



## Jurisdictional Determinants Of Investor-State Dispute Settlement: A Contemporary Critique

Ali Nawaz Khan\*

Naveed Ahmad†

Bakht Munir ‡

**Abstract** *International Convention for the Settlement of Investment Disputes (ICSID) has incorporated a specialized jurisdiction under the auspicious of the World Bank Group. The convention has promulgated a standing offer for the investors of the contracting states to invoke ICSID jurisdiction on the fulfilment of some determinants. ICSID tribunals have amplified the application of these determinants to the extent to overshadow the legitimate rights of sovereign states. The magnification of standards of determinants of investor-state dispute settlement has caused unpredictability of ICSID jurisdiction. Uniform and predictable standards of determinant have the potential to strengthen and promote this mechanism of institutional settlement of investment disputes.*

**Key Words:** Jurisdictional Determinants, State Dispute, Jurisdiction, Investor, Investment

**JEL Classification:**

### Introduction

Investor-state dispute settlement (ISDS) jurisdiction under the auspicious of the World Bank has been an informal arbitration procedure in the hands of professionally skilled referee incorporated by an international convention. In 1965, the International of Reconstruction and Development (IBRD) of the World Bank group facilitated the member states to adopt an international convention for the resolution of investment disputes. In the legal framework of international law, the conventions have acquired the same status as the legislations in the domestic law in the absence of the global parliament. The political organs of the institution launched the norms of new rules of the regulatory mechanism that has the capacity to become the law through acceptance, acquiescence, adoption or usages (Franck, 1982). The wide ratification of a treaty made it the law as the binding norm to follow as sovereign consent (Franck, 1982).

The adopted international [convention for the settlement of investment disputes \(ICSID\)](#) has provided a specialized mechanism of investor-state dispute settlement (ISDS). ICSID Convention provides provisions both substantive and procedural law as applicable for the investment dispute settlement mechanism. The informal mechanism

\*Assistant Professor, University Law College, University of the Punjab, Lahore, Pakistan.

†Assistant Professor, University Law College, University of the Punjab, Lahore, Pakistan.

‡Lecturer, Institute of Languages and Linguistics, New Campus, University of the Punjab, Lahore, Pakistan. Email: [muniradv@yahoo.com](mailto:muniradv@yahoo.com)

procedure differs from the permanent court system, where the adjudicators are selected at the will of the parties. The procedures of the proceedings are decided by the selected tribunal as per the convenience of the parties. The institutional rules of arbitration, i.e. ICSID Rules of Arbitration, have been provided for the adjudicative process.

The consensual acts of the sovereign states create international obligations for their governments and private individuals. The obligations to accept ICSID jurisdiction is a standing offer to settle an investment dispute by the institution. This offer, when accepted by the foreign investor, vest jurisdiction upon the ICSID tribunal. In other words, an undertaking between the contracting states to the BIT or MIT or ICSID Convention to introduce a standing offer of the contracting states for the individuals of other state for the acceptance of jurisdiction of ICSID ([Torral, & Schultz, 2010](#)). Gus van Harten has identified these distinctive characteristics of ISDS, which differentiate this mechanism from the other international adjudicative regimes ([Van Harten, 2010](#)). The consent of contracting sovereign states, generally and prospectively, available to individuals against the host state without any intervention from the respective state. The mechanism provides for damages as the only remedial option available against the host state even without exhausting any prior domestic remedy and post-award judicial review in the host state ([Van Harten, 2010](#)).

The paper has analyzed the determinants of investor-state dispute settlements mechanism as provided by the ICSID Convention. The tribunals constituted under the ICSID Convention have interpreted the determinants of ICSID jurisdiction to expand the application of the investor-state dispute settlement mechanism. Thus, extravagant applications of ICSID jurisdiction have engendered controversies for the stakeholders of the mechanism. The paper has highlighted the souring spots embedded in determinants of ICSID jurisdiction, which need to resolve for certainty and predictability of the system of ISDS.

### **Attributes of ICSID Jurisdiction**

The states are committed to treating transnational corporations equitably and protecting their investments. In case of a dispute regarding the investment, the local laws, as well as the contractual obligations, are to be fulfilled by the states and multinational corporations. The transnational corporations are subject to the local jurisdiction, but the contracting states are free to choose the mechanism and applicable law to resolve the investment disputes ([Commission Report, 1983](#)). The ratification of the ICSID Convention provides an opportunity to offer arbitration jurisdiction for the settlement of investment disputes. There are different ways and means to consent to arbitrations by ICSID tribunals. The contracting states confer jurisdiction upon the ICSID tribunal by treaty obligations or contractual liabilities for the settlement of investment disputes of the host states.

ICSID tribunal assumes the jurisdiction by considering the attributes provided by the ICSID jurisdiction. Therefore, ICSID jurisdiction can be exercised on the fulfilment of certain pre-requisite conditions provided by Article 25 of the convention. Foreign investors from the contracting states have the privileged to invoke jurisdiction under ICSID Convention foreign investors. The ICSID Convention has not defined criteria of the foreign investor and foreign investment. However, Article 25 of the ICSID Convention provides the determinants attributed to invoke ICSID jurisdiction. Article 25(1) ICSID Convention provides That ICSID Centre has jurisdiction to adjudicate

investment disputes where it arises due to some legal dispute between the contracting state and the national of other contracting state. The national of other contracting parties can file its acceptance of such consent with secretary-general ICSID along with the claim of the dispute.

The ICSID tribunals are constituted at the request of the foreign investors, even without the permission of the home state. ICSID jurisdiction can be invoked where the nature of disputes affects the legal issues. The dispute must arise in consequent of the foreign investment to invoke ICSID jurisdiction. The contracting states of the ICSID Convention have consented to ICSID jurisdiction by investment treaties or applicable contract or local legislation to generate a standing offer for the foreign investors. ICSID tribunals exercise their jurisdictions where an investor of contracting states accepts the standing offer of the host contracting states. The burden of proof to prove the determinants is upon the foreign investors interested in invoking ICSID jurisdiction.

### **Consent to ICSID Jurisdiction**

Consent is an essential condition for the exercise of ICSID jurisdiction by the tribunal. Proof of consent is required at the time when the request is made for the ICSID tribunal. The burden is on the foreign investor to provide about the existence of the consent in writing on the date of registration of the dispute with the ICSID forum. The supporting documents are required for this effect (ICSID Arbitration Rules, R.2). The consent for the ISDS in an investment treaty by the contracting states is a sovereign act that is a matter of public law. The relationship of the states in the context of the treaty is not limited to a single contractual transaction ([Van Harten, 2007](#)). The parties to the investment agreement contracted to insert such consent clause as part of dispute settlement provisions of the agreement. The indirect methods of consent include: firstly, local legislation by the state for the acquisition of ICSID jurisdiction for investment disputes; secondly, affirming the jurisdiction in investment treaties; thirdly, the state is competent to offer consent to constitute ICSID tribunal for the dispute ([Schreuer, 2009](#)).

A contracting state may consent to ICSID jurisdiction either by a clause in the investment contract, unilateral instrument, national legislation or investment treaty, i.e. BIT or MIT ([Garibaldi, 2009](#)). The investment treaties are treated as a specific expression of intentions of the parties as *lex specialis* and are referred with preference over the customary international law, despite their same weightage ([Hirsch, 2012](#)). There are more than 3300 investment treaties regulating the relationship regarding foreign investment in the host states. The investment treaties have incorporated mainly the substantive law regarding the rights and obligations of the states for their foreign investment interests of foreign investors of contracting states in the host state. The consent to assume ICSID jurisdiction in the majority of cases has been given through bilateral investment treaties. More than 60% of the cases registered until 2019 have explained that the BITs have been the major source of consent for the assumption of ICSID jurisdiction (ICSID Caseload, 2019). On the other hand, there is a weak trend to confer ICSID jurisdiction by host state domestic legislation, i.e. 9% and investor-state contracts, i.e. 16%. Even this pattern of consent for ICSID jurisdiction remain to continue in the last year, i.e. 2018, when BIT consent invoked in 56.5% of cases while consent under investment contract between investor-state in 18% cases. But the ICSID jurisdiction is invoked only in 1.5% of cases under the investment law of the host states (ICSID Caseload, 2019).

The state may express its standing offer to consent to ICSID jurisdiction through an investment promotion domestic legislation. The very purpose of such legislation is to provide incentives to foreign investors consequential conducive investment environment in the country. Domestic legislation is usually considered a domestic issue, which can be repealed by a domestic piece of subsequent legislation. The domestic legislation which has the impact on creating international obligations are to be treated under the VCLT and principles of international law to make it irrevocable in its effect by subsequent statute law ([Garibaldi, 2009](#)). The most common method of consent to assume ICSID jurisdiction is investment treaties. These investment treaties may be in the form of a Bilateral Investment Treaty (BIT) between two parties or more than two parties, i.e. Multilateral Investment Treaties (MIT). The common consent of parties to the treaties are to be interpreted in accordance with VCLT ([Garibaldi, 2009](#)). The consent by investment treaty considered to be irrevocable unilaterally ([ICSID Convention, Article 26](#)). However, the termination of the treaty can be dealt with under VCLT or agreement of the parties through the treaty provision or separate agreement between the parties to that effect (VCLT, Article 54 & 56). Article XVI of Bolivia-USA treaty 1998 can be cited as an example, which provides that the treaty remains effective for ten years and on the expiry of such term will remain to continue unless any party of the BIT serve notice of termination of one year. The terminated treaty will provide a safeguard of ten years to the covered investment during this period of validity ([Garibaldi, 2009](#)). The consent to ICSID arbitrations contain in the treaty is itself a sovereign act of the states. The foreign investors claim for remedial action has been treated as an acceptance in response to the 'standing offer' of the state available either in BITs or MITs. The generalized offer that appeared in investment treaties has been the result of the interstate bargain over the regulatory standards of treatment of the investors from the contracting states in investment treaties ([Van Harten, 2007](#)).

The contracting parties to the investment treaty can limit the application of the consent clause for [ICSID jurisdiction, Art 25\(4\)](#) of the ICSID convention provides to exempt certain disputes or category of disputes by the application of the reservation clause for ICSID jurisdiction ([ICSID Convention, Article 25](#)). The states sometimes use the inclusive clause to specify the dispute or can exclude a category from the application of the treaty or legislation for the ICSID jurisdiction ([Schreuer, 2009](#)). The investment contract made by the parties precludes the subsequent withdrawal of the consent for ISDS despite its denunciation of the ICSID convention. The acceptance of the other party of the ICSID litigation amounts to the perfecting of such consent of the contracting host state. The acceptance of consent by the litigant party needs not to be expressed in one single document ([Garibaldi, 2009](#)). The consent of the host state and the private foreign investor in an investment contract would have the irreversible consent for the ICSID jurisdiction for both the parties to the contract. This common consent is treated as perfected consent and cannot be withdrawn unilaterally ([Garibaldi, 2009](#)). At the same time, the legal effect of the consent clause has been that the Contracting state cannot frustrate ICSID jurisdiction unilaterally, even by effecting changes in its municipal law ([Osode, 1997](#)). Consent even remains effective till six months of the service of notice of denunciation in the depository of the World Bank ([ICSID Convention, Article 71](#)). The rights and obligations remain unaffected, which have arisen before notice of denunciation ([ICSID Convention, Article 72](#)). The Centre arbitrates foreign investment disputes of a legal breach of international obligation upon the voluntary consent of the

parties ([ICSID Convention, Article 25](#)). The dispute can be arbitrated through ICSID when clauses of consent to submit the dispute is mentioned in the agreement between the investor and the state even in the absence of standing offer of investment treaties ([Parra, 2012](#)).

### **Legal Dispute**

The ICSID jurisdiction arises for the settlement of legal disputes relating to foreign investments. There are three possibilities of the question of controversy to invoke jurisdictions: on the dispute of issue of fact or issue of law and mix issue of law and fact. The issues of facts are justiciable by the production of evidence and its appreciation in a trial proceeding. However, the issues of law for any dispute can be solved by consulting the applicable law. The legal framework of ICSID has not devised any trial proceedings but to apply relevant law in an institutional arbitration proceeding for the issues of law ([ICSID Convention, Article 25](#)). The disputes involve the assertion of the rights or obligations in case of controversy over a legal issue. The legal arguments are pleaded for some legal remedy relating to investment dispute. The ICSID decisions in the case of *Continental Casualty v. Argentina* held that the claimant could invoke ICSID jurisdiction where acts or measures taken by Argentina have affected to breach the legal rights incorporate in contracts or legislation or bilateral investment treaties (*Casualty v. Argentina*).

The existence of a dispute refers to the point of disagreement or conflict of views on some issue of law or fact between the parties. Legal dispute pre-supposes some events and communications of parties about the violative act with its disagreements regardless of initiation of any alternative means for its settlement ([Schreuer, 2009](#)).

### **Foreign Investment**

The expression of the foreign property was familiar with the literature of law in customary international law for the property of the long resident foreign national. The notion of foreign property replaced with the more dynamic expression of foreign investment, which implies a certain duration and movement of the property from one territory to another. The important features identified for the foreign investment includes that the substantial commitment involves for some duration with the risk for both sides. The profit and return are involved in the operation of activities significant for the development of the host state ([Schreuer, 2009](#)). ICSID jurisdiction can be invoked in case of a dispute relating to foreign investment. The definition of foreign investment is a fundamental requirement to invoke the investor-state dispute settlement jurisdiction of ICSID. The ICSID Convention has not defined the expression but left it open for the contracting state or parties to determine the same as per their economic requirements. In the absence of a common legal definition, which varies for different investment instruments, including BIT, MIT or investment contracts. The investment from outside deals with two major categories: foreign direct investment (FDI) and portfolio investment in stocks. Capital importing countries issued bonds to generate money for reconstruction activities in the post-WWII era ([OECD, 2008](#)). Portfolio investments have been the major form of foreign investment in the first half of the twentieth century. The nature of investment changed after the emergence of multinationals corporations and the expansion of their subsidiaries in the post-world war II era.

The traditional open-ended definition of investment provides to include all type of assets, including portfolio investment, contractual rights and intellectual rights. However, some definitions adopted through the investment treaties have excluded the short term and speculative investments ([Sauvant & Ortino, 2013](#)). The recently appeared trend is that every kind of asset of the foreign investor is considered as a foreign investment. Sometimes, an investment instrument uses the close list approach for the inclusion and exclusion of possible assets related to foreign investment. There are a few BITs and FTAs which have to use the defined list of entities for the investment criteria. Sometimes the investment treaties incorporate a definitive list approach for the type of assets to specify to be the part of the foreign investment. There are some RTAs in ASEAN and a draft agreement on EU/PACP trade which have excluded the portfolio investment from seeking ISDS protection. But the IISD's Model Agreement on Investment for Sustainable Development of April 2005 has included the portfolio investment in the definition of investment.

### Foreign Investor

The ICSID Convention has recognized 'individual' as the subject of international law in the arena of jurisdictions with the object to settle their investment disputes ([Schreuer, 2009](#)). ICSID Convention provides that the private investor invoke jurisdiction of the Centre for the settlement of investment disputes even without the permission of home states. The foreign investor includes legal persons incorporated in the third country and national of the contracting party of international investment agreement incorporated in the territory of the other contracting party ([Sauvant & Ortino, 2013](#)). The criteria for foreign investment and investor thereof have not been defined in the ICSID Convention. The question of whether foreign investor to be treated as a public or private entity has been left the states to decide in their treaty or contractual obligation. The ICSID jurisprudence has recognized the private, public and state-controlled companies as the foreign investors to approach ICSID jurisdiction ([Sauvant & Ortino, 2013](#)). The state-owned corporations can invoke ICSID that if the corporation is not functioning as an agent of the respective government. The corporation cannot be treated as a government-owned entity unless it is not acting to discharge the essential functions of the government and work to advance the purposes of the government ([Schreuer, 2009](#)). The objection about the source of capital has been meaningless for the purpose of determining the status of the foreign investor. The case of CSOB vs Slovakia, the ICSID tribunal rejected the contention of the host state that the foreign investor was an agency without having independent status and discharging the functions of the controlling state.

In another case of [CDC vs Seychelles](#), the claimant was a company with a separate legal personality but was 100% owned by the British government. The Respondent initially raised, but did not pursue, an objection that the claimant was not a "national of another Contracting State". As the claimant's investment related to a commercial loan, In the case [Telenor v. Hungary](#), the claimant was 75% owned by the State of Norway. No issue was raised as to whether the claimant's qualification as foreign investors as a "national of another Contracting State".

The criteria for the foreign investor depend upon the investment treaty; if so, provided with the determinative list for the inclusion of entities as a foreign investor. The majority of investment treaties have provided the criteria to include state-owned

and a private foreign national of a foreign state participant of foreign investment (Subedi, 2008). The state-owned enterprises (SOEs) or state control enterprises (SCEs) play their part in the foreign territories worldwide for the promotion of foreign direct investments. These are treated with the same protection as the foreign investors unless otherwise agreed by the parties ([Sauvant & Ortino, 2013](#)). The shareholding, irrespective of the minority or majority of the assets in the foreign investment, qualifies to avail the protection of the ISDS. The legal persons qualify as foreign investors on the test of their seat of incorporation and control determine the nationality of the foreign investor. On the other hand, a natural person's nationality, according to the home state law, is the determining factor for his claim as a foreign investor of that nationality on the date of registration of the consent to arbitrate (Subedi, 2008).

### **Nationality of the Investor**

The ICSID arbitrational jurisdiction has been established to deal with the disputes of a foreign investor of a contracting party and the host state (ICSID Convention, Article 25). The nationals of other contracting states have been given direct access to the institutional arbitration without the intervention of the home state in case of foreign investment disputes. The natural persons are required to be the national of the contracting party other than the host state either at the time of consent to the ICSID jurisdiction or at the time of the request for the arbitration to the ICSID forum. The claimant must have some legal personality to access the ICSID tribunal ([Schreuer, 2009](#)). The access to ICSID jurisdiction has been conditional on the determination of the nationality of the investor. The inaccessibility of ICSID jurisdiction for the investors from non-contracting states has been explained due to the absence of the reciprocal obligations between the states ([Schreuer, 2009](#)). Article 25(2) (b) of the ICSID convention deal with nationality requirement for legal persons. Art 25(2) (b) provides that the legal person must have the nationality of the contracting state on the date of consent for arbitration other than the host state. This clause provides an exception to the host state consent and foreign control to treat the legal person as a foreign investor (ICSID Convention, Article 25). The identification of the nationality has its impact to debar foreign investors for the appointment of an arbitrator to constitute an investment tribunal ([Schreuer, 2009](#)). The customary international law approves place of incorporation or registered office or effective seat of a legal person as the touchstone of nationality. The nationality of the natural person is to be determined according to the national law of the contracting state to which the claimant belongs on the date of the institution of the claim with the ICSID forum ([Schreuer, 2009](#)). ICSID jurisdiction can be approached by contingent submission on the condition to cure the defect of the non-contracting party by the subsequent execution of BIT by the states and the novation of investment contract ([Schreuer, 2009](#)). The acquisition of the nationality even after the date of consent destroy ICSID jurisdiction as a foreign investor (ICSID Convention, Article 25). The ICSID tribunal has adopted the same approach in the settlement of investment disputes.

The investment tribunals are entitled to apply the national laws of the home state. The tribunals are not bound as an exclusive determinant of the question of nationality. Tribunals can go beyond other consideration, such as a fraudulent acquisition or involuntary acquisition violative of international law ([Schreuer, 2009](#)). An unincorporated consortium does not qualify as a legal person on behalf of other partners

despite of their agreement to represent. Legal persons are not absolutely debarred from accessing the ICSID tribunal on the basis of double nationality. In the case of *Rumeli Telekom v. Kazakhstan*, it was held that the Claimants were independent commercial entities and qualified as nationals of another Contracting State. The Respondent's argument that the State of Turkey was the real party in interest was rejected. The agreement of parties for the question of nationality carries weight for the question of nationality. This agreement cannot create nationality if the investor otherwise not belong to the state, which is a contracting party ([Schreuer, 2009](#)). The legislation of a state can extend its coverage to incorporated legal persons of other territory outside the territorial limit of the contracting state. The treaties can extend their criteria for nationality by using the concept of controlling interests for the corporation. The reasonable control of the corporation is a good reason to prove the nationality of a legal person. At the same time, this relationship between control and the agreement suggests its objective existence and cannot be replaced by the agreement ([Schreuer, 2009](#)).

### **Analysis of Investor-State Dispute Settlement Jurisdiction**

The flexible accessibility of ICSID jurisdiction has been the distinctive feature of ICSID jurisdiction. The ICSID mechanism provides that the private individual, i.e. foreign investor, invoke the ICSID jurisdiction directly against the regulatory breach treaty obligation rather than a commercial relationship. The directly accessible capability of the foreign investor, even without any interference of the home state, has made it the most attractive destination of the foreign investor when consent for the assumption of jurisdiction is irrevocable. The respondent host states have no role to play in settlement of disputes before the ICSID forum. The sovereign immunity and the act of the state doctrine do not apply to resist the process of private enforcement of international obligations under ICSID jurisdiction ([Garcia, 2004](#)). The foreign private investors have become the actors in international law without having recourse to substantive or procedural laws. The citizens of the contracting states have the discretion to invoke the jurisdiction of ICSID tribunals to resolve the disputes affecting their legal rights as a foreign investor. ICSID tribunal has been the judge of its jurisdiction. The tribunals assume their jurisdiction on the satisfaction of the claim attribute determinants as provided in Art 25 of the ICSID Convention. The responsibility to prove the existence of determinants of ICSID jurisdiction lies upon the foreign investors. Investment treaties have been the major contributor to express the consent of contracting states for the future treatment of foreign investments. The recent trends of BITs and FTAs have expanded the scope of investment, which included criteria of 'attempt to make an investment. The indirectly controlled investment and local affiliates of the parent company also fall within the scope of foreign investment. An ICSID tribunal treated the money claims and 'concession under the public law' to be held to fall within the scope of investment on the criteria of foreign investment ([Garcia, 2004](#)).

The open-ended definitions of determinants of ICSID jurisdiction have engendered unpredictability for the host states. The convention has not defined the determinants of ICSID jurisdiction and left open to define by the states in their investment treaties. The case of [SGS vs Pakistan and Agility Corporation vs Pakistan rejected the objection to the jurisdiction of the ICSID](#) tribunal that ICSID jurisdiction does not cover the performance service contracts for the purpose of foreign investment disputes. The persuasive decisions of ICSID tribunals in the case of *SGS v Pakistan and Agility*

Corporation vs Pakistan have interpreted the foreign investment to expand the scope of expression of foreign investment. The expanded scope of interpretation has diluted the position of commercial disputes. The jurisdiction for the purpose of the commercial dispute has become uncertain in the presence of expanded expression of attributes of ICSID jurisdiction. At the same time, the recognition of the state-controlled corporation as foreign investors has caused to defeat the very purpose and scope of the ICSID Convention. These states controlled mega-corporations have the capacity to act as the agent of the respective governments. The state-controlled mega corporations have created vulnerability for the least developing countries (LDCs) due to the major contribution in the natural resources of poor economies of the world. The nationality of the foreign investors is decided on the basis of their citizenship on the date of filing the consent of arbitration with the ICSID forum instead of an admission of investments. Even double nationality is not considered any hindrance to entertained by the ICSID tribunals. The flexibility of such nature has the potential to choose the best to manipulate in the interest of the foreign investor. Foreign investors opt to incorporated multinational in the country best suited the serve their interests. Furthermore, ICSID tribunals have allowed the contingent claim to cure the defect of nationality or to change of nationality. However, undefined and limitless interpretations have been the catalyst to the unpredictability of ICSID jurisdiction.

## **Conclusion**

ICSID Convention has provided the attributive determinants for the exercise of jurisdiction in foreign investment disputes. The contracting states express their consent for future investment dispute through bilateral or multilateral investment treaties. The treaties clauses have been the expression of standing offer for the settlement of investment disputes. The contracting governments rectify investment treaties to bind the future public interest of the states. Foreign investors have the option to invoke the jurisdiction of ICSID tribunals even with the interference of the home state. Investment treaties in certain cases have not defined attributes of ICSID jurisdiction and left open to the interpretation of ICSID tribunals. The undefined standards of attributive determinants and the magnified interpretation thereof have engendered unpredictability of ICSID jurisdiction due to its open-ended approach. The extravagant interpretation has diluted the scope of commercial arbitrations. The unpredictable interpretations of attributes of ICSID jurisdiction have stimulated vulnerability challenges for the fragile economies of least developing countries (LDCs) in the presence of state-controlled mega-corporations. Taking into the existing dynamics of foreign investment law, the paper suggests the ICSID Convention incorporate the basic standards of the attributive determinants. The codified standards of determinant have the capacity to enhance the predictability for the host states.

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