The tribunal laid down a test where the activity performed by the entity was important to establish jurisdiction rather than control of government. The test was later applied in the case of *Maffezini, Emilio A. v. Kingdom of Spain*[76], where tribunal exercised jurisdiction looking into public nature of the activity performed by the Spanish agency.[77] In *Amco v. Indonesia* corporate nationality of the party was held to be the most important factor and the actual nationality prevailed over technical nationality.[78]Rather than a strict approach, ICSID have a flexible approach in relation to control of corporation and real interest behind the investment. Article 25(2)(b) states that:

"National of another Contracting State" means:

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

According to Article 25(2)(b) corporate entity of a state is deemed to be national of that state when it is agreed, so that it has an option to claim against the respondent host state. This situation is governed by bilateral treaties and multilateral treaties. In the case of *Amco v. Indonesia* and *Klöckner* v. *Cameroon*[79] it was held that in a few instances due to implied clause of agreement, locally incorporated companies are treated as foreign investors.[80] It should be noted that this

[74] *MINE* v. *Guinea*, ICSID Case No. ARB/84/4
[75] *CSOB* v. *Slovakia*, ICSID Case No. ARB/97/4
[76] *Maffezini, Emilio A. v. Kingdom of Spain*, ICSID Case No. ARB/97/7
[77] *Ibid*
[78] *Amco* v. *Indonesia*, ICSID Case No. ARB/81/1
[79] *Klöckner* v. *Cameroon*, ICSID Award of October 21, 1983. ICSID Case No. ARB/81/2
[80] *Ibid*

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same result can be achieved by means of the definition of investment, which if broad enough, as is usually the case, might not need an agreement on nationality or control.[81]

In the celebrated case of *Barcelona Traction, Light and Power Co. Ltd*,[82] International Court of Justice held that in limited cases only shareholders of a foreign corporate entity can be protected by the State of its nationality. This decision was considered customary international law in respect of corporate nationality and diplomatic protection.[83] This perception is changing in recent years in the context of disputes regarding investments.[84] In a later decision of *Electtronica Sicula* International court of Justice held that the shareholders of a corporation is protected by State of their nationality though the Corporation had nationality of respondent State.[85] The character of diplomatic protection behind all these decisions is showing a new dimension, as the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected.[86] This is evident when individuals have right of action in the disputes. The past characteristics tend to reappear in situations like the rule of continuous nationality in the *Loewen* case.[87]the changing view is also supported by Iran-United States Tribunal[88] and the rules and decisions of the United Nations Compensation Commission,[89]. ICSID is also following the changes as discussed earlier in the *Amco* case.

In *Tokios*, for example, while the tribunal accepted that there was no origin of capital requirement and that the fact of the claimant being a foreign corporation was enough to establish jurisdiction, a dissenting opinion emphasized that the investors were nationals of the defendant State and were only channelling domestic capital through a foreign entity, a situation which should have resulted in the rejection of jurisdiction.[90] A related issue that counsel will often find in investment arbitration is whether a foreign investor is allowed to claim for damages affecting a corporate entity only when such investor has a controlling interest or can do so even if it is a minority shareholder. ICSID tribunal in the case of *Vaccum Salt Products Ltd.* v. *Ghana*[91] ruled that foreign control was an objective test and found out that this test was not met by an investor holding a 20% of a Ghanaian corporation.[92] A number of ICSID and other cases have discussed this question, in particular *AAPL v. Sri Lanka*,[93] *AMT v. Zaire*,[94] *Antoine Goetz et consorts v. Republique du Burundi*,53 *Maffezini v. Spain*,[95] *Lanco v. Argentina*,[96] *Genin v. Estonia*,[97] the *Aguas* Award and

[81] rancisco Orrego Vicuña, "Arbitrating Investment Disputes" < http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf> accessed on 10 December 2014
[82] *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain),* ICJ Reports 1970, 3.
[83] Sornarajah, *The Scope and Definition of Foreign Investment*, (2002, APEC Workshop on Bilateral and Regional Investment Rules/Agreement), 88
[84] *Ibid*
[85] Case Concerning the *Elettronica Sicula S. p. A. (ELSI) (United States of America* v. *Italy)*, ICJ Reports 1989, 15
[86] Mohammed Bennouna "Preliminary Report on Diplomatic Protection, by Mohammed Bennouna",1998, International Law Commission:Special Rapporteur, A/CN.4/484, 5
[87] *Loewen Group Inc. and Raymond L. Loewen v. United States of America* ICSID Case No. ARB(AF)/97/3
[88] For the jurisprudence of the United States-Iran Claims Tribunal see generally George H. Aldrich: The Jurisprudence of the Iran-United States Claims Tribunal, 1996;
[89] United Nations Compensation Commission, Decision of the Governing Council on Business Losses of Individuals, S/AC.26/1191/4, 23 October 1991, par. F, and Decision 123 (2001).
[90] *Tokios Tokèles v. Ukraine* (Jurisdiction), ICSID Case No. ARB/02/18
[91] ICSID Case No. ARB/09/05,
[92] *Vacuum Salt Products Ltd.* v. *Ghana*, ICSID Award of February 16, 1994 4 ICSID Reports 329. 32
[93] *AAPL* v. *Sri Lanka*, ICSID Case No. ARB/87/3
[94] *AMT* v. *Zaire*, ICSID Case No. ARB/93/1
[95] *Antoine Goetz et consorts* v. *Republique du Burundi*, Sentence du CIARDI du 10 Fevrier 1999.

Vivendi Annulment and *CME v. Czech Republic, CMS, Enron* and other cases.[98] These cases have dealt with both majority shareholder and minority shareholder situations. It also governed situation which either effected shareholders directly or indirectly. The object of protection is the substantive interest.[99]

The Committee on Annulment in the *Compañía de Aguas del Aconquija* or *Vivendi*, ruled that:

"Moreover it cannot be argued that CGE did not have an "investment" in CAA from the date of the conclusion of the Concession Contract, or that it was not an "investor" in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5".[100]

CONCLUSION

So it can be concluded that the jurisdictional issue is not only technical but it is a most important decisive factor for a dispute. While drafting an instrument, jurisdictional issue should be carefully carried out when it establishes ICSID as the dispute settlement mechanism. Loophole in the drafting of the instrument may lead to an easier escape route for a Host State from the claim of a foreign investor resulting into a diversified consequence.

When a state wants to attract foreign investors to invest in their state, drafter should be very particular in drafting article 25 in a lucid way so that investors can approach ICSID easily. This is the most important issue for all investors as misapprehension of offer to arbitration by host state could incur financial loss and less economic growth in the foreign investment. The costs –fees- to litigate at ICSID should also b reasonable as many cases developing countries fail to incur the costs of litigation in ICSID. Proper analysis of the organisation, composition and case law on jurisdictional matters of ICSID by the litigators of a Host State can lead to stronger building of case in the initial stage of the proceedings.

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