



***DIPLOMATIC PROTECTION AS A DISPUTE SETTLEMENT MECHANISM
IN INVESTOR-STATE ARBITRATION, IN THE LIGHT OF MODERN
INTERNATIONAL LAW***

A Thesis Submitted for the Degree of Doctor of Philosophy

by

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Abstract

This thesis assesses the role of diplomatic protection (DP) from historical and current perspectives. The institution of DP is one of the oldest state rights in international law, and examples of its use have been recorded prior to the 18th and 19th centuries. Historically, DP has been used by powerful states for the purpose of protecting investors in host countries. However, it carries two main conditions for execution, namely establishing nationality and the exhaustion of local remedies. Both of these conditions will be evaluated and analysed in the context of current international law. Over time, using DP as a dispute settlement mechanism has served to politicise investment disputes, and, for this reason, in 1965, the Washington Convention for the International Centre for Settlement of Investment (ICSID) was established. It came into force in 1966, and its main purpose was to ‘depoliticise’ investment disputes. Article 27 of the Convention explains that DP is not allowed in investor-state disputes, but exceptionally it can be exercised for the enforcement of awards. However, it is not clear to what extent it could work as a successful instrument for enforcing awards. In addition, the thesis examines the changing role of DP over the years to conclude that the ICSID Convention has begun to lose popularity among some member countries. Indeed, some Latin American countries have now withdrawn from the Convention. A doctrinal analysis will be applied to try to find solutions to the problems faced by the ICSID regime.

Keywords: international law, customary international law, diplomatic protection, ICSID Convention, investor-state disputes, bilateral investment treaties (BITs), investment arbitration, nationality of investors, exhaustion of local remedies, denouncement, enforcement mechanism.

Declaration

I declare that the work presented in this thesis is my own and has not been submitted for any other degree or professional qualification.

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List of Abbreviations

AAD	Arbitration Award Default Coverage
ALBA	Members of the Bolivarian Alliance for the People of Our America
ATE	After the event
BIT	Bilateral Investment Treaties
BTE	Before the event
CAFTA	The Central America Free Trade Agreement
CETA	EU-Canada Comprehensive Economic and Trade Agreement EU
European Union	
CIL	Customary International Law
CSN	South American Community of Nations
DP	Diplomatic Protection
ECHR	The European Convention on the Protection of Human Rights and Fundamental Freedoms
FCN	Friendships, and Commerce and Navigation Treaties
FDI	Foreign Direct Investment
FSIA	United States of America's Foreign Sovereign Immunities Act of 1976
FTSE	Financial Times Stock Exchange
GATT	General Agreement on Tariff and Trade 1947
GSP	The Generalized System of Preferences
IALS	The Institute of Advanced Legal Studies
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
IL	International Law
ILC DP	Draft Articles on Diplomatic Protection International Law Commission,
ILC RSWIA	The ILC's Articles on Responsibility of States for Internationally
Wrongful Acts	
IMF	International Monetary Fund
ISA	Investor-State Arbitration
ISDS	Investor State Dispute Settlement
ITO	International Trade Organization
LDC	Less developed countries
MAI	Multilateral agreement on Investment
MIGA	Multinational Investment Guarantee Agency
MIT	Multilateral Investment Treaties
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement OECD Organisation for Economic Co-operation and Development

NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PRI	Political Risk Insurance
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
SIA	United Kingdom State Immunity Act 1978
SOE	State Owned Enterprises
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
TTP	Trans-Pacific Partnership
UDHR	The Universal Declaration of Human Rights [1948]
UNASUR	The Union of South American Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCRC	The United Nations Convention on the Rights of the Child
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Glossary of Terms

Ad hoc	An arbitration that is not administered by an arbitral institution.
Arbitration	The resolution of a dispute between two or more parties by a third person (the arbitrator), who derives powers from an arbitration agreement between the parties and whose decision is binding on them.
Arbitration clause	A clause in a contract or agreement that requires the parties to resolve their disputes through an arbitration process. In the context of investment arbitration, this clause may be included in the investor–state agreement; it generally provides for broad jurisdiction to submit any investment dispute to arbitration.
Arbitrator	An independent person or body officially appointed to settle a dispute.
Award	The decision of an arbitral tribunal. An award (or arbitral award) is much like the judgment in a court of law. An arbitral award is binding but not necessarily final. The parties might be allowed to take further steps to interpret, revise, rectify, appeal or nullify the decision.
Bilateral Investment Treaty (BIT)	This is an agreement that establishes the terms and conditions for private investment by nationals and companies of one state within another state. Bilateral treaties between two states are intended to promote and protect foreign direct investment in host states.
Convention on the Settlement of Investment Disputes between States and Nationals of other States	This Convention is also known as the Washington Convention. It was adopted under the auspices of the World Bank on 18 March 1965 and entered into force on 14 October 1966. It established the International Centre for the Settlement of Investment Disputes (ICSID).
Customary International Law	A source of international law. The term refers to international obligations that arise from established state practices and customs, rather than obligations that arise from formal written international treaties.
Developed	

countries	A term of reference for states that have relatively high <i>per capita</i> incomes and standards of living. Synonyms are ‘rich countries’ and ‘high-income countries’.
Developing countries	This term is used synonymously with ‘Third World’, ‘less developed countries’ and ‘underdeveloped countries’. A similar term is ‘the global South’. These terms denote states that have relatively low <i>per capita</i> incomes and relatively low standards of living.
Diplomacy	The application of intelligence and tact in the conduct of official relations between the governments of independent states. More briefly, diplomacy refers to the conduct of business between states by peaceful means.
Diplomat	A senior official who discusses affairs with another country on behalf of his or her own country, usually working as a member of an embassy.
Diplomatic Protection	A state is entitled to protect its subjects who are injured by acts contrary to international law that are committed by another state.
Diplomatic Relations	Diplomatic relations exist between two states that have so agreed. Such relations usually involve the establishment in each other’s country of, and the conduct of bilateral international relations through, resident diplomatic missions.
De-politicisation	The process of placing at one remove the political character of decision-making.
Denunciation (Treaties)	A process of termination of a treaty or the withdrawal of a party from a treaty.
Enforcement of awards	This term has various meanings, depending on the legal system. It generally denotes securing compliance with an award, and if necessary, by intervention of the forces of law.
Execution	The legal right of the creditor in an award to collect monetary damages from the debtor in the award, or to benefit from other remedies granted if the debtor refuses to pay the converted award voluntarily.
Exhaustion of	

Local remedies	Local remedies include all effective remedies available to natural or legal persons under the domestic law of the state concerned. Local remedies must be capable of redressing the situation complained of, whether judicial or administrative, ordinary or extraordinary, in the first, second, or third instance. They include procedural means and other formal remedies.
Economic sanctions	The withdrawal of customary trade and financial relations for foreign and security purposes. The sanctions may be comprehensive, prohibiting commercial activity with regard to an entire country; or targeted, blocking transactions by and with particular businesses, groups or individuals.
Foreign Direct Investment (FDI)	The process whereby residents of one country (the source country) acquire ownership of assets in another country (the host country). This is done to control the production, distribution and other activities of a firm in the host country.
Gunboat Diplomacy	The use of military threats by a strong country against a weaker country to make the weaker country obey.
Genuine link	A state cannot claim that the rules pertaining to the acquisition of nationality that it has laid down (by virtue of its internal laws) are entitled to recognition by another state, unless it has acted in conformity with the general aim of ensuring that the legal bond of nationality accords with the individual's genuine connection or link with the state.
International Centre for the Settlement of Investment Disputes (ICSID)	This centre was established to provide facilities for the conciliation and arbitration of investment disputes between the nationals of two (or more) contracting states.
Investor	Any natural or legal person who enters into business relations with the state.
Investment	Any asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.
Investor–State Dispute Settlement	Dispute settlement between a state and a private party from another state, relating to the treatment of an investment of the latter within the former.

Legal disputes A dispute is legal if the claim is based on treaties, legislation and other sources of law, and if remedies such as restitution or damage are sought.

Least Developed Countries Least developed countries are low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets.

Most-Favoured Nation A treatment accorded by the granting state to the beneficiary state or to persons or things in a determined relationship with the beneficiary state; such treatment is not less favourable than treatment extended by the granting state to a third state or to persons or things in the same relationship with that third state.

Multilateral Investment Treaties An international treaty between three or more states for the promotion and protection of investments, which provides foreign investment with the protection of host states.

Nationality A term of art denoting the legal connection between an individual and a state.

Nationality of companies According to the traditional rule, the nationality of a company refers to the state under whose laws the company is incorporated and in whose territory the company has its registered office. In some cases, nationality of the companies could be decided according to whether it has seat of management, or centre of control in their territory, or according to shareholders nationality.

New York Convention 1958 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is also known as the New York Convention. It was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.

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Chapter One: Introduction

1.1. Introduction

In globalised world, international economic trade and investment relationships between states are fundamental for the growth of countries. Over the last few decades, the process of globalisation, together with vast improvements in transport and technology, has worked to link states and citizens all over the world. This has helped the growth of economic and trade relations between states. Furthermore, State Owned Enterprises (SOEs), international companies, and individual investors have been given increased opportunities to make decisions about whether to invest in foreign states. This process has created competition between host countries. Nowadays, almost every developed and developing country strives to attract foreign direct investment (FDI). Indeed, there are many reasons why host states compete to receive FDI, and these reasons include opportunities to create new jobs, which directly or indirectly impact the local economy, bringing new opportunities for education, technology and culture.

Historically, the protection of investors in foreign countries was the direct responsibility of the home state of the investor, and this role was part of foreign policy. Home states would usually espouse the claims of their nationals and try to settle disputes with host states in a diplomatic way. Previous research tells us that this type of protection became known as diplomatic protection (DP). A recent definition of DP is as follows: ‘a concept of customary IL whereby a State espouses the claims of its nationals against another State and pursues it in its own name.’¹ Over the years, DP has been widely exercised by powerful states in order to protect the properties owned by its nationals in host countries. When necessary, forceful mechanisms, such as ‘gunboat diplomacy’, have been used against a host state, and, at one time, this approach was viewed as a legitimate and legal dispute settlement method. However this kind of approach served to create a political atmosphere, which ended up transforming investor-state disputes into state-state conflicts. Nowadays, using any kind of forceful tool against another sovereign state is not legal, and this is clearly indicated Article 2 (4) of the UN Charter.

The popularity of DP reached its height in the 18th and 19th centuries. This was because, in these times, states were regarded as the sole subjects of public international law (IL). Thus, neither

¹ ILC Draft Articles on DP (2006).

corporations nor individual investors had any legal rights to bring a claim against a state for violating international rules.² Therefore, conflicts between foreign individuals and host states were politicised. Over time, this approach began to harm investment relations between states, and it impacted on other areas of foreign affairs.

In context of DP, in order for the home state of the investor to formally espouse an investor's claim, certain conditions need to be met. The most important prerequisite for DP is that the investor must be a genuine national citizen of the protecting state. Here, the word 'genuine' is very important for two reasons: firstly, investors might possess or claim more than one nationality, and this serves to complicate the situation in respect of which state espouses a claim; secondly, investors might switch to another citizenship with the purpose of obtaining DP. For these reasons, 'nationality' problems need to be resolved by a tribunal, which will check the real and effective nationality of the investors, as happened in the *Nottebohm* case.³ If issues arise concerning the nationality of shareholders, this poses even more complications. This happened in the well-known *Barcelona Traction* case.⁴ In this case, the Spanish Government caused the bankruptcy of a Canadian company whose shares were partly owned by Belgian citizens. Belgium espoused the claim of the Belgian shareholders who were seeking compensation for actions taken by the Spanish Government in contravention of IL. Spain objected to the ICJ's jurisdiction, partly on the grounds that Belgium had no standing. The ICJ agreed, and dismissed the case, holding that as the general rule of international law, only a national of the state of a company is permitted to sue. Lastly, previous ICJ tribunals have needed to assess the 'real and effective' nationality of individuals, but modern legal articles, specifically the 2006 International Law Commission's (ILC) Draft Articles on Diplomatic Protection, allow claims from individuals who are lawfully resident in a country.⁵

Second pre-requisite is the exercise of the exhaustion of local remedies rule. This is another essential requirement for DP. If local remedies have not been exhausted, then the home state of the investor cannot espouse its national's claim. The individual must ask to settle the dispute in

² Leonie Timmers, 'The Protection against Expropriations in Venezuela: A Right to Property in Theory' in Freya Baetens (eds) *Investment Law within International Law* (Cambridge University Press 2013) 138.

³ The Affaire Nottebohm Case (*Leichtenstein v Guatemala*) ICJ (1955).

⁴ *Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)* ICJ (1962).

⁵ ILC Draft Articles on Diplomatic Protection (2006) Art 8.

the local courts, before initiating DP against the host state. This means that using DP faces challenges in the international arena, and even after meeting all requirements, the investor's claim might still not be accepted by the home state. Furthermore, even if the home state of the individual has espoused a claim, in DP, the investor will not have any control over the dispute, and they must wait for a conclusion to the disagreement. Therefore, to solve only one investment problem, investors are expected to meet different conditions, and even then, they do not know if their home state will accept claims against another state. In some circumstances, the home state of the investor might not wish to instigate conflict with another host state. These kinds of requirements for settling investment disputes create other problems, and this situation does not motivate investors to use DP as a dispute settlement mechanism.

Nowadays, international officials understand that DP cannot be used as a primary investor-state dispute mechanism, and that, in the contemporary world, there is a need for other institutions that will move investment disputes away from the political arena, or, in other words, 'de-politicise' investment disagreements. With this in mind, in 1965, under the supervision of the World Bank, the International Centre for the Settlement of Investment Disputes (ICSID) was established. As officially stated on the web page of the World Bank, ICSID is one of the five organisations of the World Bank group, and its purpose is to guide investor-state disputes towards resolution. The Convention came into force in 1966, and since then investment disputes between investors and host states have been supervised by the ICSID Secretariat.

The ICSID Secretariat registers disputes arising directly out of 'investment'.⁶ Therefore, other political or commercial conflicts cannot be registered with the Secretariat. The purpose of the ICSID is outlined in the preamble of the Convention, which explains that there is a need for international co-operation for economic development, and, in this process, the role of the private international investor should be considered.⁷ After ratification of the ICSID Convention, an investor of the home state is permitted to sue the host state using a third party tribunal, without the involvement of their home state. This means that the ICSID Convention is unique among legal conventions, in that individuals are given expansive rights in international law; in no other

⁶ Article 25 (1) of the ICSID Convention (1965).

⁷ The Preamble of the ICSID Convention (1965).

sphere of international law have private actors been given such privileges.⁸ In Bilateral Investment Treaties (BITs) the host and the home state can opt to use ICSID as the investment dispute centre.

Since its inception, ICSID has become a popular means for resolving investor-state disputes. Indeed, up to 31st December 2018, more than 706 Cases have been registered under the ICSID Convention and its Additional Facility Rules.⁹ The Additional Facility Rules are available for those disputes where one party is not ratified by the ICSID Convention. All of these disputes were settled with the support of the ICSID Centre. Indeed, the ICSID works successfully, and it would not have been possible to have resolved this large number of disputes using DP or state-state methods. After interviewing eleven arbitrators, Tucker came to the conclusion that, ‘BITs substituted DP and without BITs gunboat diplomacy and war would proliferate.’¹⁰

It is worth mentioning that ICSID was not intended to be a substitute for, or to take the place of DP. Both institutions work in different ways as a dispute settlement mechanism in investment arbitration, and this is why, to a certain extent, investment arbitration is still struggling to define its identity.¹¹ The rules of ‘nationality’ and the exhaustion of local remedies still survive within the articles of the ICSID Convention, and this confirms that there is still a link between DP and investor-state arbitration.

1.2. The Significance and Aims of the Research

This thesis will explain the role of DP in investment arbitration. On the one hand, the ICSID does not allow the use of DP (Article 27), but Article 27 (1) allows DP only if the losing party fails to comply with an award. This research proposes a comprehensive approach to the issues, and seeks to understand under which circumstances DP should be exercised against host states. It has been claimed that ICSID has ‘depoliticised’ investment arbitration, but in practice states still use diplomacy as investment dispute settlement mechanism, even though the ICSID Convention

⁸ Beth A Simmons, ‘Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment’ (2014) 66 (1) World Politics 42.

⁹ ICSID Caseload-Statistics (Issue 2019-1) (International Centre for Settlement of Investment Disputes 2018) 7.

¹⁰ Todd N Tucker, *Judge Knot: Politics and Development in International Investment Law* (Anthem Press 2018) 80.

¹¹ Gustavo Laborde, ‘The Case for Host State Claims in Investment Arbitration’ (2010) I (1) Journal of International Dispute Settlement, 97-122.

and BITs exist. For instance, when the Bolivian Government nationalised its country's biggest energy provider, Empresa Electrica Guaracachi, the UK Company Rurelec indirectly owned a 50.01% of stake of the company. Therefore, Rurelec took the Bolivian Government to the Permanent Court of Arbitration in The Hague, and requested compensation of \$100 million. At the same time, the UK Embassy in Bolivia protected its own companies in the host country, and lobbied against the Bolivian Government. Officials from the UK Embassy in Bolivia made an official statement as follows, 'Our regular high-level lobbying on behalf of Rurelec has helped to demonstrate the seriousness with which we take protection of our companies' interests.'¹²

In another case, the former UK Prime Minister, David Cameron, personally intervened against the Indian Government on behalf of two British companies, Cairn Energy and Vodafone. The ex-prime minister of the UK concerned that the deal between Cairn Energy and its Indian subsidiary Vedanta Resources were not approved by the government authorities for more than seven months.¹³ In addition, Mr Cameron was involved in the matter of \$2 billion tax demanded by Vodafone, and unpaid bills of more than £20 million of owing to British companies that worked at the Commonwealth Games staged in Delhi.¹⁴

In the context of this thesis, it is important to understand why home states feel the need to intervene on behalf of investors, in an era of BITs and investment arbitration. This research will try to simplify under which circumstances the involvement of the home state is necessary and acceptable. Moreover, although it has been claimed that the ICSID Convention has 'depoliticised' investment arbitration, the above examples reveal that politics continue to lobby to try to protect investors in host countries. So far, states such as the Republics of Bolivia and the Republic of Ecuador which have denounced the ICSID Convention, have done so for political but not legal reasons.

1.3. Research Questions

Under modern International Law (IL), it is difficult to argue that all the investor-States disputes

¹² Claire Provost and Matt Kennard, 'The Obscure Legal System that Lets Corporations Sue Countries' 10 June 2015, *The Guardian* <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-tip-icsid/> accessed October 2018.

¹³ Rowena Mason and Dean Nelson, 'David Cameron Intervenes for Cairn and Vodafone in India' 19 February 2011, *The Telegraph* <https://www.telegraph.co.uk/finance/newsbysector/energy/8334832/David-Cameron-intervenes-for-Cairn-and-Vodafone-in-India.html> accessed October 2018.

¹⁴ Ibid

may be settled under a single institution or settlement mechanism. According to one research¹⁵ it is argued that only one out of two international agreements have dispute resolution provisions. The remaining agreements also need settlement mechanisms, and DP fulfill this function.

This thesis aims to understand the role of DP in modern investment arbitration. Moreover, for the research its important to identify the position of DP as a dispute settlement mechanism in investor-State disputes. It will try to discover whether all types of investment disputes have been ‘depoliticised’, and whether or not home state involvement is needed at any time during the arbitration process. As part of these aims, the thesis will attempt to answer these questions:

- 1- Why Investor-State Arbitration was created?
- 2- Was the ICSID Convention successful for resolving investor–state disputes?
- 3- Do investors need home-state protection in the era of the ICSID Convention?
- 4- Does diplomatic protection plays a powerful role in investment arbitration? Or do home states have a right to espouse their nationals’ claims in investor–state disputes?
- 5- Do we need investment arbitration?

1.4. Methodology

For this research, a doctrinal methodology was applied. The doctrinal methodology has been dominant in the realm of research for several centuries. From the Middle Ages until the 17th century, legal doctrine was considered and used as an argumentative discipline to determine what kind of arguments were acceptable for specific cases.¹⁶

The doctrinal method lies at the basis of common law and is the core legal research method.¹⁷ With the popularity of common law, doctrinal research methodology became the dominant research mechanism in the legal sphere. In the 19th and 20th centuries, law as a subject started to be studied at universities, especially in the UK, where the doctrinal method was

¹⁵ Barbara Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining', *Journal of Legal Studies* (2007), 36 (1) 189-212.

¹⁶ Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (eds) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 5.

¹⁷ Terry Hunchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' *Deakin Law Review* (2012), 17(1) 83-119.

applied as a research instrument for legal studies.¹⁸ In the 19th century, learned writings or ‘doctrine’ were the fundamental sources of law.¹⁹

The doctrinal methodology focuses entirely on library-based research.²⁰ It comprises two main processes that can be outlined as follows.²¹ First, the sources of law are located. This helps the student to understand historical aspects of the law, discover where legal doctrines originated, and learn how law was applied in the past. Historically, international dispute resolution law was governed by states; previously, the institution of diplomatic protection (DP) mainly worked properly.

The protection of foreign investors evolved over time in various steps. For investors in the 18th and 19th centuries, one of main dispute settlement mechanisms was DP. However, this mechanism was accessible for only a few states’ investors. At that time, the biggest issues confronting investors were how to deal with the direct actions of governments in the acquisition and nationalisation of assets, and finding equitable judicial and executive protection in foreign territories. Chapter Two of this study analyses the historical aspects of DP and its development.

The second process of doctrinal methodology involves interpreting and analysing texts. Today, the most important sources of international law are customary law, treaties, and the general principles of law. For this thesis, analysis was focused primarily on the International Law Commission’s Draft Articles on DP (2006) and Articles on the Responsibility of States for Internationally Wrongful Acts (2001). Additional instruments for the analysis were the ICSID Convention, Bilateral Investment Treaties (BITs), and International Investment Treaties (IIAs) between states. The ICSID Convention provides a legal framework for international investor–state dispute resolution and is one of the most important treaties used in such disputes. However, an examination of BITs signed between states reveals that specific terms and definitions have not been sufficiently dealt with in the relevant Conventions. For instance, the ICSID Convention

¹⁸ Amrit Kharel, ‘Doctrinal Legal Research’, 2018, Juris Nepal Law Associates, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130525, last accessed 17th of May 2019.

¹⁹ Terry Hutchinson, ‘Doctrinal research: researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law*, (Routledge Taylor & Francis Group 2013) 10.

²⁰ Ashish Kumar Singhal and Ikramuddin Malik, ‘Doctrinal and Socio-Legal Methods of Research: Merits and Demerits’, 2012, Vol.2 (7), Educational Research Journal, 252-256.

²¹ Terry Hunchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’, 2012, 17 (1) Deakin Law Review, 83-119.

does not define ‘nationality’, but states have proceeded to define the terms of ‘nationality’ in various BITs. These sources were classed as primary sources for this research.

Secondary sources examined and referred to in this research include books, academic journals, cases, and previous studies. The Brunel University, Institute of Advanced Legal Studies (IALS), and Queen Mary University of London libraries were used during this research.

As mentioned, the methodology was doctrinal legal research. This approach can be uniquely utilised by every legal researcher or lawyer because it identifies, analyses and synthesises the content of the law.²² This methodology employs readings and analysis of the primary sources of legal doctrines and its aim is to achieve more than description of the law. Hutchinson and Duncan claimed in the past, this non-articulation was not a problem, whereas currently ‘the research is being directed, read and more importantly “judged” by those outside a narrow legally trained discipline, [so] articulation of method is vital – especially if funding is tied to quality, and quality depends on methodological clarity.’²³

However, there are some criticisms regarding the doctrinal method. The method has been criticised as being too theoretical, descriptive, technical and uncritical. It has also been described as not taking the context of the law sufficiently into account. Further criticisms are that it lacks a clear methodology and legal practice; it does not offer an adequate framework for addressing issues that arise; and it does not consider social, political, economic frameworks or its contexts.²⁴

It is known that law cannot be isolated from society; the law should be real and practicable for everyday life. However, legal doctrine does not study law as it is. It is limiting its ‘empirical data’ to legal texts and court decisions whereas other disciplines learn legal reality, law as it is.²⁵ In addition, because of the above-mentioned criticisms, lawyers need more than doctrinal and library-based research skills to make their research practical and relevant at an international level.²⁶

²² Hutchinson (n 19) 9.

²³ Hutchinson and Duncan (n 21) 83-119.

²⁴ See Mark Van Hoecke (n 17) 3; Kumar Singhal and Malik (n.20) 252-256.

²⁵ Mark Van Hoecke (n 17) 2.

²⁶ Kumar Singhal and Malik (n 20) 253.

1.5. The Structure of Thesis

The first chapter of this thesis presents an introduction to the research, and deals with the following aspects: the scope of the research, the significance of the research, the research problems, and the research methodology used. This chapter also outlines details the organisation of the thesis.

Chapter Two explores the development of diplomatic protection in relation to international investments by tracing historical developments in protecting foreign investors. This is done using various case studies, and by examining the findings of international law jurists. The chapter also gives a brief introduction to evolutionary changes of the diplomatic protection from Calvo Doctrine (1868) to Hull Rule (1938) and other foundations of ILC's Draft Articles on Diplomatic Protection (2006). Furthermore, the chapter investigates the scope of state responsibility towards international investors. Thereafter, early developments are traced by presenting the insights of various writers, including Emmerich Vattel (*The Law of Nations*, 1758), with special reference being made to the issue of the nationalisation of international investments. Part of this chapter also focus on the international legal framework which defines the scope of international legal instruments, such as the Montevideo Convention on the Rights and Duties of States (1933).

Unlike other works on the same topic, in Chapter Two this work presents a unique adumbrated course of development. The discussion refers to various concepts related to diplomatic immunity, using the Calvo Doctrine (1868) and the Hull Formula (1938) as points of reference. Moreover, among the various international legal documents examined include the United Nations General Assembly Resolution (XVII) on Permanent Sovereignty over Natural Resources (1962), the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), the ICSID Convention (1966), and various Bilateral Investment Treaties (BITs). A significant contribution in this chapter concerns highlighting the role of modern international instruments for resolving disputes relating to international investments, such as the ILC Draft Articles on State Responsibility, International Covenant on Civil and Political Rights (ICCPR), and ICSID. The chapter concludes by explaining the significance of international trade and relevant state responsibility towards it. The conclusion also stresses that contemporary BITs may utilise an ICSID platform for minimising

international investment disputes. Moreover, the chapter concludes that diplomatic protection still remains an effective tool for protecting international investments.

Chapter Three focuses on analysing the domain and scope of diplomatic protection as it is used as a tool for protecting foreign investors. Invoking diplomatic protection requires the fulfillment of certain conditions, and establishing the nationality of the investor is one of the most significant factors among these conditions. This chapter will examine the legal discourse for defining nationality, with special reference to the nationality of the individual, the nationality of the company, rights of the refugees, and other entities formed through an award of sovereign charter. A brief discussion on the modes of acquiring nationality will also be presented, with special focus on states, keeping in mind their role in protecting international investments. Diplomatic protection of stateless persons and refugees is also examined, as it is relevant to the point of discussion, with emphasis placed on Article 25 (2) of ICSID. This chapter examines modes of defining the nationalities of states, the nationality of natural persons, the nationality of juridical persons, and the significance of nationality in relation to diplomatic protection for foreign investments.

The last part of this chapter focuses on the rights of shareholders in a company. The protection of shareholders with foreign investments is a complex issue, which has now been elaborated using the ICSID framework. A thorough discussion will be presented of the protection of the rights of shareholders in companies working in foreign territories. Based on the analysis presented in previous chapters, this chapter will continue the critical analysis of the conditions for invoking diplomatic protection of foreign investments. This chapter mainly presents a textual and contextual analysis of Article 27 of the ICSID Convention, and reveals that invoking diplomatic protection to protect foreign investments remains an exceptional remedy, which is only applied after the fulfilment of certain conditions. This chapter also connects to next chapter which presents an analytical study of the ‘exhaustion of local remedies’ rule.

Chapter Four analyses shifts in the global attitude towards the ‘exhaustion of local remedies’ rule as a condition for invoking diplomatic protection for international investments. A foreign investor needs to prove that local remedies have not been effective, on account of the reluctance of the contracting state, or that the remedies made available were not adequate. In these cases, where there is an inability of the host state to provide remedies, or where remedies are inadequate for the purpose of justice, an aggrieved foreign investor has rights to invoke

international jurisdiction. The chapter places special focus on Article 44 (b) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), and explains that a state's responsibility is not invoked where the exhaustion of local remedies rule is applicable, and where there is an effective local remedy that the claimant has not exhausted. Moreover, Article 26 of the ICSID Convention provides parties with an option for international arbitration with consent. A detailed discussion on the exhaustion of local remedies rule will be presented, keeping in mind the various BITs and multilateral agreements signed by states, such as the North American Free Trade Agreement (NAFTA, 1994).

This chapter finds that the modern international legal interface for resolving international investor disputes calls for mutual agreement to international methods of settlement. Recent decades have seen the rise of an 'internationalised' investment regime which has been protected by international forums that are organised by the United Nations Conference on Trade and Development, (UNCTAD, 1964) or by the Organization for Economic Co-operation and Development (OECD, 1961). Chapter Four concludes that a lengthy process of local remedies may jeopardise the interests of foreign investors, which can affect the growth of international trade and globalisation. One solution for this issue has been to adopt a flexible interpretation of the condition of the 'exhaustion local remedies' rule.

Chapter Five focuses on identifying the concept of DP and analyses the characteristics and distinguishing features of the ICSID. This chapter also looks at examining the political aspects of investment arbitration for both developing countries and developed countries.

Chapter Six aims to examine the judicial and non-judicial resolution systems available to resolve international investment disputes arising between investors and states. International investment arbitration is one of the most effective methods for the resolution of international investments disputes, but some legal challenges have still arisen in relation to the enforcement of arbitral awards. This chapter focuses on analysing practical solutions that can provide effective enforcement, and which can increase an investor's access to justice.

Chapter Seven presents a summary and conclusion, with recommendations provided in respect of the knowledge standards of international law. This chapter looks at what changes are needed to the ICSID Convention in order to help prevent the withdrawal of various countries from the Convention. This approach might help maintain the survival of the institution as the primary international investor-state dispute settlement mechanism.

Chapter Two: The Customary International Law and Individual's Protection

2.1 Introduction

This chapter explores the international responsibility of states towards protecting foreign investors, by critically analysing historical developments and the development of international consensus. The protection of foreign investors has evolved over time in various steps. Perhaps the biggest issues to confront investors have been how to deal with the direct actions of governments in the acquisition and nationalisation of assets, and finding equitable judicial and executive protection in foreign territories. This thesis will begin by outlining the evolutionary development of state responsibility towards international investors.

The protection of investors in foreign territories has been a continuing source of conflict throughout history; the issue first became apparent in classical times. Before international agreements such as the ICSID Convention or BITs states under the classical international treatment of investors, states included the extra-territorial application of national laws, the rule of reciprocity, and restrictive systems for the treatment of aliens under national laws. However, they lacked adequate protection of property and equitable interests. In the 18th century, Emmerich Vattel in *The Law of Nations* (1758) argued for state responsibilities towards protecting foreign investors. He advocated rights against the arbitrary acquisition of the property of foreign investors through nationalisation or other unilateral acts of certain states. The Montevideo Convention on the Rights and Duties of States (1933) was a significant development in defining the various elements that make up a state, including a permanent population, a defined territory, a sovereign government, and, most significantly, the capacity to enter into international agreements. This Convention was a departure from the narrow interpretation of the state as an entity capable of protecting its nationals and its territory from foreign invasions.

A broad interpretation of state responsibility towards the protection of foreign investors further evolved with the following legislations: the Calvo Doctrine (1868); the Hull Formula (1938); the United Nations General Assembly Resolution (XVII) on the Permanent Sovereignty Over Natural Resources (1962); the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001); the ICSID Convention (1966);

and Bilateral Investment Treaties (BITs). The aforementioned international legal instruments focus on avoiding the unilateral and arbitrary actions of states against foreign investors in order to protect the international trade regime. Moreover, these international developments also cover the use of diplomacy to resolve 'unjust' trade practices. Indeed, the international legal regime has always worked to find a balance between the protection of foreign investments and a state's right to regulate international investments. Transitional solutions such as the Calvo Doctrine and the Hull formula have contributed towards finding balance. Although the Calvo Doctrine did not attain significant reputation among the international community, it contributed towards the ILC draft conventions and later developments in the shape of the ICSID Convention, the laws of the sea, and various treaties during the 1960s. The Hull Formula focused on seeking compensation against the arbitrary seizure of property in other states. To illustrate, the *Chorzow Factory Case* is an example where the Judge noted that it is a principle of international law that any breach of international obligation must be remedied through adequate reparation. The rule of compensating international investors was confirmed in the UNGA Resolution 1803 (XVII) in 1962. Furthermore, following input from the UN, Bilateral Investment Treaties (BITs) were introduced, which encapsulate the idea of obtaining compensation from a state in cases of the inadequate protection of international investments. This thesis will also elaborate on the concept state responsibility towards international investment, an idea that can be traced from the ILC Draft Harvard Convention (1929), which defines the scope of damage to a person and property. This development precluded the adoption of the laws of the sea in 1956 and further treaty laws in 1966.

In 2001, the ILC Draft Articles of State Responsibility provided for the protection of international investors. The Draft Articles define the scope of the actions of states in prejudicing the interests of international investors in violation of international responsibility. Article 4 of the Draft Articles obliges member states to act in accordance with international laws and not in an arbitrary manner. This development will be explored by presenting various case studies. Reference to the ILC Draft Articles on the Expulsion of Aliens (2014) will be made to explore the powers a state has for expelling a foreigner from its territory. This study will focus on defining the conditions of the declaration of an alien and later expulsion, and it will also explore how the property of an expelled person can be protected in law. Article 13 of the ICCPR will

also be examined in relation to expelling foreigners from a state's territory and the various conditions relating to this.

This thesis will also focus on exploring the diplomatic protection of international investments as described in the International Law Commission (ILC) Draft Articles on Diplomatic Protection (2006). In this respect, the scope of international responsibility towards protecting international investors will be defined, together with state prerogative for protecting nationals, rules regarding refugees and the stateless, and, most significantly, the invocation of diplomatic protection and the conditions relating to this. The ILC Draft Articles contributed towards the formulation of the ICSID Convention. Indeed, this chapter will reflect on the significance of exploiting diplomatic protection in relation to international investors' rights, with special focus on Article 27 of the ICSID Convention. This Article calls for limiting a state's use of diplomatic protection with the proviso of triggering it, in cases of the failure of the contracting state in the performance of its responsibility towards protecting international investments.

This chapter will be divided into three main sections. The first part will embark on highlighting the need to find a balance between state regulation and the protection of foreign investments. The second part will focus on transitional developments that call for an effective system of protection for international investors against the arbitrary use of state powers against rights of a person and the property of an international investor. The last section will present an overview of contemporary international law on the same subject matter.

2.2. A Historical Assessment of the Protection of Aliens: Diplomatic Protection

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, provides the following:

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”

Although, when it was introduced, this Convention did not prove to be popular in all countries of the world. However, even if no convention existed to offer such a clear definition, it would not be inaccurate to argue that, historically, a sovereign state must possess a national population and

autonomous territory, as basic elements, in order to be classed as a state. The history of international relations attests that states can survive only if they are able to protect their sovereign territory and their citizens. This means that states see it as their duty to protect their land, as well as their citizens on both national and foreign territory. Now, as in the past, it is part of human nature to travel abroad for different purposes, including tourism, business, education and making investments. When citizens from one nation enter a foreign state, they are sometimes described as 'aliens'. In other words, these people are viewed as outsiders.¹ The word 'alien' is derived from the Latin word *alius*, meaning 'other'.² Therefore, an alien is an individual who, according to the laws of a given state, is not considered its national.³

In previous centuries, 'alien-others' have been treated differently in different jurisdictions. For instance, in Ancient Rome, the alien fell outside the legal system and the judicial organisation of the city, that is, they were 'outlawed',⁴ and were treated as enemies, barbarians or outcasts.⁵ This meant they were usually denied legal capacity and rights.⁶ However, historically, aliens have been able to gain access local tribunals under one of the four principles outlined below:

1. Extra-territoriality. The alien's own national laws can be used to govern them while the alien is abroad.⁷
2. Reciprocity. When the rights of the alien depends on corresponding rights granted to citizens living in the alien's native country.⁸ An alien might enjoy these corresponding rights, either because these rights are granted diplomatically, or legislated for, or simply offered on the basis of reciprocity.⁹

¹ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 3.

² Ibid.

³ Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 1.

⁴ Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden 1949) 25.

⁵ Newcombe and Paradell (n 1) 3.

⁶ *Encyclopaedia of Public International Law Volume I* (published under the auspices of the Max Planck Institute for Comparative Public Law and International Law, under the direction of Rudolf Bernhardt, 1944) 102.

⁷ Frank Griffith Dawson, Ivan L Head, and Peter E Herzog, *International Law, National Tribunals, and the Rights of Aliens* (Syracuse University Press 1971) 109.

⁸ Ibid.

⁹ Ibid.

3. The Restrictive System. This is based on rules of equality between nationals and aliens. Even though this rule might be proclaimed in theory, aliens might become subject to many important exceptions, enough as to render any guarantees meaningless.¹⁰

4. Assimilation or equal treatment. Aliens are granted the same rights as the nationals of the host state.¹¹

These four principles have not always been adequate to cover all cases or situations relating to diplomatic protection. Under these rules, in some instances, aliens were not able to gain membership of any community other than their own.¹² Due to this, and other discriminatory treatment, many citizens began to feel that they needed better protection from their national governments when they travelled or did business abroad. It should be noted that, in previous centuries, only the states themselves were subject to international law, not individuals, and individuals could not protect their own rights under international law. It was a state's responsibility to protect its citizens from the governments and subjects of other countries. Furthermore, historically, countries have not been under any obligation to admit aliens onto their territory, but once a foreign citizen entered onto its land, international laws deemed that the host state was under an obligation to provide a degree of protection to the foreigner and/or his property, in accordance with international minimum standards set for the treatment of aliens.¹³ Failure to correspond to these principles might result in breaking international laws that engaged the responsibility of the host state.¹⁴ This idea was defined for the first time in 1758 by Emmerich Vattel as follows:

“Whoever ill-treats a citizen indirectly injures the state, which must protect that citizen and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation since otherwise the citizen would not obtain the great end of the civil association, which is safety.”¹⁵

¹⁰ Ibid.

¹¹ Ibid 110.

¹² Ibid.

¹³ John Dugard ‘Diplomatic Protection’ in James Crawford, Alain Pellet, and Simon Olleson (eds), *Oxford Commentaries on International Law: The Law of International Responsibility* (Oxford University Press 2010) 1051.

¹⁴ Ibid.

¹⁵ Emmerich Vattel, *The Law of Nations, or the Principles of Natural Law* (Book II Chapter VI, Liberty Fund 1758) 298.

Vattel's proposition was generally accepted internationally as the foundation of the principle of diplomatic protection. His main aim was to rationalise diplomatic protection as an institution, and to protect aliens abroad. However, it should be noted that the exercise of diplomatic protection can be traced back to the Middle Ages, if not earlier.¹⁶ Diplomatic protection is one of the oldest rights established in international law.¹⁷ But, in comparison with other international legal mechanisms (such as the laws of the sea or the acquisition of territory), it is comparatively young.¹⁸ There are no recorded examples of the exercise of diplomatic protection prior to the late eighteenth/early nineteenth century.¹⁹ Even so, before this time, just as with other issues, such as economics, industry, and foreign affairs, the protection of citizens and their property had for a long time been the subject of government policies. Furthermore, up until recently, an individual's property was, essentially, classed as the property of the nation.²⁰ For instance, between 1820 and 1914, the British armed forces intervened in Latin America twenty six times in order to enforce the claims of British subjects in relation to outrage and injury, or to restore order and protect their property.²¹ During the same period, Lord Palmerston, the British Foreign Secretary, set out British policy on diplomatic protection for bondholders.²² He believed this kind of protection lay entirely within the political discretion of the Government, based on 'good policy reasons'.²³

The above examples show that the actions of a home state were recognised as lawful when they were undertaken to protect its nationals against a host state. Interestingly, during this period, jurists universally agreed that it was lawful to use force to protect the lives and property of its nationals.²⁴ In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice (PCIJ) asserted the following:

¹⁶ Ian Brownlie, *Principles of Public International Law* (6th Edn, Oxford University Press 2003) 500.

¹⁷ Anna Maria Helena Vermeer-Künzli, *The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument*, (D. Phil Thesis, University of Leiden, 2007) 141 available at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/12538/proefschrift%20vermeer%20binnenwerk.pdf?sequence=2> last accessed 18 July 2014.

¹⁸ Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 8.

¹⁹ *Ibid.*

²⁰ Vattel (n 15) 302.

²¹ Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press 1985) 54.

²² Micheal Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press 2011) 23.

²³ *Ibid.*

²⁴ Ian Brownlie, *International Law and the use of Force by States* (Clarendon and Oxford University Press 1963) 289.

“It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.”²⁵

This mirrors Emmerich Vattel’s view about diplomatic protection. However, at the beginning of the twentieth century, Edwin Bocharad published a different take on Vattel’s theory; he argued that, in international law, states do not have an automatic right to protect its citizens abroad.²⁶ However, for Bocharad, this was a moral rather than a legal idea, because there were no real means of enforcing it.²⁷ Bocharad justified his position by arguing that, when citizens enter into a contract, they do so voluntarily, taking into account the probabilities and possibilities of performance by the foreign government.²⁸ Moreover, by going abroad, the investor (citizen) implicitly submits to local laws and the local judicial system and, if necessary, the contract or the local law should provide a remedy for a breach of contract.²⁹ In a short, it means that when an alien takes up residency in a foreign country, and invests capital there, he/she becomes subject to the same conditions as that country’s own nationals.³⁰

The above arguments suggest that there should not have been any problems for people when they travelled, and any disputes relating to foreigners could be fairly settled in the foreign state’s national courts. However, in reality, these circumstances often meant it was difficult for an alien to expect an objective settlement in a foreign country, especially in investor-state disputes. Diplomatic protection was often misused by powerful states against developing countries. As a result, lawyers began to look for alternative dispute settlement mechanisms and organisations through which investors could settle their disputes fairly. They arrived at the conclusion that

²⁵ Mavrommatis Palestine Concessions (Greece v. UK) Jurisdiction 1924 PCIJ Series A No. (2) 12

²⁶ Edwin M Bocharad, *The Diplomatic Protection of Citizens Abroad or the Law of International Law* (The Banks Law Publishing Co 1916) 29.

²⁷ Ibid.

²⁸ Ibid 285.

²⁹ Ibid.

³⁰ Isi Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law* (Stevens & Sons Limited 1957) 48.

investors should be encouraged to use mediation, negotiation and arbitration to settle their disputes. Nowadays, these methods are commonly used by disputants; they are preferred in comparison to the diplomatic protection of parties, but, nevertheless, there is still a role for diplomatic protection to play in international law. Historically, politicians have taken an active role in protecting their nationals at home and abroad, and as a result, certain political viewpoints have been accepted as legal theories, and have been named after their proponents, including Carlos Calvo (The Calvo Doctrine), Luis María Drago (The Drago Doctrine), and Cordell Hull (The Hull Formula). These examples show that the protection of nationals and their interests have always been, and continue to be, an important legal consideration in international day-to-day life and business. Two of these examples will be outlined in more detail below.

2.3. The Calvo Doctrine (1868)

Prior to the 19th century, diplomatic protection was viewed by Latin American states as a discriminatory exercise in power rather than as a method of protecting the human rights of its nationals.³¹ This view developed because of the misuse of diplomatic protection by powerful states against Latin American states and their nationals. European states gave the impression that the legal mechanisms used by Latin American states were inefficient and slow, in comparison to their own, and that the court systems used in Latin America were not equal to European legal systems in cases where citizens were in need of protection.³² Furthermore, Western states put diplomatic pressure on developing states in Latin America, and sometimes intervened militarily to assert pressure. Therefore, Latin American states did not feel they possessed full political and economic independence. Latin America understood that it was necessary and profitable to attract foreign capital and foreigners to work in their territories, but this ambition was meaningless unless they could control their own economic, social, and legal procedures. These political

³¹ John R. Dugard, 'ILC First Report on Diplomatic Protection Agenda' Item 6 [2000] UN Doc A/CN.4/506 and Add.1, 212

³² Horacio A Grigera Naon 'Arbitration and Latin America: Progress and Setbacks' in Julian D.M. Lew and Loukas A Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International 2007) 398.

circumstances gave rise to a desire to create more logical, moral and secure legal defenses.³³ In 1868 the Argentine diplomat, jurist, and scholar Carlos Calvo announced the following:

“It is certain that aliens who establish themselves in a country have the same right to protection as nationals but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents and not claim from the state to which the authors of the violence belongs any pecuniary indemnity.”³⁴

Calvo said that foreigners should be treated neither better nor worse than citizens of his country.³⁵ His doctrine was based on principles of the equality of nations³⁶ and the independence of a nation's territorial jurisdiction.³⁷ It is important to note that proponents of this doctrine do not assert strict equality, because it is obvious that foreigners do not always enjoy full equality with nationals elsewhere.³⁸ In this vein, foreigners would not be granted full political rights or access to all economic activities, but would be subject to restrictions on the kind of property they may acquire and activities they undertake.³⁹ Therefore, the core idea underlying the Calvo Doctrine is not that aliens should be treated the same as nationals, but rather, aliens should not be given better treatment than nationals.⁴⁰ Calvo asserted that if an investor had a dispute with his host country, then the host country's state courts should settle the conflict. Calvo's twin ideas are, for good or ill, his main legacy to international law and international politics.⁴¹

Understandably, European states and America did not support Calvo's doctrine. This was because, as capital-exporting countries, they not only invested abroad, but were in a position to impose upon, or place political pressure on, developing countries, in order to safeguard their

³³Carlos Calvo, *Le Droit International Théorie et Pratique* (5th edn, A. Rousseau 1896) 350; Donald R Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 14.

³⁴ *Ibid.* 18.

³⁵ Tilmann Rudolf Braun, 'Globalization: The Driving Force in International Investment Law' in Micheal Weibel and Asha Kaushal et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 493.

³⁶ Shea (n 33) 18.

³⁷ *Ibid.* 19.

³⁸ Oscar M Garibaldi, 'Carlos Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties', (2006) 3 (5) *Transnational Dispute Management* 18.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

national interests. For instance, in 1873, in the early years of the practice of Calvo's Doctrine, the Mexican Minister of Foreign Affairs, Lafragua, sent a note to the US Ambassador, Mr Foster, in which he referenced Calvo's Doctrine, and affirmed that Mexico was not responsible for the harm caused to foreign owners during the civil war.⁴² The Ambassador replied that Calvo was a 'young lawyer', whose theories had not been universally accepted.⁴³ This was the first of many rejections of Calvo's Doctrine by the United States.⁴⁴

Nevertheless, Calvo's views gained support in capital-importing states, especially in Latin America and in Asia. These economically dependent countries began incorporating Calvo's views into contracts they entered into with foreign investors. This practice became known as using the 'Calvo Clause'. The main purpose of the Calvo Clause was to accomplish what Latin American governments had failed to achieve using other techniques: to limit, or, if possible, eliminate diplomatic interposition.⁴⁵ In addition, the clause required all disputes to be settled under national law. The Clause began to be seen not only in state-investor contracts, but also in constitutions, national legislation, and international agreements formed by Latin American states. For instance, Article 16 of the Constitution of Ecuador states the following:

“The waiving of all rights to diplomatic recourse is implicit in contracts concluded by the Government or by public entities with foreign natural or juridical persons. If such contracts are made in Ecuadoran territory, they cannot be subjected to a foreign jurisdiction.”⁴⁶

Similar provisions were introduced into constitutions and national jurisdictions in other countries. However, the inclusion of the Calvo Clause in a state's national legal system divided the opinion of scholars. Some scholars believed that the Calvo Clause was successful, but others viewed it as being totally useless. The main reason for the latter view was because the Calvo Clause is half-legal and half-diplomatic in nature.⁴⁷ This makes the clause unpredictable in

⁴² Jorge E Viñuales and Magnus Jesko Langer, 'Foreign Investment in Latin America: Between Law and Hatred' in Claude Auroi and Aline Helg (eds), *Latin America 1810-2010 Dreams and Legacies* (Imperial College Press 2012) 324; Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 21.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Shea (n 33).

⁴⁶ Denise Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors' (1995) 26 *Law and Policy in International Business* 1181.

⁴⁷ Shea (n 33) 281.

practice. Donald Shea,⁴⁸ an eminent researcher on this theory, and a supporter of the Calvo Doctrine explains as follows:

“The Calvo Clause as a technique to implement the Calvo principles has proved to be the most successful method of limiting the exercise of diplomatic protection.”⁴⁹

Conversely, for scholar Denise Manning-Cabrol, in spite of the fact that the Calvo Clause was incorporated into constitutions, laws and contracts, she argues that it is an ineffective legal instrument, and actually does nothing to prevent the use of diplomatic protection.⁵⁰ For this reason, the United States of America and Latin American States continue to resolve disputes through the use of diplomatic intervention.⁵¹ Another scholar, Carmen Tiburcio argues that, whilst it is true that Calvo is perceived as an opponent of diplomatic protection, an accurate examination of his work shows that he only opposes diplomatic protection in cases where intervention is unfounded.⁵² In other words, Calvo criticises intervention only in cases of expropriation of private property, and not intervention in all cases.⁵³ In short, Calvo voiced criticism of abuses of diplomatic protection in situations where protection was not really needed, and therefore, where interventions should not have taken place.⁵⁴

An exploration of international legal practises confirms that diplomatic protection was exercised before, during and after the development of the Calvo Clause. International law affirms that a state’s right to diplomatic protection may not be waived, even though an entity or individual may waive a personal right to diplomatic protection.⁵⁵ Furthermore, not only developed states exercise diplomatic protection. In recent years, Latin American nations have used diplomatic protection but have euphemistically termed this as ‘good offices’.⁵⁶ Given these different arguments, it is necessary to ask whether the ideas of Calvo are dead, or still alive?⁵⁷ This question can be answered by exploring the views of different scholars. Donald Shea argues that

⁴⁸ Wenhua Shan, 'Is Calvo Dead' [2007] 55 American Journal of Comparative Law 124.

⁴⁹ Shea (n 33) 31.

⁵⁰ Denise Manning-Cabrol (n 46) 1181.

⁵¹ Ibid.

⁵² Tiburcio (n 3) 46.

⁵³ Ibid.

⁵⁴ Ibid. 48.

⁵⁵ Majorie M Whiteman, *Digest of International Law* (1967) 8 Washington, Department of State Publications 918.

⁵⁶ Manning-Cabrol (n 46) 1181.

⁵⁷ Shan (n 43) 123.

the future of the Calvo Clause depends on developments in inter-American diplomacy and international jurisprudence, which, in turn, depend on the degree of integration and harmonisation of the world community.⁵⁸ Academic Wenhua Shan suggests that the Calvo Doctrine has been significantly changed or generally ‘deactivated’ but is not yet completely dead.⁵⁹ Shan argues that when political and economic climates are ‘right’, the Calvo Clause could be re-activated and ‘resurge’, and this seems to be happening.⁶⁰ These arguments support the view that Calvo’s ideas are still alive, but it is impossible to predict how long the doctrine will continue to be used as a legal rule in international law.

2.4. The Hull Formula (1938)

Investing in a foreign country is an activity undertaken at the investors’ own risk. This is because investors are faced with the danger that the home state might either, nationalise, expropriate, or confiscate their investments. These three terms are often viewed as meaning the same thing. However, from a legal perspective, they are different. Confiscation means that a state deprives a person, in real or juristic terms, of their property, whether or not this is done in punishment.⁶¹ Nationalisation occurs when a state starts a new policy that affects property, or when a state decides it must act to protect public security or public interests, and, therefore, it takes control of or exploits certain resources and goods.⁶² Expropriation involves the state depriving someone of their property, but, in contrast to confiscation, expropriation does not have any penal connotations.⁶³ These actions put investors at serious risk. Prior to 1917, expropriation had international ramifications. Methods used for settling disputes between an expropriating country and an expropriated one, included arbitration, diplomatic intervention, and governmental pressure.⁶⁴ This was of particular relevance during the Russian Revolution in 1917, and continued to be relevant with the Mexican nationalisations of the 1930s. Doman argues that these two events gave rise to the first series of impersonal expropriations on a large scale.⁶⁵

⁵⁸ Shea (n 33) 281.

⁵⁹ Shan (n 43) 163.

⁶⁰ Ibid.

⁶¹ Saul Litvinoff, ‘Creeping Expropriation’ (1964) 33 (2) *Revista Juridica de la Universidad de Puerto Rico* 217.

⁶² Ibid 218.

⁶³ Ibid 217.

⁶⁴ Nicholas R Doman, ‘Postwar Nationalisation of Foreign Property in Europe’ (1948) 48 (8) *Columbia Law Review* 1126.

⁶⁵ Ibid.

It would be less risky for investors if they could get ‘prompt, adequate and effective’ compensation from home states. Achieving these outcomes is one possible solution for investors, which would avoid or, at least, minimise the risks of being subjected to expropriation by host states. The terms ‘prompt’, ‘adequate’ and ‘effective’ have different meanings but all can be used to support investors. For instance, the term ‘prompt’ requires paying compensation without unreasonable delay; ‘adequate’ means that investors should receive the equivalent to the fair market value of the expropriated property (as valued immediately before it was expropriated); whilst ‘effective’ means that payment must be made in a freely transferable currency.⁶⁶ These terms were used as a basis for the development of The Hull Formula, which was first used by Secretary of State Cordell Hull, at the time of the Mexican expropriations.⁶⁷

The development of The Hull Formula began with a letter from Secretary Hull to the Mexican Ambassador in Washington on the 21st of July 1938, about the payment of compensation to American nationals for agrarian and oil properties that had been taken over by the Government of Mexico.⁶⁸ Secretary Hull wrote the following:

“[...] The American owners, whose properties have been taken, are left not only without present payment but also without assurance that payment will be made within any foreseeable time...”

The taking of property without compensation is not expropriation. It is confiscation. Governments would be free to take property far beyond their ability or willingness to pay and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this

⁶⁶ Frank G Dawson and Burns H Weston, ‘Prompt, Adequate and Effective: A Universal Standard of Compensation’ (1962) 30 *Fordham Law Review* 737-738; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011) 93.

⁶⁷ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd Edn Cambridge University Press 2010) 414.

⁶⁸ Green Haywood Hackworth, *Digest of International Law* (Vol.3 Chapters IX-XI, Washington D.C. United States Government Printing Office 1942) 655.

instant case, nullify this universally accepted principle of international law based as it is on reason, equity and justice.”⁶⁹

The Mexican Minister of Foreign Affairs responded to this letter on the 3rd of August 1938, stating the following:

“There is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory, the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those, which Mexico has carried out for the purpose of redistribution of the land.”⁷⁰

However, at the end of the letter, the Mexican official admits that, in obedience to Mexico’s laws, they were indeed under an obligation to indemnify to American nationals in an adequate manner, but they stressed that the manner of such payments must be determined by their own laws.⁷¹ On the 13th April 1940, Secretary Hull wrote a note back to the Mexican Ambassador in Washington, stating the following:

“The Government of the United States readily recognises the right of a sovereign state to expropriate property for public purposes. [...] The right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.”⁷²

These letters reveal that American policy was to protect its investors abroad. For the United States of America (USA), expropriation, nationalisation and confiscation can only be legal if the investor obtains ‘prompt, adequate and effective compensation’. Nevertheless, it is worth mentioning that questions about awarding compensation to the owners of expropriated property and abolishing vested rights have been raised for thousands of years.⁷³ These problems did not begin at the time of the development of The Hull Formula, but these problems began to be addressed using this formula. Using The Hull Formula, the international community came to

⁶⁹ Ibid 656.

⁷⁰ Ibid 657.

⁷¹ Ibid 658.

⁷² Ibid 662.

⁷³ Doman (n 64) 1125.

understand that a person who has assets seized, without explanation, is entitled to recover them, or be paid their equivalent.⁷⁴ If this rule is not respected, then the actions of the expropriating state are viewed as being illegal. Moreover, the restitution of possessions is recognised in most legal systems, as a matter of justice and fair dealings between persons.⁷⁵ However, The Hull Formula raises critical questions about how to calculate and value the property of investors in host countries, in order to give full and appropriate compensation. For capital-importing countries, ‘appropriate’ can interpret with regard to relevant circumstances, and awards should be given in accordance with the domestic laws of the expropriating state.⁷⁶ Summing up in the *Chorzow Factory* case, the Judge noted that, “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”⁷⁷

After World War II, a number of newly independent states emerged. However, these states began to question the legitimacy of The Hull Formula. States started to claim national rights to determine how they would treat investors, and the standards of compensation that should apply if treatment was deemed sufficiently harmful.⁷⁸ Furthermore, some states such as Libya, or Iran claimed they were tied to long-term contracts to which they were not party, and felt that these contracts did not give them economic independence, especially if it was not possible to control their own natural resources. On the basis of these arguments, British oil assets were nationalised in Iran in 1951, LIAMCO concessions were expropriated in Libya in 1955, and in the 1960s sugar interests were nationalised in Cuba. The expropriation, nationalisation and confiscation undertaken by these newly independent states put foreign investors at enormous risk. The investors thus needed protection from these newly independent states, which were not secure places for investment. They needed more legal protection for their capital. Guzman explains, “Before decolonisation, the official views of these states were controlled by their colonial

⁷⁴ B.A. Wortley, ‘The Protection of Property Situated Abroad’ (1961) XXXV Tulane Law Review 740.

⁷⁵ Ibid.

⁷⁶ Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 72.

⁷⁷ *Factory at Chorzow Case*, Jurisdiction, (1927) PCIJ Series A Number 9 21.

⁷⁸ Andrew Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’, in Karl P. Sauvant and Lisa E. Sachs (eds), *The Effects of Treaties on Foreign Direct Investment Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford University Press 2009) 74; Andrew Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 Virginia Journal of International Law, 639, 641.

masters who supported a regime of full compensation.”⁷⁹ This meant that, even if investors had problems with their host states, these problems were settled by the imperial states.

In order to gain full economic independence, least developed countries (LDCs) started to work with the United Nations (UN), but early attempts made in this regard by less industrialised countries were not successful. However, in 1962, as part of the General Assembly Resolution 1803 (XVII), the UN adopted the ‘Declaration on Permanent Sovereignty over Natural Resources’, which, for the first time, was broadly supported in the developing and in the developed world.⁸⁰ This resolution required sovereign states to pay ‘appropriate’ compensation in the event of expropriation. This resolution was adopted during a time when collective resistance to The Hull Formula was on the rise in the UN.⁸¹ During the same period, developing states began signing Bilateral Investment Treaties (BITs) with developed states.

Different scholars have interpreted this epoch differently. For example, Guzman suggests this period comprises two phases: 1) When developing countries successfully dismantled The Hull Formula; and 2) When developed countries responded with treaties that offered each individual LDC the opportunity to improve its position in the competition for investment.⁸² Sornarajah argues that if there had been customary international law dealing with investment protection, then there would have been no need to confirm, time and time again, what already existed by entering into bilateral investment treaties.⁸³ In his opinion, the less-developed states entered into treaties in order to clarify the rules that should apply if any disputes arose between them.⁸⁴ Furthermore, Dolzer asserts that, under BITs, states do not view The Hull Formula as undesirable, but they enter into treaties because some provide developing countries with special benefits.⁸⁵ Finally, it would not be wrong to argue that the main reason why The Hull Formula ceased to be popular was because of the appearance of BITs. This argument can be countered by

⁷⁹ Ibid. Guzman (n 78) 646.

⁸⁰ Noah Rubins and N. Stephan Kinsella, ‘*International Investment, Political Risk and Dispute Resolution: A Practitioner’s Guide*’ (Oceana Publications 2005) 167.

⁸¹ Zachary Elkins, Andrew T. Guzman and Beth Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000’ in Micheal Weibel and Asha Kaushal et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 493.

⁸² Guzman (n 78) 96.

⁸³ Sornarajah (n 67) 184.

⁸⁴ Ibid.

⁸⁵ Rudolf Dolzer, ‘New Foundations of the Law of Expropriation of Alien Property’ (1981) 75 (3) *The American Journal of International Law* 567.

stating that most BITs offer investors even greater protection than The Hull Formula ever did, at the expense of the host states.⁸⁶ In addition, breaches of BITs are violations of international law. Also, under BITs, investors can settle their disputes through arbitration, which has an enforcement mechanism. These advantages did not accrue to investors under The Hull Formula, and, thus, it is understandable why the Formula is no longer used today.

2.5. International Law Commission [ILC] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)

The International Law Commission (ILC) was founded in 1948, and from its early inception one of the first topics it faced dealing with was state responsibility. However, the topic of state responsibility was neither addressed by nor put into writing by the ILC straightaway. In 1929, the Harvard Research Draft Convention was among the first proposed codifications of the laws of state responsibility.⁸⁷ The Hague Conference followed this in the 1930's. Both the Harvard Draft Convention and the Hague Conference perceived the responsibility of states as being for damage done in their territory to the person or property of foreigners.⁸⁸ However, the Harvard Draft Convention was not well received by the ILC.⁸⁹ This was because it appeared, in some respects, to depart from well-established rules of international law.⁹⁰ Indeed, it did not become successful until 2001. Another reason for the hesitant reception of the Harvard Draft was because, if there is no international obligation, therefore, there is no international responsibility, and this basic principle was not dealt with in the Draft.⁹¹ Matine-Daftary argues that the main reason why the Draft was unsuccessful was because it was, 'based on purely European standards of justice. These standards did not propose protection of the rights and interests of individuals alone, but rather an acceptance of the jurisdictions of the European Court of Human Rights and the rights of individual petitions.'⁹² Indeed, the practices of international law today confirm that achieving consensus is not easy task, and ultimately it took decades for states to unanimously

⁸⁶ Guzman (n 78) 642.

⁸⁷ James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 33.

⁸⁸ Philip Allot, 'State Responsibility and the Unmaking of International Law' (1988) 29 (1) *Harvard International Law Journal* 3.

⁸⁹ Alan Nissel, 'The Duality of State Responsibility' (2013) 44 (3) *Columbia Human Rights Law Review* 828.

⁹⁰ United Nations, *Yearbook of the International Law Commission*, Summary Record of the 512th Meeting, 'State Responsibility', Vol.I Document A/CN.4/SR.512 (1959) (United Nations Publication 1959) 152.

⁹¹ *Ibid.*

⁹² *Ibid* 149.

accept ILC's Draft Articles on State Responsibility. These periods of unproductiveness in relation to addressing the idea of state responsibility did not benefit most states, and, in 1988, Allot suggested the following:

“There is reason to believe that the Commission's long and laborious work on state responsibility is doing serious long-term damage to international law and international society.”⁹³

However, other international agreements were not seen in the same light. For instance, the ILC successfully adopted a final draft of the Laws of the Sea in 1956, and the Law of Treaties in 1966. These examples show that, for states, it was easier to come to an agreement on some topics more than others. The main reasons for this might lie in political changes that took place after the 1960s, and the economic growth of some countries after World War II. Nissel puts forward two main reasons for this discontinuity:

- 1) Changes in the balance of institutional power in world politics affected the ILC.⁹⁴ In particular, a shift in authority between Anglo-America and Latin American countries allowed Latin Americans to represent their views in international institutions.⁹⁵
- 2) The spirit of decolonisation that pervaded institutional politics at the time precluded any substantive consensus on the law of state responsibility.⁹⁶

In addition, it is worth mentioning that the laws of state responsibility and diplomatic protection are politically more sensitive in comparison with other legal codifications carried out by the ILC. This is because ‘state responsibility’ is viewed as a set of international rules that govern the international obligations of states in their relations with other states.⁹⁷ From a political point of view, each state recognises another state's wrongful action against it. For instance, as mentioned earlier, states have, historically, not been obliged to admit aliens into their territories, but once they have done so, they are obliged to protect these foreigners, or at least provide them with a

⁹³ Allot (n 88) 1.

⁹⁴ Nissel (n 89) 835.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Sompong Sucharitkul, ‘State Responsibility and International Liability under International Law’ (1996) 18 *Loyola of Los Angeles International and Comparative Law Journal* 823.

minimum standard of treatment. If the host state fails to do this, this may result in an internationally wrongful act or omission by the host state.⁹⁸ This ‘international responsibility’ covers new legal relationships under international law.⁹⁹ In other words, the theory of state responsibility for injuries to aliens rests on the idea that an individual injury is an injury to the home state.¹⁰⁰ This means that one state’s international wrongful action does not only impact on the alien, but also on the alien’s home state. In the *Phosphates in Morocco* case, the PCIJ affirms this by stating, “International responsibility would be established immediately as between the two States.”¹⁰¹ It is probably for this reason that, in the early days of ideas about ‘state responsibility’, international lawyers from Latin America and other countries viewed this subject as essentially a matter of confining the diplomatic protection of aliens within limits that respected the sovereignty of all states.¹⁰² Moreover, for some states, the law of state responsibility essentially meant the responsibility for injuries to aliens, as well as the diplomatic protection of citizens abroad.¹⁰³

Article 1 of the ILC’s 2001 Draft Articles of State Responsibility reads as follows: “...every internationally wrongful act of a state entails the international responsibility of that State.”¹⁰⁴ However, according to Article 2 of the Articles on State Responsibility, it is only under two specific conditions that particular conduct can be characterised as constituting an internationally wrongful act:

- 1) The act must be attributable to the state.
- 2) It should constitute a breach of that state’s international obligations. For example, in respect of investor-state disputes, if an investor has signed a contract with one of the ministries of a state or governmental entity, and this contract binds a state, and if the investor’s property is expropriated, and the state fails to compensate the investor for the expropriated property, this

⁹⁸ Dugard, (n 13) 1051.

⁹⁹ Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its Fifty-Third Session (2001) Article 1 (1) 63.

¹⁰⁰ Sornarajah (n 67) 122.

¹⁰¹ *Phosphates in Morocco Case*, Preliminary Objections, (1938) PCIJ Series A/B No. 74, 28

¹⁰² Allot (n 88) 4.

¹⁰³ Sompong Sucharitkul (n 97) 824.

¹⁰⁴ ILC Draft Articles on State Responsibility [2001] Article 1.

is a wrongful act on the part of the state. Under the Draft Articles on State Responsibility, the host state is responsible for this wrongful act.¹⁰⁵

The state cannot act by itself if it requires persons, groups of peoples, ministries, and governmental entities to act on its behalf. This is clarified in Article 4 of the Articles of State Responsibility. Article 4 states that the act of any state organ shall be considered an act of that state under international law, whether the organ exercises a legislative, executive, judicial or any other function, whatever position it holds in the organisation of the state, and whatever its character as an organ of the central government or of a territorial unit of the state.¹⁰⁶ Moreover, according to Article 4 (2), an organ of state is any person or entity that acts in accordance with the internal law of that state.¹⁰⁷ Nowadays, it is not always easy to identify whether a party belongs to a certain state or not. This was an issue in the case of *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*.¹⁰⁸ Here, the claimant argued that, according to the ILC's Draft Articles on State Responsibility, Cocobod was a state organ. The tribunal considered both Ghanaian law and other Articles of State Responsibility, such as Article 5, which reads as follows:

“The conduct of a person or entity, which is not an organ of the State under Article 4, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law.”¹⁰⁹

The tribunal also considered Article 8, which states the following:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.”¹¹⁰

¹⁰⁵ Ibid Article 2.

¹⁰⁶ Ibid Article 4 (1).

¹⁰⁷ Ibid Article 4 (2).

¹⁰⁸ *Gustav F. W. Hamester GmbH & Co KG Claimant v. Republic of Ghana* (Award, 2010) ICSID Case No ARB/07/24, [182].

¹⁰⁹ ILC Draft Articles on State Responsibility [2001] Article 5.

¹¹⁰ Ibid Article 8.

After analysing all relevant laws and after the facts were put forward by both parties, the tribunal concluded that Cocobod could by no means be considered an organ of the Ghanaian State, either *de jure* or *de facto*.¹¹¹ However, in *Salini Costruttori S.P.A and Italstrade S.P.A. v Kingdom of Morocco* the tribunal came to conclusion that the party was a Moroccan State organ and that, under the ILC's Draft Articles on State Responsibility, the Moroccan State was responsible for that company's wrongful acts. The tribunal ruled the following:

“The *Societe Nationale des Autoroutes du Maroc* (ADM), incorporated in 1989 as a limited liability company, builds, maintains and operates highways and various road-works, in accordance with the Concession Agreement concluded with the Minister of Infrastructure and Professional & Executive Training, acting on behalf of the State (Kingdom of Morocco).”¹¹²

The above examples show that the ICSID tribunals have referenced the ILC's Draft Articles on State Responsibility in some cases. They relied on these Articles as secondary rules, because the primary rules had been breached. Riphagen describes this scenario as follows:

“International law as it stands today is not modelled on one system only, but on a variety of interrelated subsystems, within each of which the so-called ‘primary rules’ and the so-called ‘secondary rules’ are closely intertwined—indeed, inseparable.”¹¹³

In this respect, the question arises of when and where arbitration tribunals should refer to these Draft Articles. Most investment tribunals, especially those dealing with investor-state disputes, do refer to the Articles, but without distinguishing attribution.¹¹⁴ At the same time, it is not an easy task for tribunals to determine the scope of the Articles. For instance, the tribunal in *Wintershall Aktiengesellschaft v Argentina Republic* stated the following:

“The ILC's Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of state responsibility vis-à-vis non-state actors. Tribunals are

¹¹¹ *Gustav F. W. Hamster GmbH & Co KG Claimant v. Republic of Ghana*, (n 108) [188]

¹¹² *Salini Costruttori S.P.A and Italstrade S.P.A. versus Kingdom of Morocco* (Decision on Jurisdiction 2001) ICSID Case No ARB/00/4, [2]

¹¹³ Willem Riphagen, ‘Third Report on State Responsibility’ (1982) II (1) (35) Yearbook of ILC 28.

¹¹⁴ Stephan Wittich, ‘State Responsibility’ in Marc Bungenberg and Jorn Griebel et al. (eds), *International Investment Law* (Nomos Verlagsgesellschaft 2015) 41.

left to determine ‘the ways in which state responsibility may be invoked by non-state entities’ from the provisions of the text of the particular treaty under consideration.”¹¹⁵

Some scholars interpret the ILC Articles to mean that only Part One (Articles 1-27) is applicable to investor-state relations, whereas the other parts are confined to inter-state relations.¹¹⁶ Moreover, some argue that Article 55 explains that the ILC Articles do not apply when another area of international law is *lex specialis*:

“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.”¹¹⁷

Thus, Article 55 of the ILC’s Draft Articles on State Responsibility stipulates that other articles shall only apply until the extent to which internationally wrongful acts or their legal consequences have been determined by special rules of international law. This is a deceptively simple concept, which is, however, difficult to apply in practise.¹¹⁸ Caron urges arbitrators to take more care, and not to imbue the Articles with undue or unquestioned authority.¹¹⁹ Moreover, Caron argues that arbitrators need to appreciate that these abstract rules are extremely difficult to apply, and that the arbitrators have to take particular care when they are seeking to apply the ILC’s law on state responsibility under *lex specialis*. Crawford and Olleson, who are experts in the law of state responsibility, support Caron’s arguments. They believe that the provision for *lex specialis* is potentially applicable in investor-state arbitration, to the extent that individual investment protection treaties may contain specific rules that govern discrete questions of state responsibility, and which deviate from the general supplemental rules articulated in Articles.¹²⁰ In addition, both scholars claim that investment tribunals have cited these Articles in crucial instances, and that this has attained positive results, except for in a few cases.¹²¹

¹¹⁵ *Wintershall Aktiengesellschaft v Argentina Republic* (Award, 2008) ICSID Case No ARB/04/14 [113]

¹¹⁶ Wittich (n 114) 41.

¹¹⁷ ILC Draft Articles on State Responsibility [2001] Article 55.

¹¹⁸ David D. Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority’ (2002) 96 *The American Journal of International Law* 872.

¹¹⁹ *Ibid.*

¹²⁰ James Crawford and Simon Olleson, ‘The Application of the Rules of State Responsibility’, in Marc Bungenberg and Jorn Griebel et al. (eds), *International Investment Law* (Nomos Verlagsgesellschaft 2015) 419.

¹²¹ *Ibid.*

In short, the views of scholars and the tribunals' comments indicate that the ILC's work on state responsibility will only be effective and successful if it is weighed, interpreted and applied with caution. To do this, decision makers must avoid a simple reading of the Articles, and instead must consult the commentaries and reports for each Article, which illuminate the practises underlying the rules, discussions of the ILC, and the comments of various governments.¹²² Only after doing this will arbitrators' decisions be more appropriate, and the ILC's document on state responsibility be regarded as practical for the international legal system.

2.6. International Law Commission's Draft Articles on the Expulsion of Aliens (2014)

In 2014, the ILC adopted its Draft Articles on the Expulsion of Aliens. This was not a new topic, and the Draft Articles cover the sovereign rights of states. Historically, the expulsion of aliens has been an important and controversial issue in the political life of many nations, and it remains so today.¹²³ Throughout history, many different states have expelled aliens from their territories. For example, Jews were expelled from England in 1290, Muslims were expelled from Spain in 1610, and the Huguenots were expelled from France in 1685.

Originally, the word 'expulsion' was used to describe the exercise of state power which secured the removal of an alien from the territory of a state, 'voluntarily', but under threat of forcible removal or through the use of force.¹²⁴ A similar definition of the term 'expulsion' is provided in Article 2 (a) of the Draft Articles on the Expulsion of Aliens. This Article defines 'expulsion' as a formal act or conduct attributable to a state, by which an alien is compelled to leave the territory of that state. However, this does not include extradition to another state, surrender to an international criminal court or tribunal, or the non-admission of an alien to a state.¹²⁵ This definition makes it clear that 'expulsion' constitutes a lawful act on the part of a host state, but only where it does not conflict with international law. Thus, Article 3 of the Draft Articles

¹²² Caron (n 118) 873.

¹²³ Sean D. Murphy, 'The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission' (2013) 107 *American Journal of International Law* 2.

¹²⁴ Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford University Press 1978) 201.

¹²⁵ See ILC Draft Articles on Expulsion of Aliens [2014] Article 2 (a).

provides that states have the right to expel an alien from their territory on condition that the expulsion is in accordance with the Draft Articles, without prejudice to any other applicable rules of international law, especially human rights law.¹²⁶ Grotius describes such an act as being, “barbarous and contrary to the law of civilized nations.”¹²⁷ This means that, on the one hand, civilised states cannot expel aliens from their territory as they wish, but that, on the other hand, the following applies:

“[T]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation.”¹²⁸

This confirms that removing foreigners may be done in certain circumstances, which are clearly listed in the Draft Articles. Grounds for expulsion are as follows:

- 1) An expulsion decision shall state the grounds on which it is based, and a state may only expel an alien on grounds that are provided for by law.
- 2) Grounds for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question and the current nature of the threat to which the facts give rise.
- 3) A state shall not expel an alien on grounds that are contrary to its obligations under international law.¹²⁹

Similar views were expressed in the summing up of the *Boffolo* case by Ralston (the Umpire), as follows:

“A State possesses a general right of expulsion but expulsion should only be resorted to in extreme circumstances and must be accomplished in the manner least injurious to the person affected.”¹³⁰

¹²⁶ Ibid Article 3.

¹²⁷ Richard Plender, *Internatinal Migration Law* (2nd revised Edn, Martinus Nijhoff Publishers 1988) 63.

¹²⁸ *Fong Yue Ting v. United States* [1893] US 698 149

¹²⁹ ILC Draft Articles on the Expulsion of Aliens [2014] Article 5.

It important to note that, as stated in the Draft Articles, Article 13 of the ICCPR provides that the following is permitted:

“An alien lawfully in the territory of a State party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”¹³¹

However, there are some limits on the exercise of this right. For example, a state cannot expel a foreigner where the expulsion is arbitrary or discriminatory, or where the foreigner would be returned to a situation of persecution or torture.¹³² Moreover, states cannot expel or remove their own nationals, as this is prohibited under international law. If they do, they will infringe the sovereignty of other states, and will violate the national’s rights of residence in their home state.¹³³ Nevertheless, under international law, if a citizen holds more than one nationality, a state has full authority to expel that national from their territory, as this is not prohibited under international law.¹³⁴ However, a state cannot denationalise its citizen for the sole purpose of expelling that person. Article 8 of the Draft Articles clearly states that, “a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”¹³⁵ In addition, the Draft Articles prohibit states from removing refugees¹³⁶ or stateless persons¹³⁷ from their territories. Furthermore, a state cannot expel an alien from its territory for the purpose of confiscating that alien’s assets, as this is prohibited under the Draft Articles.¹³⁸ If an alien is expelled, and his or her assets are held in the territory of the expelling state, then those assets are

¹³⁰ United Nations, Reports of International Arbitral Awards Boffolo Case 1903 of a General Nature (2006) Vol.X, United Nations 528.

¹³¹ ICCPR [1966] Article 13.

¹³² ILC Draft Articles on the Expulsion of Aliens (2014) Article 24; William T. Worster, 'International Law and the Expulsion of Individuals with more than one Nationality' (2009) 14 (2) UCLA Journal of International Law and Foreign Affairs 426.

¹³³ Ibid 427.

¹³⁴ Ibid 500.

¹³⁵ ILC Draft Articles on the Expulsion of Aliens [2014] Article 8.

¹³⁶ Ibid Article 6 (a).

¹³⁷ Ibid Article 7.

¹³⁸ Ibid Article 11.

protected by the relevant rules of international law.¹³⁹ Moreover, it has been argued that an alien should be given reasonable opportunity to dispose of his/her property and assets, and is granted permission to carry or transfer money and other assets to his/her country of destination. In no circumstances should the alien be subject to measures of expropriation, or be forced to part with his/her property and/or assets.¹⁴⁰ Simply because the protection of assets is such a serious issue for both expelling and receiving states, it is addressed in Article 20 of the Draft Articles. This Article states the following:

“The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.”¹⁴¹

As can be seen, under Article 20, expelled aliens can freely dispose of their assets from abroad. In other words, expulsion of the alien will not affect their assets. However, in some cases, the expelling state may, in accordance with its own laws, limit or prohibit the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question, or that comprise the proceeds of criminal or other unlawful activities.¹⁴² According to Article 30, where a state expels an alien in violation of the Draft Articles or any other rule of international law, it will incur international responsibility for doing so. Simply put, illegal expulsion is prohibited in the Draft Articles as well as other international universally accepted norms, such as the Universal Declaration of Human Rights (1948).

In this regard, the first Special Rapporteur of International Responsibility, Garcia Amador, stated that, “In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien.”¹⁴³ In addition, Article 31 of the Draft Articles permits the national state of the alien to exercise diplomatic protection for the purpose of defending its citizen against illegal expulsion by the expelling state. In conclusion, it is noteworthy that the expulsion of aliens only takes place when a state decides to expel foreign

¹³⁹ Maurice Kamto, ‘Preliminary Report on the Expulsion of Aliens’ (2005) A/CN.4/554 198

¹⁴⁰ L. Sohn and Thomas Buergenthal, ‘Movement of Persons Across Borders’ (1992) 23 *Studies in Transnational Legal Policy* 96.

¹⁴¹ ILC Draft Articles on the Expulsion of Aliens [2014] Article 20.

¹⁴² ILC Draft Articles on the Expulsion of Aliens with Commentaries [2014] United Nations 30.

¹⁴³ F V Garcia Amador, ‘International Responsibility Sixth Report on State Responsibility’ Yearbook of International Law Commission [1962] A/CN.4/134 II (1) 26.

nationals from its territory; each state's municipal laws or internal government policies may differ on this matter. However, the Draft Articles, as approved by the International Law Commission, could act as guidance for a state's municipal law or domestic policy.

2.7 The International Law Commission [ILC] Draft Articles on Diplomatic Protection, 2006

Another recent ILC document is the Draft Articles on Diplomatic Protection (2006). When these Articles were drafted, diplomatic protection was still generally perceived as being closely related to state responsibility. The first Special Rapporteur, Carcia Amador, included a number of draft articles relating to diplomatic protection in his report.¹⁴⁴ The ILC decided to work on these special inter-linked topics separately. Thus, many of the principles contained in the Articles on State Responsibility for Internationally Wrongful Acts are not repeated in the Draft Articles on Diplomatic Protection.¹⁴⁵ The ILC's work on diplomatic protection begins by defining the principles of diplomatic protection in Article 1 as follows:

“Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”¹⁴⁶

Interestingly, Article 1 does not provide a complete definition of diplomatic protection, rather, it describes the characteristics and features of diplomatic protection. The reason for this might be that if Article 1 had provided a precise definition, this would create difficulties in practise in the future. Additionally, if the ILC narrowed down or drew a defined scope of diplomatic protection, this might result in disagreement between states, which may delay the ILC's work on diplomatic protection. As in the past, according to the Draft Articles on Diplomatic Protection, diplomatic protection can only be exercised where certain circumstances are met. Firstly, a person must have the nationality of a certain state. This means that, in most cases, only nationals are under the protection of their governments. For Rubins and Kinsella, the nationality requirement is the most

¹⁴⁴ Dugard (n 13) p. 1052.

¹⁴⁵ International Law Commission, 'Report on the Work of its 58th Session' [2006] 10 A/61/10 New York 22.

¹⁴⁶ ILC Draft Articles on Diplomatic Protection [2006] Article 1.

significant formal pre-requisite for diplomatic espousal.¹⁴⁷ This is because without the connecting factor of nationality, diplomatic protection cannot normally arise.¹⁴⁸ This is made clear in Article 3 of the ILC Articles on Diplomatic Protection, which says. “The State entitled to exercise diplomatic protection is the State of nationality.”¹⁴⁹ At the same time, it is important to note that the national state is not under a duty to exercise diplomatic protection; in other words, international law does not oblige states to exercise diplomatic protection against other countries. It is a discretionary action, falling to the national state to exercise if it so wishes. In some situations, Article 8 of the ILC Articles on Diplomatic Protection permits the exercise of diplomatic protection in respect of a stateless person who, at the date of injury, and at the date of official presentation of the claim, is lawfully and habitually resident in that state.¹⁵⁰ According to Article 8(2), the same rule also applies to refugees, if the refugees are recognised by that state as refugees or have documented refugee status.¹⁵¹ Article 8 is one of the most important articles in the ILC’s work on diplomatic protection. This is because, if Article 8 did not provide protection for millions of stateless persons or refugees, they might be discriminated against in comparison to other people who have citizenship, and their human rights might be violated.

The second requirement in relation to diplomatic protection is the ‘exhaustion of local remedies’. This requirement originated in Europe in the Middle Ages, before the modern national state was born.¹⁵² However, it was only in the 19th and 20th centuries that the ‘exhaustion of local remedies’ became a firmly established part of the international law of diplomatic protection.¹⁵³ In the *Interhandel* case, the ICJ recognised this rule as, “a well-established rule of customary international law.”¹⁵⁴ This same principle is also recognised by Amerasinghe.¹⁵⁵ Under this rule, an alien must seek reparation for the wrongful acts of the host state under that state’s national law. International law thus gives the host state the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be

¹⁴⁷ Rubins and Kinsella (n 80) 407.

¹⁴⁸ Guy.N. Leigh, ‘Nationality and Diplomatic Protection’ (1971) 20 *International and Comparative Law Quarterly* 453.

¹⁴⁹ ILC Draft Articles on Diplomatic Protection [2006] Article 3 (1).

¹⁵⁰ *Ibid* Article 8 (1).

¹⁵¹ *Ibid* Article 8 (2).

¹⁵² Chittharanjan Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press 2004) 22.

¹⁵³ *Ibid* 28.

¹⁵⁴ *The Interhandel Case (Switzerland v. United States of America)* (Preliminary Objections 1959) ICJ 27 6

¹⁵⁵ Chittharanjan Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford University Press 1967) 169.

called into question on an international level.¹⁵⁶ Only after this has happened can an alien's national state take up the case (of diplomatic protection), or bring it before an international tribunal. This principle is clearly stated in Article 14 (1) of the Articles on diplomatic protection as follows:

“A State may not present an international claim in respect of an injury to a national or other person referred to in Draft Article 8 before the injured person has, subject to Draft Article 15, exhausted all local remedies.”¹⁵⁷

This means that, according to Article 14, the following persons are required to have exhausted all local remedies: natural and legal persons; foreign companies that are partly or mainly financed by public capital; non-nationals; and, in exceptional circumstances (according to Article 8), refugees and stateless persons.¹⁵⁸ Moreover, it is important to note that injured aliens (persons) are only required to exhaust remedies which may result in a binding decision.¹⁵⁹ Article 15 states that local remedies are not required to be exhausted in the following circumstances:

- 1) There are no reasonably available local remedies to provide effective redress.
- 2) There is an undue delay in the remedial process which is attributable to the state alleged to be responsible.
- 3) There is no relevant connection between the injured person and host state.
- 4) The injured person is manifestly precluded from pursuing local remedies.
- 5) Where the state alleged to be responsible has waived this requirement.¹⁶⁰

The ILC's document on state responsibility states secondary rules which deem that action can only be taken when the primary rules have been breached. However, Article 17 of the ILC's Draft Articles on Diplomatic Protection is not applicable in investor-state disputes. Article 17 clearly states the following:

¹⁵⁶ Trindade, Antônio Augusto Cançado, 'The Application of the Rule of Exhaustion of Local Remedies' *International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press 1983) 1.

¹⁵⁷ The ILC Draft Articles on Diplomatic Protection [2006] Article 14 (1).

¹⁵⁸ The ILC Draft Articles on Diplomatic Protection with Commentaries [2006] 71.

¹⁵⁹ *Ibid* 72.

¹⁶⁰ The ILC Draft Articles on Diplomatic Protection [2006] Article 15.

“The present draft articles do not apply to the extent that they are inconsistent with the special rules of international law, such as treaty provisions, for the protection of investments.”¹⁶¹

The main reason this paragraph was included is because the international legal community believe that the dispute settlement procedures provided for in BITs and by the ICSID offer greater advantages to the foreign investor than customary international law. They argued that BITs and the ICSID offer the following benefits:

- 1) They give the investor direct access to international arbitration;
- 2) They avoid the political uncertainty inherent in the discretionary nature of diplomatic protection.
- 3) They dispense with conditions for the exercise of diplomatic protection.¹⁶²

It is clear that the Draft Articles on diplomatic protection forbid states from exercising diplomatic protection in investor-state disputes. However, in the chapters that follow, examples will be cited from bilateral investment and multilateral treaties (such as the ICSID, Article 27), under which parties may exercise diplomatic protection under certain conditions. It is important to stress that Article 17 refers to “treaty provisions” rather than “treaties”, because treaties, other than those specifically designed for the protection of investments, regulate this area of law, and examples include the treaties of Friendship, Commerce and Navigation.¹⁶³

2.8. The Necessity of Diplomatic Protection

In 1975, the scholar Lillich stated the following:

“Hence, pending the establishment of international machinery guaranteeing third-party determination of disputes between alien claimants and states, it is in the interest of all international lawyers not only to support the doctrine (of diplomatic protection), but to oppose vigorously any effort to cripple or destroy it.”¹⁶⁴

¹⁶¹ Ibid Article 17.

¹⁶² The ILC Draft Articles on Diplomatic Protection with Commentaries [2006] 90.

¹⁶³ Ibid.

¹⁶⁴ R. B. Lillich, ‘The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack’ (1975) 69 (2) The American Journal of International Law 359.

This quotation reveals that Lillich was probably aware that diplomatic protection would remain necessary to international law for the foreseeable future. There are several reasons why he might have taken this view, but the following course of events might have informed his opinion. Before the Second World War, only countries and states were the subjects of international law. The only opportunity held by individuals to protect their rights abroad was via the use of diplomatic protection. However, after the Universal Declaration of Human Rights (1948), the situation changed and individuals became the subjects of international law. This meant that individuals could now enforce their human rights at an international level.¹⁶⁵ However, Dugard argues that international human rights law does not comprise human rights conventions only. Dugard argues that an entire body of conventions and customs, including diplomatic protection, all together comprise international human rights law.¹⁶⁶ Furthermore, Dugard claims that, whilst the European Convention on Human Rights (1950) may offer real remedies to millions of Europeans, it is difficult to argue that other human rights conventions, such as the American Convention on Human Rights (1969) or the African Charter on Human Rights (1981), have achieved the same degree of success.¹⁶⁷ Moreover, he believes that only a limited number of individuals have obtained, or will obtain, satisfactory remedies under these conventions and that their remedies are weak.¹⁶⁸ For Dugard, diplomatic protection is a customary rule of international law, which applies universally, and, as such, it potentially offers a more effective remedy.¹⁶⁹

The institution of diplomatic protection as a procedural device has undergone change, by recent legislations made in the area of human rights, for example.¹⁷⁰ However, it has not disappeared, nor have any human rights declarations prohibited diplomatic protection as a dispute settlement mechanism. What all this means is that for individuals, diplomatic protection can provide a similar protection mechanism system to human rights declarations, because persons can now seek to defend themselves against national states. In short, as seen in the arguments above, an individual's rights are better protected by modern international law. Nevertheless, states still

¹⁶⁵ Dugard (n 13) 1069.

¹⁶⁶ Ibid 1070.

¹⁶⁷ Ibid 1069.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Wilhelm Karl Geck, 'Diplomatic Protection' (1987) in Rudolf Bernhardt (eds), *Encyclopaedia of Public International Law* (published under the auspices of the Max Planck Institute for Comparative Public Law and International Law) 1046.

“own” international law. For this reason, Amerasinghe believes that diplomatic protection will survive as an institution, based on the theory that the state owns rights in international law, and not the individual.¹⁷¹

As noted above, under the ICSID Convention, investors are permitted to initiate settlement procedures directly against host states, without any intervention by national states. This is classed as one of the successes of the Convention. It is believed that the Convention, with its prohibition of diplomatic protection, simply de-politicises investor-state disputes. When the ICSID Convention was drafted, the exclusion of diplomatic protection was explained in terms of the obligation to abide by the agreement to arbitrate, in order to avoid a multiplicity of claims and claimants, and to remove disputes from the realm of politics and diplomacy into the realm of law.¹⁷² However, when the Convention was approved, it was on the basis that, under certain circumstances, diplomatic protection could not be exercised until the enforcement stage of the investor-state procedures was reached.¹⁷³ In this respect, Article 27 of the Convention states the following:

“(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”¹⁷⁴

Thus, Article 27 (1) of the Convention prohibits the exercise of diplomatic protection by the investor’s national state if the parties have consented to arbitration, unless the host state has failed to abide by and comply with an award. However, it does not mean that parties to the ICSID Convention are automatically prevented from exercising diplomatic protection over

¹⁷¹ Amerasinghe (n 18) 342.

¹⁷² Schreuer H Christoph et al., *The ICSID Convention Commentary* (2nd Edn, Cambridge University Press 2009) 419.

¹⁷³ R. Doak Bishop, *Enforcement of Arbitral Awards against Sovereigns* (JurisNet LLC 2009) 26.

¹⁷⁴ ICSID Conventions [1965], Article 27.

investment disputes involving their own nationals vis-à-vis other contracting parties.¹⁷⁵ They are prevented from doing so only if the parties have consented to or have actually initiated arbitration under the ICSID Convention.¹⁷⁶ However, it should be noted that ‘consent’ to ICSID arbitration by the investor cannot be construed as a valid waiver of diplomatic protection.¹⁷⁷ This means that, even under the ICSID Convention, diplomatic protection will be revived if the host state fails to abide by and comply with the award. Lastly, it is worth mentioning that diplomatic protection is not only triggered when the enforcement of an arbitral award is needed. In some rare cases, it can be exercised by the home state against a host country for the purpose of avoiding future disputes. For example, in 2007, the Italian Government warned that a new South African law (regarding the development of natural resources) might breach a bilateral investment treaty between Italy and South Africa.¹⁷⁸

With the introduction of BITs and the ICSID Conventions, the institution of diplomatic protection took a new turn, and new conditions and new rules started to apply. These new routes worked to alter the views of scholars. For example, Crawford argued the following:

“One might argue that bilateral investment treaties in some sense institutionalise and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis case* formula, the rights concerned are those of the state, not the investor.”¹⁷⁹

Furthermore, Juratovich claimed that:

“Investment treaty actions and diplomatic protection will both continue to have a role, even if unequal in magnitude and it is, therefore, necessary to continue to grapple with their interface.”¹⁸⁰

Some scholars believe that settlement by diplomatic means can be swift, less expensive, and less

¹⁷⁵ August Reinisch and Loretta Malintoppi, ‘Methods of Dispute Resolution’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 714.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. 419.

¹⁷⁸ Doak Bishop (n 173) 28.

¹⁷⁹ James Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 (4) *The American Journal of International Law* 888.

¹⁸⁰ Ben Juratovich, ‘The Relationship between Diplomatic Protection and Investment Treaties’ (2008) 23 (1) *ICSID Review* 35.

confrontational than direct arbitration, and may be the sole remedy available in the absence of a BIT.¹⁸¹ However, other scholars, such as Paulsson, believe that diplomatic protection has, “proved itself unworkable as a way of protecting business interests in the context of contemporary international economic life.”¹⁸² Furthermore, some believe that diplomatic protection is a remedy of last resort, and experience demonstrates that it provides results which rarely satisfy the investor.¹⁸³ These views reveal divergent views about the institution of diplomatic protection. This research will examine these issues from today’s investor-state dispute perspective. This research will attempt to answer questions such as: Do investors still need diplomatic protection? And, will diplomatic protection be prohibited in the future? The following chapters will consider these questions.

2.9. Conclusion

The legal protection of international investors is important in the development of international trade. Historically, international investors have suffered from arbitrary state action against the person and property rights. Moreover, some international investors have covered-up malpractice by seeking diplomatic protection from powerful states. The evolution of the modern international legal framework for the protection of international investments strives for a balance between the rights of the individual investor, with state prerogatives for regulating international trade. The main focus of these developments is treating the international investor in accordance with both national and international laws, where the scope of arbitrariness is limited. This chapter contends that the international contemporary framework for the protection of international investors is more sophisticated than the unilateral regulation of trade by receiving nations. Moreover, this international approach aims to prevent foreign state actors from using other states to protect the investments of their nationals. The ICSID Convention and BITs concentrate on drafting agreements with special focus on minimising state intervention in trade related issues. All this has led to the establishment of free international trade standards, where states remain neutral, and

¹⁸¹ Giorgio Sacerdoti and Matilde Recanati, ‘Approaches to Investment Protection Outside of Specific International Investment Agreements and Investor-State Settlement’, in Marc Bungenberg and Jorn Griebel etc (eds), *International Investment Law* (Nomos Verlagsgesellschaft, 2015) 1847.

¹⁸² Jan Paulsson, 'Arbitration Without Privity' in Doak, (n 173) 34.

¹⁸³ Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* (2nd revised and enlarged edition, Kluwer Law International 1995) 147.

international investors can find remedies using national legal set-ups or international arbitration. Subsequent chapters will examine alternative remedies available for the protection of international investments, with a special focus on defining the scope of diplomatic protection for international investors.

Chapter Three: The Exercising Diplomatic Protection and ICSID Convention

3.1. Introduction

This chapter will investigate the domain and scope of the conditions for exercising diplomatic protection in order to protect the rights and interests of foreign investors. As concluded in the previous chapter, invoking diplomatic protection needs the fulfilment of certain conditions, most importantly: nationality, exhausting all available local remedies, and contending that a foreign investor has suffered harm on account of the wrongful acts of the host state. This chapter will focus on defining and explaining the concept of 'nationality' according to the various conditions for obtaining diplomatic protection.

The first part of the chapter will explore the concept of nationality and its various facets, specifically relating to the nationality of the individual, the company, refugees, and other entities formed through the award of a sovereign charter. The debate about nationality will present contemporary opinions of the definition of nationality as a condition for diplomatic protection. Moreover, the debate will also cover the differentiation of nationality from citizenship. All this will be done using international legal interpretations of nationality as shown in various case laws. The debate on nationality will cover various facets of nationality, including companies as the nationals of a state and their eligibility to invoke diplomatic protection. Reference to the *Barcelona Traction* case will be made in order to explore how the nationality of a corporation is decided on the basis of its incorporation in a particular state. The diplomatic protection of stateless persons and refugees is also relevant to this point of discussion. Until the Hague Codification Conference of 1930, stateless people did not have any legal rights. Later, they attained legal rights for the protection of their foreign investments through diplomatic protection. Article 8 of the ILC Draft Articles on Diplomatic Protection provides cover for stateless persons and refugees.

The second part of the chapter will examine Article 25 of the ICSID Convention as it defines the conditions for jurisdiction over the legal status of the subject matter, the issue to be dealt with, and consent: one of the parties must be a contracting state, the case must relate to an investment, and both parties must give consent, in writing, to have recourse to the Centre. Special focus will be placed on Article 25 (2), which examines how to define a national of another state, the nationality of natural persons, the nationality of juridical persons, and nationality in relation to the diplomatic protection of foreign investments. The ICSID

Convention has transformed the way nationality is defined in terms of investment disputes. Although nationality related issues are not directly dealt with by the ICSID, the Convention has influenced how nationality is defined in terms of the diplomatic protection of international investments. With regard to diplomatic protection, the concept of nationality establishes an adequate link between the private party and the state under the responsibility to protect.

The last part of the chapter looks at the rights of shareholders in a company. The protection of the shareholders of a company in foreign investment disputes is a complex issue which has been elaborated somewhat in the ICSID framework. A thorough discussion will be presented about the protection of the rights of shareholders in companies working in foreign territories. As mentioned earlier, the chapter will focus on the conditions for invoking diplomatic protection in case of harm to foreign investments. The main aim of the chapter will be to establish the significance of the nationality of various entities that may be involved in investor disputes, such as natural persons, companies, refugees, and shareholders. Based on the analysis presented in the previous chapter, this chapter continues the critical analysis of the conditions for invoking diplomatic protection in foreign investment cases. Moreover, the chapter will act as basis for the next chapter, which will present a detailed examination of the exhaustion of local remedies rule.

3.2. Conditions for Exercising Diplomatic Protection

The exercise of diplomatic protection is based on meeting certain conditions. When certain conditions are met, diplomatic protection is legally exercisable for national states. This chapter will focus on the main conditions that need to be met for the exercise of diplomatic protection. *First of all*, a person must have the nationality of a state. This means, in most cases, only nationals are under the protection of their governments. For Rubins and Kinsella, this nationality requirement is the most significant formal pre-requisite for diplomatic espousal.¹ This is because without the connecting factor of nationality, normally there cannot be any diplomatic protection.² *Secondly*, the right of diplomatic protection can only arise if the 'injured' person has exhausted all local remedies available in the host state. *Lastly*, the alien (the investor) has to be injured by the host state's wrongful act.

¹ Noah Rubins and Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oceana Publications, 2005) 407.

² Guy I F Leigh, 'Nationality and Diplomatic Protection' (1971) 20 *International and Comparative Law Quarterly* 453.

3.3. The Nationality of Individuals in International Law

People are the most important elements of states. This is because, nationhood does not require statehood, but there can be no statehood without a nation, which comprises nationals and territorial sovereignty.³ National entities in a certain territory determine the existence of states and the formation of nation-state relationships. This relationship is a, ‘historic-biological’ idea based on the, “subjective corporate sentiment of unity members of a specific group” who make up a race or a nation.⁴ Nowadays, this concept is usually linked to a political or legal structure, but this link was not made in the past. Historically, only states could be the principal subjects of international law, but under contemporary international law, individuals are included also. Interestingly, before the independence of the United States of America, and during British colonial times, ‘nationals’ were classed as ‘subjects’.⁵ Furthermore, it was only when the medieval system of government was replaced by the principles of territorial state sovereignty that the terms ‘subject’ and ‘citizen’ became synonymous.⁶ However, the term ‘nationality’ was still not used at that time. This term is fairly new and was used for the first time in the 1835 edition of the *Dictionnaire de l'Academie Francaise*.⁷ From the time the expression was first conceived, ‘nationality’ has been used as a synonym for ‘citizenship’. This interpretation is based on Greek and Roman ideas of citizenship; these legal cultures have provided the foundation for today’s idea of ‘nationality’, and are directly relevant to current definitions of ‘citizenship’.⁸ Therefore, although ‘nationality’ and ‘citizenship’ are different terms, they are often used as synonyms. These words are sometimes used to replace each other because both terms identify the legal status of an individual in light of his or her state membership.⁹ In other words, both terms emphasise different aspects of the same idea of state membership.¹⁰ Indeed, some states such

³ Kay Hailbronner ‘Nationality in Public International Law and European Law’ in Rainer Bauböck, Eva Ersboll, Kees Groenendijk and Harald Waldrauch (eds) *Acquisition and Loss of Nationality, Volume I: Policies and Trends in 15 European Countries* (Amsterdam University Press 2006) 35.

⁴ O’Leary Siofra, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International 1996) 6.

⁵ Maximilian Koessler, ‘Subject’, ‘Citizen’, ‘National’, and ‘Permanent Allegiance’ (1946) 56 (1) *The Yale Law Journal* 60.

⁶ *Ibid* 60.

⁷ *Ibid*.

⁸ Alferd M. Boll, *Multiple Nationality and International Law* (Martinus Nijhoff Publishers 2007) 61.

⁹ Kim Rubenstein and Daniel Adler, ‘International Citizenship: The Future of Nationality in a Globalized World’ (2000) 7 (2) (4) *Indiana Journal of Global Legal Studies* 521.

¹⁰ Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 2.

as Italy, do not distinguish between nationality and citizenship.¹¹ Weis explains these terminologies as follows:

“Conceptually and linguistically, the terms ‘citizenship’ and ‘nationality’ emphasise two different aspects of the same notion. ‘Nationality’ stresses the international, and ‘citizenship’ the national, municipal.”¹²

O’Leary describes these two expressions as follows:

“Citizenship confers a number of rights, in particular, the right to participate politically in the life of the community. On the other hand, nationality defines membership of a state or community to the exclusion of non-members.”¹³

In short, ‘nationality’ can be defined as a legal relationship between an individual and a state. However, nationality can be understood in two ways: as a political-legal term, or as a sociological term. As a political-legal definition ‘nationality’ was defined in the legendary *Nottebohm* case in the following words, “it is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹⁴ Tiburcio argues that these differences cannot always be distinguished, because one concept does not exclude the other.¹⁵ The sociological definition of ‘nationality’ stresses the role of the individual in the relationship, and it admits the existence of the feeling of nationality before the formal creation of the state.¹⁶ It is a fact that, throughout history, ‘nationalities’ have existed, but sometimes states have not enacted any laws to define them. This was the case in China before 1909 and Israel before 1952.¹⁷ Therefore, it would not be wrong to argue that if nationalities can exist without legislative support, it is plausible that they can exist without state recognition.¹⁸ Nevertheless, it is commonly accepted that a country’s national laws decide on matters of nationality. In other words, each sovereign state has the power to grant and to withdraw nationality according to its municipal laws. This was stressed in the *Nottebohm* (1955) case as follows:

¹¹ O’Leary (n 4) 9.

¹² Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff Publications, 1979) 4-5.

¹³ O’Leary (n 4) 7.

¹⁴ *The Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase 1955) ICJ 23.

¹⁵ Tiburcio (n 10) 3.

¹⁶ *Ibid* 4.

¹⁷ Andrew Grossman, ‘Nationality and the Unrecognised State’ (2001) 50 (04) *International and Comparative Law Quarterly* 854.

¹⁸ *Ibid*.

“It is for every sovereign state, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalisation, granted by its own organs in accordance with that legislation.”¹⁹

A similar view was expressed in the *Polish Nationality Case* (1923), where PCIJ emphasised that, “generally speaking, it is true that a sovereign state has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations.”²⁰ Furthermore, an almost the identical assessment is given in the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (The Hague Convention, 1930). This reads as follows:

“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”²¹

In addition, a similar statement is presented in Article 3 (1) of the 1997 European Convention on Nationality, which states, “Each State shall determine under its own law who are its nationals.”²² In addition, Article 2 of The Hague Convention (1930) reads as follows, “Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with that State.”²³

The above noted articles reveal that countries have established rules or domestic legislation to determine who is a national and who is not. However, a state cannot grant or withdraw nationality for individuals simply in order to follow its national legislation. This is because there is no sole definition of ‘nationality’ in international law. Brownlie (1963) explains that scholars such as Gauterpacht, Guggenheim, Redslob, Fitzmaurice, and McNair feel that international law does not regulate the question of nationality.²⁴ However, under current international law the situation is different. Today, international law controls questions of nationality, according to its own requirements and restrictions. For instance, Article 15 (1) of

¹⁹ The *Nottebohm Case*, (n 14) 20.

²⁰ *Acquisition of Polish Nationality*, (Collection of Advisory Opinions 1923) PCIJ Series B 7 16.

²¹ The Hague Convention [1930] Article 1.

²² The European Convention on Nationality [1997] Article 3 (1).

²³ *Ibid* Article 2.

²⁴ Ian Brownlie, ‘The Relations of Nationality in Public International Law’ (1963) 39 *British Yearbook of International Law* 301.

the Universal Declaration of Human Rights (UDHR) states that, “Everyone has the right to a nationality.”²⁵ Furthermore, Article 7 of The Convention on the Rights of Child reads as follows:

“1. [The] child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. State Parties shall ensure the implementation of these rights in accordance with their national laws and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”²⁶

Van Panhuys affirms that, “restrictions imposed by international law on the competence of states to issue nationality rules are, of course, closely connected with the function of nationality in substantive law.”²⁷ Moreover, states are under obligation, from a human rights perspective, to follow certain rules, including the rule that they cannot force to individuals to change or remove their nationalities. This is clearly stated in the Article 15 (2) of the Universal Declaration of Human Rights (1948), which reads, “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²⁸ These legal provisions help to regulate issues of nationality, the status of refugees, and statelessness in the world.

In modern times, countries usually grant nationality using three main criteria as outlined below:

1. *Jus Sanguinis* (the law of blood). Nationality is granted on the basis of the nationality of one or both parents.
2. *Jus Soli* (the law of the soil). Nationality is granted by birth on a specific territory.
3. *Jus Domicile* (the long residence principle) whereby nationality is granted due to a period of residency or by way of naturalisation.

²⁵ The Universal Declaration of Human Rights [1948] Article 15 (1).

²⁶ Convention on the Rights of the Child [1990] Article 7.

²⁷ H. F. Van Panhuys, *The Role of Nationality in International Law. An Outline* (Sijthoff 1959) 165.

²⁸ The Universal Declaration of Human Rights [1948] Article 15 (2).

In relation to these concepts, Weis remarks that there is no doubt that *jus soli* and *jus sanguinis* are the predominant modes of the acquisition of nationality.²⁹ However, there are some exceptions to these rules in international law, where the state cannot grant nationality to an individual. Article 12 of the Hague Convention (1930) states the following:

“Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.”³⁰

To sum up, the matter of nationality is usually decided by each government’s own national policy, but increasingly, nowadays, this matter is becoming controlled more by international conventions that guide states in the operation of their national laws under these conventions are significant for both the states and for the investors.

3.4. Nationality and Diplomatic Protection

In the first part of this chapter, nationality was defined as a legal and political link between the state and the individual. In this state-individual relationship, it is not sufficient for the individual to consider himself or herself a national of a state, and instead the state in question must expressly recognise an individual as a national.³¹ This requirement is important because only according to this kind of state-individual connection can diplomatic protection (DP) be exercised. In other words, if rights of protection are given according to the lawful administration of the territory, then it might be said that nationality arise from the fact of the rights of protection.³² The two ideas are interlinked. In addition, scholars have interpreted the exercise of DP differently. For some scholars, the question of ‘nationality’ is of international importance.³³ Others are interested in the benefits of nationality in respect of the area of international law.³⁴

Article 3 of the ILC Articles on DP (2006) explains that, “The State entitled to exercise diplomatic protection is the State of nationality.”³⁵ However, there are some requirements in

²⁹ Weis (n 12) 96.

³⁰ The Hague Convention [1930] Article 12.

³¹ Tiburcio (n 10) 4.

³² Ian Brownlie (n 24) 333.

³³ I. A. Shear, *Starke’s International Law* (Buttersworths, 1994) 309.

³⁴ Annemarieke Vermeer-Künzli, ‘Nationality and Diplomatic Protection: A Reappraisal’ in Alessandra Annoni and Serena Forlati, *The Changing Role of Nationality in International Law* (Routledge 2013) 76.

³⁵ ILC Draft Articles on DP [2006] Article 3 (1).

relation to this principle that exist in the international legal arena, and the principle is not unlimited or unrestricted. Article 2 of the Harvard Research Draft Convention on Nationality (1929) states that, "...under international law the power of a State to confer its own nationality is not unlimited."³⁶ Indeed, limitations are that: a claimant must be a national on the date of the injury; they must be national at the date of presentation of the claim; and the link of nationality must remain uninterrupted during the intervening period. All three conditions must be fulfilled for the exercise of DP.³⁷ Scholars such as Van Panhuys and Cutherbert believe that these conditions prevent the abuse of DP in the international arena.³⁸

It is worth mentioning that, under international law, a national state is not under any duty to begin DP.³⁹ In the international arena, it is not always easy to exercise DP, especially when an individual has a dual nationality. Some main questions to ask in relation to exercising DP are: When dual nationality exists, should both countries espouse nationality claims, or should only one country espouse a claim? If so, which country should make the claim? This situation can create conflict and raise diplomatic issues between states. Probably for this reason, The Hague Convention Preamble (1930) clearly states that it is in the general interest of the international community for all its members to recognise that every person should have a nationality, and should have one nationality only.⁴⁰

It is not easy for international law to accumulate every sovereign state's municipal laws under one universal legal system. Therefore, it is unrealistic and impractical to have one general nationality law. In other words, multiple nationalities will persist as long as sovereign nations confer nationality independently, and do not formulate an international system of granting nationality.⁴¹ This idea is approved in The Hague Convention Preamble (1930), as follows: "...considering... under the economic and social conditions, which at present exist in the various countries, it is not possible to reach immediately a uniform solution of all the above mentioned problems."⁴² Until a single and unique system for granting nationality is introduced, courts need to focus on how to solve the problems that dual nationality creates.⁴³

³⁶ Harvard Research Draft Convention on Nationality [1929] Article 2.

³⁷ Cuthert Joseph, *Nationality and Diplomatic Protection (The Commonwealth of Nations)* (A.W.Sijthoff 1969) 456.

³⁸ Ibid 29 and Van Panhuys (n 27) 929.

³⁹ Ibid Article 8 (1).

⁴⁰ The Hague Convention [1930] Preamble.

⁴¹ I. Scott Bieler, 'Notes, Dual Nationality, Dominant Nationality and Federal Diversity Jurisdiction' (1981) 38 (1) (7) Washington and Lee Law Review 78-79.

⁴² The Hague Convention [1930] Preamble.

⁴³ I. Scott Bieler, (n 41) 79.

Courts need to find solutions that are continuous, active, and effective, and that link theories. For instance, in the Nottebohm Case, the Court ruled that nationality must be a, “real and effective nationality”, and it must correspond with the factual situation.⁴⁴ Another example can be cited from an Iran-United States claims tribunal where the parties held opposite views about bringing claims against each other. Under these circumstances the Tribunal in Case No. A/18 explains that the determination of a claimant’s dominant and effective nationality involves the consideration of, “all relevant factors, including habitual residence, centre of interests, family ties, participation in public life, and other evidence of attachment.”⁴⁵ Furthermore, Article 5 of the Hague Convention states the following:

“Within a third State, a person having more than one nationality shall be treated as if he had only one, either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”⁴⁶

The ILC’s Draft Articles on DP have changed these circumstances. Article 4 defines nationality for the purposes of DP, and the Article’s commentary explains that it is not required for a state to prove an effective or genuine link between itself and its nationals as a factor for exercising DP (along the lines suggested in the Nottebohm Case), even where the national possesses only one nationality.⁴⁷ In the past, the main purpose of these principles was to help find a solution for the courts when ruling on multiple nationality problems; these principles avoided creating a hypothetical, political or legal relationship between the individual and state, but supported continuous, effective, genuine, and active state-individual relationships. O’Connell suggests that using the nationality of birth might help solve multiple nationality problems, so as to give effect to the nationality used by the individual, and not to permit representation by the national’s state against the other state, of which the individual is also a national.⁴⁸ It is an accepted rule in international law that a state may not afford DP to a national against a state whose nationality such a person also possess.⁴⁹

⁴⁴ Nottebohm Case [1955] ICJ Reports 22.

⁴⁵ Charles N. Brower and Jason D. Brueschke, *The Iran-United States Claims Tribunal* (Nijhoff Publishers 1998) 29.

⁴⁶ The Hague Convention [1930] Article 5.

⁴⁷ ILC Draft Articles on DP [2006] Article 4, Commentary 33.

⁴⁸ D P O’Connell, *International Law Volume II* (Stevens 1965) 744.

⁴⁹ The Hague Convention [1930] Article 4.

Another principle that is considered in cases of deciding nationality is the principle of continuous nationality. This is when a claimant must be a national on the date of the injury and on the date of the presentation of the claim, and there should be no interruption of this nationality from the first day of claim until the exercise of DP. Oppenheim supports this idea, and states the following:

“From the time of the occurrence of the injury until the making of the award the claim must be continuously and without interruption have belonged to a person or to a series of persons...having the nationality of the State by whom it is put forward...”⁵⁰.

It is only when these conditions are met, under international laws, that DP is legally exercisable. These requirements are clearly necessitated in Article 5 of the ILC’s Draft Articles on DP. Article 5 (1) explains the following:

“A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.”⁵¹

Amerasinghe suggests that there is some support for the view that when an injured national dies before the official presentation of a claim, the claim may be continued because it has assumed a national character.⁵² In conclusion, the above examples clarify that doctrines about nationality, such as *effective and genuine link theories* have changed over the course of history. However, some principles such as *continuous nationality* still survive. This reveals that core nationality requirements about DP are still the same, but have been modernised in contemporary international law.

3.5. The Nationality of Companies and Diplomatic Protection

It is an agreed principle that a host state can only espouse the claims of a national, if that national is a natural or juridical person. In other words, an individual’s home state has to establish its right to espouse such a claim and, in most cases, this right can be obtained through nationality. Thus, establishing the nationality of individuals and corporations is

⁵⁰ L.F.L. Oppenheim, *International Law Volume I* (8th edn, D.Mckay Publishers 1955) 347-8.

⁵¹ ILC Draft Articles on DP [2006] Article 5(1).

⁵² C.F. Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 106.

important, and nationalities must be differentiated from each other. As stated earlier, an individual's nationality is a legal matter; it results from the political connections between the individual and the state. However, corporations are juridical persons, that is, they are entities that operate in circumstances which exceed the normal capacity of individuals.⁵³ Their personality represents a development brought about by new and expanding requirements in the field of economics. In other words, corporations will often have ties with several different states (including fiscal, economic and legal links); whereas individuals tend to only have a legal or political links with a single state. For this reason, relations between states and foreign corporations should be dealt with on an international level, and not as an element of the normal rules that govern the status of aliens or individuals and their assets on the territory of a state.⁵⁴ At the same time, it should be noted that, under international law, even though corporations sign contracts with states and/or have a different legal personality to individual, this does not mean that, in principle, corporations have an international legal personality.⁵⁵

One of the leading cases that considered how to establish the nationality of corporations was the *Barcelona Traction* case, in which the Court held that the nationality of a corporation is identified as being that of, "a state under the laws of which it is incorporated and in whose territory it has its registered office."⁵⁶ In 1957, before the *Barcelona Traction* case was decided, the scholar Schwarzenberger explained that international tribunals use the following six criteria to help establish the state to which a corporation is more genuinely linked to, in order to determine the nationality of corporations: i) The Siege Social test; ii) The Domicile test; iii) the test of Incorporation; iv) the test of Control; v) the test of Beneficial Interest; and vi) the test of Responsibility.⁵⁷ Schwarzenberger agrees with the Court that international law permits each state to define the nationality of corporations and to grant them nationality. This is reflected in Article 54 of the Treaty on the Functioning of the European Union (2012), which states the following:

"Companies or firms formed in accordance with the law of a Member State, and having their registered office, central administration or principal place of business within the Union, shall be treated in the same way as natural persons who are nationals of Member

⁵³ *Case Concerning Barcelona Traction, Light and Power Limited (Belgium v Spain)* (Second Phase, 1970) ICJ 39.

⁵⁴ Seidl-Hohenveldern, *Corporations in and under International Law*, (Cambridge University Press 1987) 14.

⁵⁵ James Crawford, *Brownlie's Principles of Public International Law*, 8 (Oxford University Press 2012) 122.

⁵⁶ *Ibid.*

⁵⁷ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* 3 (Stevens & Sons Limited 1957) 387-418.

States. ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”⁵⁸

From a DP perspective, a similar definition is given in Article 9 of the ILC’s Draft Articles as follows:

“For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”⁵⁹

Article 9 clarifies under which conditions corporations can be accepted as having the nationality of a certain state, and under which circumstances DP may be exercisable. Article 9 has its roots in *Barcelona Traction (Belgium v Spain)*; this case raised many questions regarding the diplomatic protection of both corporations and shareholders. Briefly, *Barcelona Traction (Belgium v Spain)* is a case that is often quoted when scholars are discussing the nationality of a corporation and how to distinguish the nationality of a company from the nationality of its shareholders. In this case, the Spanish Government caused the bankruptcy of a Canadian company, whose founders also had Belgian nationality. Belgium espoused its citizens’ claims against Spain, and tried to obtain compensation from the Spanish Government. However, the Spanish Government objected to the claim on grounds that the company was Canadian, and not Belgian. The International Court of Justice agreed with Spain, and dismissed the case, holding that:

“[...] the general rule of international law states that where an unlawful act was committed against a company representing foreign capital, only the national of state of company could make a claim.”⁶⁰

In this case, the Court confirmed that the nationality of the corporation was Canadian, and that therefore only Canada could espouse a claim in respect of the corporation. The Court

⁵⁸ Treaty on the Functioning of the European Union [2012] C326/383 Article 54.

⁵⁹ ILC Draft Articles on DP [2006] Article 9.

⁶⁰ *Barcelona Traction Case* (n 53) [88]

identified the nationality of the company on the following basis: i) the company was incorporated in Canada under Canadian law, which was an act of free choice; ii) its main office was based in that State; iii) its board meetings were held in Canada; iv) the company had operated under Canadian law for over fifty years; v) and the Canadian tax authorities had registered it there for tax purposes.⁶¹ This meant that Belgium had no standing to make a claim.⁶² Furthermore, it should be noted that the Court in this case distinguished the corporation's nationality from its shareholders' nationalities. In other words, the Court clarified that a corporation does not necessarily have the nationality of the majority of its shareholders.⁶³ The Court concluded that the harm done to the company prejudiced its shareholders.⁶⁴ However, it did not give rights to the shareholders take legal action, either in the name of the company, or in the name of the shareholders.⁶⁵ This is because if the shareholders and the company concerned were to take diplomatic action separately against the host state in respect of a single injury, it would create confusion in international law. This issue is dealt with in Article 11 of the ILC's Draft Articles on DP, which provides that:

“The State nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders, in the case of an injury to the corporation unless: a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.”⁶⁶

Does this mean that a state can protect shareholders who are its citizens, but cannot protect shareholders who are not its citizens? In the *Diallo Preliminary Objections Decision (Republic of Guinea v. Democratic Republic of the Congo)* the state of nationality was given the right to exercise diplomatic protection in favour of its ‘associés’ or shareholders when there was an injury to their direct rights as such.⁶⁷ This position is also taken in Article 12 of the ILC's Draft Articles on DP, as follows:

⁶¹ Barcelona Traction Case, (n 53) [71]

⁶² Amerasinghe (n 52) 123.

⁶³ Ibid. 122.

⁶⁴ Barcelona Traction Case (n 53) [44]

⁶⁵ Ibid [42]

⁶⁶ ILC Draft Articles on DP [2006] Article 11.

⁶⁷ *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo)* (Diallo Preliminary Objections Decision Judgment 2007) ICJ 50.

“To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”⁶⁸

Therefore, a corporation’s home state must provide diplomatic protection to a juridical person where the shareholders of that company are foreign investors. This is one of the differences in the protection provided to an individual and to corporations.

It should be noted that there are similarities and differences between DP as it relates to individuals and corporations. For instance, an individual must meet the *continuous nationality* requirement (as is stipulated in Article 5 of the ILC’s Draft Articles on DP), whilst continuous nationality in respect of corporations is dealt with in Article 10 of the same legislation, which reads that a state is only entitled to exercise DP for a corporation that has continually been a national of the state or its predecessor state from the date of injury to the date of the official presentation of the claim.⁶⁹ However, there are some differences, including the provision of the *genuine link requirement*. For instance, in the *Nottebohm Case* the Court held that an individual must have a genuine connection to the State concerned. However, there is no such requirement in the case of a corporation. In *Barcelona Traction*, the Court held the following, “In the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance.”⁷⁰ However, it should be noted that this ‘genuine link’ between the corporation and the host state is only required for recognising the existence of the corporation. This is because, in the absence of such a link, a corporation would simply not be recognised in international law, and issues of nationality and of the possibility of ‘piercing the corporate veil’ would not arise.⁷¹ Staker argues that this issue of a ‘genuine link’ raises questions, such as: Is a genuine link with the state of incorporation required only at the time of incorporation, or only at the time its existence is in issue? Or, is a genuine connection required continuously from the time of incorporation to the time of bringing the claim?⁷² In conclusion, it must be mentioned that company nationality is not only required for the protection of corporations. Indeed, for Judge

⁶⁸ ILC Draft Articles on DP [2006] Article 12.

⁶⁹ Ibid Article 10.

⁷⁰ The *Barcelona Traction Case* (n 53) [70]

⁷¹ Christopher Staker, ‘Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes’ (1990) 61 *British Year Book of International Law* 161.

⁷² Ibid 164.

Gros, a company's nationality does not reflect any substantial economic bond. For him, the issue is that when the national economy of a state is adversely affected then the state should possess the right to take legal action (by using diplomatic protection).⁷³ As the author of this thesis I support judge Gros's argument. It is understandable that each country should protect their national and their country's economic welfare (if necessary) by using different legal instruments including diplomatic protection.

3.6. Diplomatic Protection: Stateless Persons and Refugees

At the beginning it is worth to distinguish status of 'refugees' and 'stateless' persons. The refugees are: 'owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return'.⁷⁴ However, 'stateless person' defined as: 'a person who is not considered as a national by any State under the operation of its law'.⁷⁵ These definitions confirm that not all stateless persons are refugees or not all refugees are stateless.

The political theorist Adrent in her book, *The Origins of Totalitarianism* describes a stateless person as being 'rightless'.⁷⁶ For her, the requirement that a company has a nationality is not only needed for the protection of corporations, but for stateless people also.⁷⁷ Adrent argues that the first loss that the 'rightless' suffers is the loss of their home, which means the loss of the entire social texture into which they were born.⁷⁸ She argues that the second loss suffered by the 'rightless' is a loss of government protection, and this implies a loss of legal status in their home countries as well as in all countries.⁷⁹ Van Panhuys also believes that the rule of nationality emphasises the position of a stateless person as a legal outlaw.⁸⁰

⁷³ The Barcelona Traction Case (n 53) The Separate Opinion of Judge Gros 279 [19] <https://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-09-EN.pdf> (Last accessed April 2016)

⁷⁴ Convention Relating to the Status of Refugees (1951) Art.1(2).

⁷⁵ Convention Relating to the Status of Stateless Persons (1954) Art.1

⁷⁶ Hannah Arendt, *The Origins of Totalitarianism* (3rd Edn, Penguin Classics 1966) 293.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid 294.

⁸⁰ H F van Panhuys, *The Role of Nationality in International Law: An Outline* (A W Sijthoff 1959) 102.

The view that a stateless person was a legal outlaw was common before the advent of modern day human rights laws, and an individual could not protect themselves from the illegal actions of governments. Similar problems were experienced by refugees. However, in the 20th century, states began to make progress in trying to protect stateless persons' and refugees' rights. For instance, at the 1930 Hague Codification Conference, the Netherlands proposed the right of a receiving state to protect refugees, but this proposal failed to be adopted.⁸¹ It has been the same story from a DP perspective. Neither the Convention on Refugees (1951) nor the Convention on Stateless Persons (1954) contains provisions that recognise the rights of contracting states to exercise DP on behalf of their stateless residents.⁸² However, the situation changed with the publication of the ILC's Draft Articles on DP, and Article 8 of this Articles provides that the home state of a stateless person or refugee can take legal action against other countries on behalf of the individual. However, it should be noted that it is only in some situations that Article 8 permits the exercise DP in respect of a stateless person who, at the date of injury and at the date of official presentation of the claim, is lawfully and habitually resident in a certain state. According to Article 8(2), the same rule also applies to refugees if the refugees are recognised by a state as refugees or have documented refugee status.⁸³ Article 8 is one of the most important parts of the ILC's work on DP. This is because, if Article 8 did not provide protection for millions of stateless persons and refugees then, in comparison with people who hold citizenship, they would be discriminated against, and their human rights violated. In conclusion, it could be stated that the ILC's Draft Articles on DP implicates the rights of stateless people and refugees, and this supports the aim of human rights internationally.

3.7. Nationality under the ICSID Convention

As with other international Conventions, the ICSID Convention sets out its own jurisdiction. Article 25 of the Convention clearly states the conditions and requirements under which the Convention is applicable. Article 25 requires that: (a) dispute must be a legal dispute; (b) it must arise out of an investment; (c) one party must be a contracting state (or any constituent sub-division or agency of a contracting state designated as such to the Centre, by that state), and the other party must be a foreign national of a member state; and, (d) both parties must

⁸¹ Ibid 72.

⁸² Ibid.

⁸³ ILC Draft Articles on DP [2006] Article 8 (2).

have consented, in writing, to have recourse to the Centre.”⁸⁴ It should be noted that ratification of the ICSID Convention by a contracting state signifies only that the state consents to being bound by the ICSID. It does not mean that the state consents to undergo arbitration in respect of disputes with foreign investors.⁸⁵ This demonstrates that the idea of the 'consent' of the parties concerned is, “the cornerstone of the jurisdiction of the Centre.”⁸⁶

This part of the chapter will focus on Articles 25 (2) (a) and (b). It will begin by examining the following: how to define a ‘national of another contracting state’; the nationality of ‘natural persons’ as referred to in Article 25 (2) (a); and the nationality of ‘juridical persons’ of other contracting states as noted in Article 25 (2) (b). The previous part of the chapter outlined the importance of nationality from the perspective of DP, and it was concluded that nationality is a crucial requirement for exercising DP. In public international law, the question of nationality has developed primarily in the context of DP.⁸⁷ However, in respect of The ICSID Convention, the issue of nationality has taken a different path, and one that does not give nationality the same level of importance it had under the rules of DP. It should be noted that the meaning of the term ‘nationality’ in the context of The ICSID Convention is not identical to the meaning it has under the laws of DP.⁸⁸ In the field of DP, the purpose of ‘nationality’ is to establish an adequate link between the private party and the state giving protection, in order to enable the latter to espouse a claim.⁸⁹

Broches, a well-known scholar and a drafter of The ICSID Convention, has widely discussed the importance of nationality under both DP and in relation to The ICSID Convention. In relation to the concept of ‘nationality’, he explains the following:

“[It] should be noted that the significance of nationality in traditional instances of espousal of a national's claim should be distinguished from its relatively unimportant role within the framework of the Convention. In the former case, the issue of nationality is of substantive

⁸⁴ The ICSID Convention [1965] Article 25.

⁸⁵ Georges R. Dealume, ‘ICSID Arbitration: Practical Considerations’ (1984) I (2) *Journal of International Arbitration* 104.

⁸⁶ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [1965] International Bank for Reconstruction and Development [23] available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf, (last accessed April 2016).

⁸⁷ Christoph H. Schreuer with Loretta Malintoppi et al. *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009) 267.

⁸⁸ C.F. Amerasinghe, ‘The Jurisdiction of the International Centre for the Settlement of Investment Disputes’ (1979) 19 *Indian Journal of International Law* 198.

⁸⁹ *Ibid.*

importance as being crucial in determining the right of a State to bring an international claim, while under the Convention, it is only relevant as regards the capacity of the investor to bring a dispute before the Center.’⁹⁰

The ICSID does not follow the laws of DP when determining the nationality of either individuals or corporations. Article 42 (Applicable Law) of the ICSID does not apply when determining the nationality of the individual claimant. Briefly, the nationality of a 'natural person' is determined by the laws of the state whose nationality is claimed. Furthermore, the nationality of a 'juridical person' is determined by the criteria of incorporation or seat of the company in question, subject to pertinent agreements, treaties and legislation. The nationality of shareholders is determined according to the applicable international investment agreements and Article 25.⁹¹ All this will be discussed further in the sections that follow.

3.7.1. The Nationality of Natural Persons

The role of 'nationality' under ICSID Convention serves to bring a private party within the jurisdiction of the Centre.⁹² However, in order to achieve this, there are certain requirements to be met, which are classed as 'positive' and 'negative'. The 'positive' requirement deems that an investor must be a 'national of another contracting state' whilst the 'negative' requirement deems that an investor 'cannot be a national of the host state'.⁹³ Moreover, according to Article 25 (2) (a) a natural person's nationality must be measured on two dates: Firstly, on the date that the parties' consent to submit to the Centre's jurisdiction, and secondly, on the date that the request for arbitration or conciliation is registered by the Centre. These requirements are essential in the context of the mutuality principle, as embodied in the Convention, which balances the interests of host states on the one hand and investors on the other.⁹⁴ As mentioned earlier, the Convention does not establish a definition of nationality. States are thus free to determine the nationality of individuals under their municipal laws. In the case of Bilateral Investment Treaties (BITs), states may choose how to

⁹⁰ A. Broches, 'Chairman's Report on Issues Raised and Suggestions Made with Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States' [1964] in *ICSID, Documents Concerning the Origin and Formulation of the Convention Volume II* (International Centre for Settlement of Investment Disputes 1968) 582.

⁹¹ Christoph H. Schreuer (n 2) 552-553.

⁹² *Ibid.* 198.

⁹³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 252.

⁹⁴ A. Broches, 'The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' [1972] 136 II *Recueil des Cours* 356.

determine an individual's nationality, as they are bound neither by other international agreements, nor by their domestic legislations.⁹⁵

Not all BITs contain the same definition of 'natural persons'. In some BITs, the parties involved agree on a definition. For instance, Article 1 (1) (a) of the Japan-South Korea BIT (2003) defines a natural person as, "[...] having the nationality of that Contracting Party in accordance with its applicable laws and regulations."⁹⁶ However, other BITs exist in which each party defines 'natural persons' differently. For example, in the Germany-United Arab Emirates (UAE) BIT (1998), in respect of the Federal Republic Germany, natural persons are defined as, "(aa) Germans within the meaning of the basic law for the Federal Republic of Germany."⁹⁷ However, in respect of the United Arab Emirates, natural persons are defined as, "(aa) [...] holding the nationality of the United Arab Emirates in accordance with the laws of the UAE."⁹⁸ It seems from these definitions that it would not be difficult to identify the nationality of natural persons. However, this is not the case, as Lauterpacht explains, "Where natural persons are concerned, few difficulties are likely to arise."⁹⁹ In ICSID practise, there are several cases in which the individual investor's nationality is one of the main issues at stake. Two such cases will now be considered in detail.

3.7.1.1. Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt

In this case the Claimants were Mr. Siag and his mother Mrs. Vecchi, and the Respondents were the Arab Republic of Egypt. Briefly, the Siag family set up an incorporated business and were investors in the Egyptian tourist sector (The Project), under Egyptian law. In 1995, the Egyptian Government expropriated the Saig family investment, which comprised property owned by the Claimants and the Project, thus destroying the value of the Claimants' investments.¹⁰⁰ The Claimants submitted a claim under the Italy-Egypt BIT (1989), in which they argued that the Egyptian Government had violated Article 5 of the Italy-Egypt BIT, by expropriating their investment. It should be noted that Article 5 only permits the

⁹⁵ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995) 31.

⁹⁶ Japan-South Korea BIT [2003] Article 1 (1) (a).

⁹⁷ Germany-United Arab Emirates BIT [1998] Article 2 (a) (aa).

⁹⁸ Ibid.

⁹⁹ E. Lauterpacht, 'The Drafting of Treaties for the Protection of Investment' (1962) 18 (3) *International and Comparative Law Quarterly* 32.

¹⁰⁰ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (Award, 2009) ICSID Case No. ARB/05/15 1 [2].

expropriation or naturalisation of investors' property for public purposes, and for the protection of national interests.¹⁰¹ And, in these cases investors are compensated in line with the market value of their property.¹⁰²

In this case, the investors' nationality was complicated, as they had originally held Egyptian citizenship, but as Egyptian nationals they were not allowed to apply for investor-state arbitration under the terms of The ICSID Convention, as investors are not permitted to take their home state to arbitration. Each of the Claimants had obtained their Egyptian citizenship separately: Mrs. Vecchi was originally an Italian citizen, but she married Mr. Elie George Siag (the father of Mr. Siag) who was an Egyptian national. Mrs. Vecchi obtained Egyptian nationality in 1954. Mr. Siag was born in Egypt, and was an Egyptian national. However, later on, Mr. Siag applied for Lebanese nationality, but before obtaining Lebanese nationality, he was required by Egyptian law to submit an application to the Egyptian Minister of the Interior to obtain permission to acquire Lebanese nationality. Mr. Siag submitted this application on 19 December 1989, but the application was inconclusive and Mr. Siag did not establish a date for acquiring Lebanese nationality that co-incided with the loss of his Egyptian nationality.¹⁰³ For these reasons, the Tribunal held that Mr. Siag had effectively lost his Egyptian citizenship on 14 June 1990.¹⁰⁴ In addition, Mrs. Vecchi lost her Egyptian nationality on 14 September 1993 when she re-acquired her Italian nationality.¹⁰⁵ The loss of their Egyptian nationality was determined under the national laws of the Egypt. However, the Respondent asserted that the Claimant's interpretation of Egyptian nationality law was incorrect.¹⁰⁶ The Respondent further asserted that their links with Italy meant that they could not establish jurisdiction under The ICSID Convention.¹⁰⁷ The Tribunal held that, although the Claimants had held Egyptian nationality in the past, they had lost it and, therefore, they only held Italian nationality.¹⁰⁸ It should be noted that they did not hold dual-citizenship, which would have meant that they satisfied both the positive and negative nationality requirements of Article 25 of the Convention. The national law of Egypt was applied by the Tribunal to come to this conclusion. Schreuer explains as follows:

¹⁰¹ Italy-Egypt BIT [1989] Article 5 (ii).

¹⁰² Ibid Article 5 (iii).

¹⁰³ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (n 98) 11 [27]

¹⁰⁴ Ibid 49 [172]

¹⁰⁵ Ibid 50 [80]

¹⁰⁶ Ibid 11 [28]

¹⁰⁷ Ibid 55 [196]

¹⁰⁸ Ibid.

“Whether a person is a national of a particular State is determined, in the first place, by the law of the State whose nationality is claimed. Indeed, in determining whether the individual holds a particular nationality, tribunals are entitled, and may be required, to apply that law.”¹⁰⁹

In summary, it was held that the Siag family had Italian nationality at the relevant time for the purpose of provisions of The ICSID Convention.¹¹⁰ However, one of the arbitrators in this case, Orrego, has proffered a dissenting opinion:

“[W]hen the investment was made the investors were Egyptians and they as citizens of this country benefited from Egyptian legislation and they were all the times considered to be Egyptians, not just by the Egyptian Government but this was also by own understanding of this family.”¹¹¹

In short, Vicuña suggests that Mr. Siag's nationality was 'artificial' in the context of this dispute.¹¹² This is because his nationality was linked to Egypt, not Italy. However, the conclusion drawn in this case was to the Siag family's advantage because Vicuña argues that the outcome was, “...not what international law or The ICSID Convention could have possibly intended.”¹¹³ However, Orrego claimed that it could only be expected that the Tribunal came to the conclusion they did, because the Respondent was able to demonstrate that the Claimants had taken steps to acquire Italian nationality for the sole purpose of obtaining investor rights pursuant to the BIT. Nevertheless, this was not an issue in this case, because the Siag family acquired their Italian nationality a long time before the claims were brought.¹¹⁴

3.7.1.2. Mr. Hussein Nuaman Soufraki v. United Arab Emirates

In the case of *Mr. Hussein Nuaman Soufraki v. United Arab Emirates*,¹¹⁵ the investor wanted to take advantage of the United Arab Emirates-Italy BIT of 1995. The Claimant, who portrayed himself as a Canadian citizen, entered into a thirty-year concession agreement with

¹⁰⁹ Christoph H. Schreuer with Loretta Malintoppi et al. (n 2) 265.

¹¹⁰ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (n 98) [196]

¹¹¹ *Ibid* 63.

¹¹² *Ibid* 68.

¹¹³ *Ibid* 69.

¹¹⁴ *Ibid* 57 [200]

¹¹⁵ *Hussein Nuaman Soufraki v. United Arab Emirates* (Award, 2004) ICSID Case No.ARB/02/7

the Respondent.¹¹⁶ However, when a dispute arose, Mr. Soufraki sought protection under the UAE-Italy (BIT) and claimed that he held Italian nationality. This is because Italy was a party to The ICSID Convention at the time, whilst Canada had signed the Convention, but had not yet ratified it. In the past, Mr. Soufraki had held Italian nationality. However, when he voluntarily acquired Canadian citizenship in 1991, he automatically lost his Italian nationality.¹¹⁷ Nevertheless, in support of his claim to be an Italian national, he presented his Italian passports, five certificates showing his Italian nationality, and a letter from the Italian Ministry of Foreign Affairs.¹¹⁸ The Tribunal concluded that, “The present dispute falls outside its jurisdiction under Article 25 (1) and (2) (a) of The ICSID Convention and Article 1 (3) of the BIT.”¹¹⁹ However, the Claimant appealed this finding, and sought to annul the award. Mr. Soufraki argued that the Italian authorities were prepared to treat him as an Italian national, which would be sufficient for the purposes of the BIT. Therefore, the Tribunal was neither obliged nor even permitted to investigate the 'nationality' matter further.¹²⁰ Additionally, the Claimant argued that the Tribunal had exceeded its power,¹²¹ and, “no international tribunal has the power to grant or withdraw nationality.”¹²² This position is correct: tribunals dealing with investor-state disputes are not able to grant or withdraw an investor’s nationality. However, the Ad Hoc Committee, which made the award, explained that the Tribunal had applied Italian law,¹²³ and, according to the national laws of Italy, Mr. Soufraki was judged not to be an Italian. The Ad Hoc Committee stated that it was only in exceptional cases that ICSID tribunals reviewed nationality documentation issued by state officials.¹²⁴ Oppenheim explains this approach as follows:

“An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state’s claim that a person has its nationality. However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that

¹¹⁶ Ibid 2 [3]

¹¹⁷ Ibid 20 [52]

¹¹⁸ Ibid 7 [14]

¹¹⁹ Ibid 31 [86 (a)]

¹²⁰ Anthony C. Sinclair, ‘ICSID’s Nationality Requirements’ (2008) 23 (1) ICSID Review-Foreign Investment Law Journal 68.

¹²¹ *Hussein Nuaman Soufraki v. United Arab Emirates* (n 113) (Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki 2007) 15 [31-32]

¹²² Ibid 26 [55]

¹²³ Ibid 44 [93]

¹²⁴ Ibid 14 [28]

nationality.”¹²⁵

Finally, this case confirms that, when identifying the nationality of an investor, a certificate of nationality is considered as part of the documentary evidence, but it does not constitute conclusive proof.¹²⁶ In conclusion, it is worth remembering Amerasinghe’s summary of the nationality requirements for natural persons: *First of all*, two dates are relevant for the fulfilment of the nationality requirement, namely, the date on which jurisdiction is consented to, and the date on which the request for arbitration or conciliation is registered. *Secondly*, both the negative and positive nationality requirements must be fulfilled on both these dates. *Thirdly*, there is no requirement of continuity in respect of these requirements. This means that it is not necessary that either the positive requirement or the negative requirement be satisfied continuously from the first date to the second. All that is required is that both the positive and negative conditions are satisfied on each of the two dates. *Fourthly*, there is no requirement that a naturalised person must have the same foreign nationality on both of the two dates.¹²⁷ When all these requirements are met, a natural person fulfils the Convention’s nationality requirements. These requirements are different for juridical persons, and this will be discussed in the next part of this chapter.

3.7.2. The Nationality of Juridical Persons

International investment law clearly distinguishes between, and treats the issue of the nationality of individuals and corporations differently.¹²⁸ A natural person's nationality is more easily identified than that of corporations. This is because, often, corporations can be linked to several countries. As with the nationality of ‘natural persons’, The ICSID Convention does not define the nationality of ‘juridical persons’. Instead, the Convention leaves it up to states to determine this matter. For this reason, states that agree to BITs may define a juridical person’s nationality as they choose.

¹²⁵ R.Y. Jennings and A. Watts (eds.) *Oppenheim’s International Law* (9th edn, Longman 1992) 855.

¹²⁶ Christoph H. Schreuer with Loretta Malintoppi et al. (n 2) 265; Katia Yannaca-Small and Stanimir Alexandrov (eds), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 215.

¹²⁷ C.F. Amerasinghe (n 3) 207.

¹²⁸ Engela C. Schlemmer, 'Investment, Investor, Nationality and Shareholders' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 75.

The UK-Mexico BIT (2007) defines juridical persons as, “An enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in business operations in the territory of that Contracting Party.”¹²⁹ Another example can be cited from the Russian Federation-People’s of Republic of China BIT (2006), in which legal persons are defined as follows:

“Legal entities, including companies, associations, partnerships, and other organizations, established or constituted under the laws and regulations of either Contracting Party, and having their seats in the territory of that Contracting Party.”¹³⁰

BITs also include various other definitions of ‘juridical persons’ as: ‘entities’, ‘companies’, ‘partnerships’, ‘associations’, ‘legal persons’, ‘enterprises’, ‘corporations’, or ‘firms’. As noted earlier, both traditionally, and in the conflict of laws, the personal status of corporations is determined by their place of incorporation, registered office, central administration or effective seat (*siège social*), or the place where the principal activities of the juridical person are conducted.¹³¹ Schreuer explains that the place of central administration or effective seat is decisive.¹³² These criteria are used for determining the nationality of juridical persons in ICSID case law when interpreting Article 25 (2) (b) of The ICSID Convention.¹³³ Furthermore, Article 25 (2) (b) of the Convention provides that, for the purpose of determining juridical nationality, a national of another contracting state is considered to be:

“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.”¹³⁴

In the second part of Article 25 (2) (b), ‘because of foreign control’, is included as an exception because if no exception was made for foreign-owned but locally-incorporated

¹²⁹ The UK-Mexico BIT [2007] Article 1 (i) (a).

¹³⁰ The Russian Federation-People’s of Republic of China BIT [2006] Article 1 (2) (b).

¹³¹ Amerasinghe (n 3) 212.

¹³² Christoph H. Schreuer with Loretta Malintoppi et al. (n 2) 279.

¹³³ Pia Acconci, ‘Determining the Internationally Relevant Link between a State and a Corporate Investor: Recent Trends concerning the Application of the “Genuine Link” Test’ (2004) 5(1) The Journal of World Investment & Trade 157.

¹³⁴ The ICSID Convention [1965] Article 25 (2) (b).

companies, a large and important sector of foreign investment would fall outside the scope of the Convention. In other words, if foreign control is not established, ICSID jurisdiction cannot be established.¹³⁵ To be eligible, the host state and the company must specifically consent to that company being treated as a national of another contracting state ‘because of foreign control’.¹³⁶ It should be noted that, even if the company is sold to nationals of a non-contracting state, after the date the parties consented to ICSID arbitration, and those nationals continue to operate through a locally-incorporated company, the position cannot be changed, and the state which is party to the dispute cannot object to the eligibility of the company for ICSID arbitration on the grounds that the Convention applies only to nationals of contracting states.¹³⁷ In other words, neither party is able to withdraw its consent unilaterally even if control of the company has changed.

Last, but not least, the ‘foreign control’ possibility is unique to the ICSID, and is not available under DP. However, this exception makes it possible to abuse the nationality requirement of the Convention. For instance, investors who intend to exploit this exception to protect their investments take capital from their home state into another state that has a treaty agreement with the investor’s national state. After establishing a company in the foreign state, the investors re-enter their home state as foreign juridical persons, bringing their capital back to the place it originated from, as a foreign investment. This mechanism is called the ‘round-tripping’ technique.¹³⁸ It was raised in the case of *Tokios Tokeles v. Ukraine*. Tokios Tokeles was a business enterprise established under Lithuanian law; 99% of the company’s shares belonged to Ukrainian nationals, and two-thirds of its management were Ukrainian nationals.¹³⁹

In 1994, Tokios Tokeles formed a wholly-owned subsidiary, Taki Spravy, under the laws of the Ukraine.¹⁴⁰ The company’s business advertised, published, and printed both in Lithuania and outside of its borders. In 2002, Tokios Tokeles initiated ICSID arbitration proceedings, alleging that the Ukraine had engaged in a series of unreasonable and unjustified actions

¹³⁵ Anthony Sinclair (n 35) 96.

¹³⁶ Aron Broches (n 8) 359.

¹³⁷ K.V.S.K Nathan, *The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes* (Juris Publishing 2000) 92.

¹³⁸ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 328.

¹³⁹ *Tokios Tokeles v. Ukraine* [Decision on Jurisdiction 2004] ICSID Case No. ARB/02/1 8 [21].

¹⁴⁰ *Ibid* [2].

against Taki Spravy, which had affected its investments in the Ukraine.¹⁴¹ The Claimant held that this constituted a breach of the BIT between Lithuania and Ukraine. However, the Respondent, (Ukraine) argued that the Claimant was not a ‘genuine entity’, mainly because it was owned and controlled by Ukrainian nationals, and had no substantial business activities in Lithuania.¹⁴² Moreover, the Respondent also argued that the Claimant had not made an ‘investment’ in Ukraine as defined by the Treaty, because the capital for the investment originated in Ukraine.¹⁴³ However, the Tribunal declined to look behind the Claimant into its shareholders, real owners, or controllers. For the Tribunal, it was important to decide whether or not the Claimant was a Lithuanian ‘investor’; anything above and beyond that did not fall within the Tribunal’s remit. Lastly, the majority of the Tribunal concluded that the Claimant was an investor under Article 1 (2) (b) of the BIT,¹⁴⁴ and a ‘national of another Contracting State’ under Article 25 of the Convention.¹⁴⁵ However, the President of the Tribunal dissented from the majority decision, and held that ‘the ICSID arbitration mechanism system, that is to say, for disputes between States and foreign investors’ is ‘not [for] investment disputes between States and their own nationals’.¹⁴⁶ Weil argues that the ‘origin of capital is relevant and even decisive’.¹⁴⁷ Sornarajah believes that such an action by an investor subverts the purpose of the treaty, which is to promote economic development through the injection of fresh funds.¹⁴⁸ The President of the Tribunal warned of the following:

“It follows that ICSID arbitral tribunals have to be particularly cautious when they determine their jurisdiction. An unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on both the availability of diplomatic protection and the jurisdiction of domestic courts.”¹⁴⁹

¹⁴¹ Ibid [3].

¹⁴² Ibid 8 [21].

¹⁴³ Ibid 31 [72].

¹⁴⁴ An Agreement between the Government of the Russian Federation and the Government of Lithuania, [Moscow, 1999] Article 1 (2) (b): in respect of Lithuania: natural persons who are nationals of the Republic of Lithuania according to Lithuanian laws; any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations .

¹⁴⁵ *Tokios Tokeles v. Ukraine* (n 137) 30 [71].

¹⁴⁶ *Tokios Tokeles v. Ukraine* (n 137) (Dissenting Opinion of Professor Weil to the Decision on Jurisdiction, 2004) 3 [5].

¹⁴⁷ Ibid 12 [20].

¹⁴⁸ M.Sornarajah, 'Developing Countries in the Investment Treaty System: A Law for Need or a Law for Greed?' in Stephen W. Schill, Christian J. Tams and Rainer Hofmann, *International Investment Law and Development: Bridging the Gap* (Edward Elgar Publishing Ltd 2015) 48.

¹⁴⁹ *Tokios Tokeles v. Ukraine* (n 137) 4 [8].

Otherwise, this might jeopardise the future of the institution,¹⁵⁰ by extending its scope and application beyond its legal limits.¹⁵¹ This is a result of juridical investors beginning to use other methods such as ‘treaty shopping’ or ‘nationality planning’. These methods are utilised by foreign investors who deliberately seek to acquire the benefits of a BIT by making foreign investments, or by bringing claims from third countries that have more favorable treaty terms with the target host state.¹⁵² This is done in order to gain full access to maximum protection for their investments. The strategy used to transfer companies from one country to another in order to either protect an investment or to take legal action against the host state is not illegal. However, if a tribunal rules that a claimant has acted in bad faith and that ‘nationality planning’ has been used to protect investments, a claimant will not succeed in the claim. In the case of *Phoenix v Czech Republic*, the Tribunal stated the following:

“The evidence indeed shows that the Claimant made an ‘investment’ not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic or in other words, the unique goal of the ‘investment’ was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. On the grounds of that, this kind of transaction is not a bona fide transaction and cannot be a protected investment under the ICSID system.”¹⁵³

A similar argument was made in the *Tokios Tokeles* case, where the Respondent (Ukraine) argued that the Claimant’s aim was to take legal action against his home state. However, in that case, the Tribunal determined that the Claimant had carried out business and investment activities for more than six years before the BIT between Ukraine and Lithuania entered into force, and that the Claimant’s aim in establishing a company in Lithuania was not to gain access to ICSID Arbitration. In addition, there was no evidence that the Claimant had used his formal legal nationality for any improper purpose.¹⁵⁴

When investors began abusing BITs using ‘nationality planning’ strategies, states devised methods to counteract these tactics.¹⁵⁵ One such method is to request a bond of economic

¹⁵⁰ Ibid 1[1].

¹⁵¹ Ibid 19 [19].

¹⁵² Matthew Skinner, Cameron A. Miles, and Sam Luttrell, ‘Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping’ (2010) 3 (3) *Journal of World Energy Law & Business* 260-261

¹⁵³ *Phoenix Action v. Czech Republic* (Award, 2009) ICSID Case No. ARB/06/5 56 [142].

¹⁵⁴ *Tokios Tokeles v. Ukraine* (n 137) 24 [56].

¹⁵⁵ Dolzer and Schreuer (n 91) 55.

substance, between the corporation and the state, which is termed a ‘denial of benefit clause’. This clause is included in the BIT.¹⁵⁶ By adopting this clause, states reserve the right to deny the benefits of the treaty to a company that is incorporated by a state, but, which has no economic connection to that state.¹⁵⁷ This idea is not a recent invention. Originally, a ‘denial of benefit clause’ was used to deny DP, and later, it was incorporated into treaties for the protection of foreign investments.¹⁵⁸ For instance, the US’s 2004 Model Treaty, Article 17(2), reads as follows:

“A Party may deny the benefits of the Treaty to an investor of the Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.”¹⁵⁹

A similar example can be found in Article 17 of the Energy Charter Treaty (ECT). Even though, here, the wording of ‘denial of benefit clauses’ is different, the purpose of the paragraph is the same: to protect third parties from claiming the benefits of treaties, and not to permit them to go beyond the criteria expressly contained in BITs.

In 1965, when the ICSID Convention was first drafted, determining the nationality of a natural or juridical person was much easier than it is today. The world has changed and has become more global, in the sense that corporations now operate universally, and this has created complex nationality issues in investor-state disputes. It seems that, in the future, nationality issues will continue to arise, and that disputes between investors and states will continue to be an international issue.

3.8. Shareholders Rights

As discussed in the first part of this chapter, under Customary International Law (CIL) shareholders were not able to bring a claim in their own name, regardless of whether they held shares directly or indirectly in a company. This rule was enacted because it was believed that allowing direct claims could create an atmosphere of confusion and insecurity in the

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Loukas A. Mistelis and Crina Mihaela Baltag, ‘Denial of Benefits and Article 17 of the Energy Charter Treaty’ (2009) 112 (4) Penn. State Law Review 1302.

¹⁵⁹ Model Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment [2004] Article 17 (2).

realm of international economic relations; the activities of a company can be internationally and widely scattered, and shares frequently change hands.¹⁶⁰ Under CIL, only natural or juridical persons could claim compensation for damage. As a result, shareholders were powerless under international law and had no effective remedy for their injuries.¹⁶¹ Nevertheless, under CIL there were exceptions to the general rule, whereby the rights of shareholders could be protected. Basically, shareholders could take independent action against a host state but only under the following circumstances:

- 1) If their direct rights had been infringed.¹⁶²
- 2) The company had ceased to exist in the country of incorporation.¹⁶³
- 3) The state of incorporation lacked capacity to take action.¹⁶⁴
- 4) If their shares were expropriated in the host state.¹⁶⁵

Furthermore, under CIL, it was acknowledged that, “a shareholder's only obligation is to pay for his shares; there is no other obligation, whether to contribute to the company, to participate in the management of the company, or even to participate in the election of the managers of the company.”¹⁶⁶ However, these rights were limited and could not protect their investors, and for this reason Schreuer argued that on this point, the ICJ was aware of the limited usefulness of customary international law and for that reason, specifically referred to the protection of shareholders' rights by way of treaties.¹⁶⁷ Indeed, the ICJ noted the following:

“Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently

¹⁶⁰ The Barcelona Traction Case (n 53) [96].

¹⁶¹ P G Lutz, 'Diplomatic Protection of Corporations and Shareholders - Capacity of Government to Espouse Claims of Shareholders of a Foreign Corporation' (1970) 1 California Western International Law Journal 148.

¹⁶² The Barcelona Traction Case (n 53) [47].

¹⁶³ Ibid [66].

¹⁶⁴ Ibid.

¹⁶⁵ Ursula Kriebaum, 'The Nature of Investment Disciplines' in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 54.

¹⁶⁶ V Lowe, 'Shareholders' Rights to Control and Manage: From Barcelona Traction to ELSI' in Nicuke Ando, Edward McWhinney and Rudiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda Volume II* (Kluwer Law International 2002) 278.

¹⁶⁷ C H Schreuer, 'Shareholder Protection in International Investment Law' (2005) 2(3) Transnational Dispute Management 3.

provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements.”¹⁶⁸

However, with the development of BITs, one can make a strong argument that the decision of the ICJ no longer reflects the current state of international law.¹⁶⁹ Later on, this view was supported approach by the ICJ itself:

“...in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as bilateral investment treaties (BITs) or the ICSID Convention, and also by contracts between States and foreign investors.”¹⁷⁰

3.8.1. ICSID and Shareholder Nationality

As discussed in the previous sections of this chapter, determining the nationality of corporations is more difficult than determining the nationality of individual investors. To make matters more complicated, identifying shareholders’ nationalities is even more difficult than identifying the nationalities of corporations. One of the main reasons for this is because foreign shareholders do not often have a contractual relationship with the host state.¹⁷¹ Nevertheless, in the process of using BITs, parties must define the investors and investments, and this determines the scope of their agreements. According to this, only defined investors or investments are protected. This principle is a cornerstone for the future of dispute settlement. When parties specify the terms of their BITs, they use wide definitions in order to protect as many investments and investors as possible. A classical example of this can be found in Article 1 of the BIT between the United States of America and the Oriental Republic of Uruguay, which reads as follows:

¹⁶⁸ The Barcelona Traction Case (n 53) [90].

¹⁶⁹ Ian A. Laird, 'A Community of Destiny - The *Barcelona Traction* case and the Development of Shareholder Rights to Bring Investment Claims' in Todd Weiler (eds) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 77.

¹⁷⁰ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections, Judgment 2007) ICJ Reports 614 [88].

¹⁷¹ Jimmt Skjold Hansen, ““Missing Links” in Investment Arbitration: Quantification of Damages to Foreign Shareholders’ (2013) 14 (3) *The Journal of World Investment and Trade* 436.

“The term 'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.”¹⁷²

In this example the word *shares* admits shareholders as investors, and gives the shareholder direct rights to claim against the host state of the investment. However, there are some exceptions even where the Treaty does not expressly provide for when an *investor directly or indirectly controls or owns investments*, but nevertheless, it does not stop shareholders benefitting from the Treaty's protection.

Claims were presented under the Germany-Argentina BIT in the case of *Siemens v. Argentina*.¹⁷³ Article 1 of the Treaty did not mention 'direct or indirect' investment. However, the Tribunal stated the following:

“The definition of ‘investment’ is very broad...The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed...One of the categories consists of ‘*shares, rights of participation in companies and other types of participation in companies*’ (Article 1 (1) (b) of the BIT). The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty.”¹⁷⁴

The Tribunal ruled that unless the Treaty had expressly limited investment to that which is owned directly by the investor, then an investor-shareholder would be able to claim protections for harm caused to an investment owned, even through multiple corporate

¹⁷² US-Uruguay BIT [2005] Article 1.

¹⁷³ Germany-Argentina BIT [1991] came into force in 1993.

¹⁷⁴ *Siemens A.G.-Argentina Case* (Decision on Jurisdiction, 2004) ICSID ARB/02/8 56 [137].

vehicles.¹⁷⁵ The Tribunal explains that, if shareholders are investors in one of the member states of the ICSID Convention, and if they fulfil all the requirements of Article 25 (2) of the Convention, they are able to claim separately from the companies. Therefore, shareholding in a company is a form of investment that enjoys protection, and even if the affected company does not fulfil the nationality requirements of the relevant treaty, there will be a remedy if the shareholder does.¹⁷⁶ This is particularly relevant where, as is frequently the case, the company possesses the nationality of the host state and does not qualify as a foreign investor.¹⁷⁷ Alexandrov notes the following:

“It is beyond doubt that shareholders have standing in ICSID to submit claims separate and independent from the claims of the corporation, and this principle applies to all shareholders no matter whether or not they own the majority of the shares or control the corporation.”¹⁷⁸

In short, the language of the Convention permits shareholders to claim for remedy if an investment treaty protects their shares. In other words, when shareholders seek protection independently, the size of their investment, as a general rule, is not relevant.¹⁷⁹ In addition, Dugan pointed out a way to calculate damages for minority shareholders called ‘derivative damages’, but investment treaties do not provide any guidance on this matter.¹⁸⁰ Overall, determining the nationality of public companies and their shareholders’ nationalities is not an easy task, and sometimes it is virtually impossible.¹⁸¹

From a jurisdictional point of view, for the ICSID, there is no difference between ‘majority’ or ‘minority’ shareholdings. However, there have been cases where respondent states have argued that minority shareholders cannot claim for damages under an investment treaty, but

¹⁷⁵ Abby Cohen Smutny, 'Claims of Shareholders in International Investment Law' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (Oxford University Press 2009) 373.

¹⁷⁶ Christopher Schreuer, 'Shareholder Protection in International Investment Law' (2005) 2 *Transnational Dispute Management* 20 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_2.pdf, (last accessed 16th of July 2018).

¹⁷⁷ *Ibid.*

¹⁷⁸ Stanimir A Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders As "Investors" and Jurisdiction (2005) 4 *Ratine Temporis*', *The Law and Practice of International Courts and Tribunals* 30.

¹⁷⁹ C.Schlemmer, 'Investment, Investor, Nationality and Shareholder' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 83.

¹⁸⁰ Christopher F. Dugan, Don Wallace Jr. et al. *Investor-State Arbitration* (Oxford University Press 2008) 318.

¹⁸¹ Stanimir A Alexandrov (n 176) 37.

ICSID tribunals have viewed this differently. In *Lanco v. Argentina* the ICSID Tribunal said the following:

“...the Argentina-US Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that Lanco holds an equity share of 18.3% in the capital stock of the Grantee, allows one to conclude that it is an investor in the meaning of Article I of the Argentina-U.S. Treaty.”¹⁸²

Additionally, the Tribunal further asserted that Lanco was liable for all contractual obligations arising under the agreement to the extent of its equity and share¹⁸³ and was a party in its own name and right.¹⁸⁴

In *CMS Gas Transmission Company v. Republic of Argentina*¹⁸⁵, CMS was a shareholder in TGN, holding 29.42% of the shares. When the dispute arose, Argentina argued that CMS was a minority shareholder in TGN, and only TGN could claim for any damage suffered.¹⁸⁶ It was further argued that, since TGN was an Argentine company, it did not qualify as a foreign investor under the BIT US-Argentina, nor was the license a foreign investment.¹⁸⁷ In the conclusion, the tribunal explained the following:

“[there is] no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”¹⁸⁸

Interestingly, in this case the Tribunal confirmed that traditional customary of international law is different from ICSID law.¹⁸⁹ Thus, this decision once again demonstrated that shareholders must indicate that they are shareholders, and if there are no restrictions or limits in treaties, then, as investors, they can claim for their shares without condition, including limitations as to whether these shares are directly or indirectly controlled, or whether they are

¹⁸² *Lanco International Inc. v. The Argentine Republic* (Jurisdiction of the Arbitral Tribunal 1998) ICSID ARB/97/6 10.

¹⁸³ *Ibid* 14.

¹⁸⁴ *Ibid* 12.

¹⁸⁵ *CMS Gas Transmission Company v. Republic of Argentina* (Decision of the Tribunal on Objections to Jurisdiction, 2003) ICSID Case No. ARB/01/8, 798 67.

¹⁸⁶ *Ibid* [36]

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* [48]

¹⁸⁹ *Ibid*.

majority or minority shareholders. Additionally, in practice, minority and majority shareholders have separately submitted claims in connection with the same disputes. Here, the ICSID Convention and BIT rules try to protect shareholders rights. From an investment point of view, investors are protected under the ICSID Convention, because without shareholders there would be no investment or even investors. For that reason, it is understandable why the ICSID and BITs rules seek to protect direct and indirect shareholders.

3.8.2. Citizenship by Investment Programmes

As mentioned earlier, under the ICSID Convention the nationality of natural persons is a crucial condition that allows investors to bring a claim against a state within the jurisdiction of ICSID. Investors who meet those conditions might work on ‘nationality-planning’ and obtain other countries’ citizenship. By gaining another state’s passport, the investor acquires the ability to bring an investor–state claim against another country. For multimillionaire investors, the simplest way of obtaining citizenship in other countries is through citizenship investment programmes. This is also known as ‘cash for passport’.¹⁹⁰

The selling of passports is not a new phenomenon; it started in the early 1980s. After the first year of independence, Saint Kitts and Nevis launched a citizenship-by-investment programme in 1984. Other Caribbean states, namely Belize, Dominica and Grenada later commenced similar programmes to attract foreign investment to their countries. The selling of passports was an alternative to attract investment and support the government’s economy; passports were seen as something to sell.¹⁹¹

Citizenship-by-investment programmes should be distinguished from other investor visa programmes, in which multimillionaires can obtain residency visas after investing the required money into the country’s economy. Not only developing countries in the Caribbean offer investment programmes to foreigners; developed countries such as the US, UK and some EU countries have similar initiatives. For instance, in US, the investment visa is called

¹⁹⁰ See Ayelet Shachar and Rainer Bauböck, ‘Should Citizenship be for Sale?’ in EUI Working Paper RSCAS 2014/01 (European University Institute Robert Centre for Advanced European Union Democracy Observatory on Citizenship 2014).

¹⁹¹ Peter Spiro, ‘Cash-for-passports and the end of citizenship’, in Ayelet Shachar and Rainer Bauböck, ‘Should Citizenship be for Sale?’ EUI Working Paper RSCAS 2014/01, (European University Institute Robert Centre for Advanced European Union Democracy Observatory on Citizenship 2014) 9.

an 'EB-5 Visa'. To apply for this type of visa, the investor should invest at least USD 1 million and the invested amount should create 10 full-time jobs for qualifying employees.¹⁹²

In the UK, this type of visa is called the 'Investor Visa (Tier 1)'. If the investor is outside the EU and wants to invest £2 million or more into the UK economy, he or she can apply for this visa. The invested amount determines when the investor is allowed to receive their permanent residency. Usually after the first year of settlement the investor becomes eligible for citizenship.

According to the immigration law of the UK, if the investor invests at least £10 million they can apply for settlement after two years; if they invest £5 million they can apply after three years; and if they invest between £2 million and £5 million they can apply only after five years. Hence, the amount of their investment determines how rapidly the multimillionaire can gain UK settlement and thereafter become a British citizen.

It is noteworthy that the rights and duties of investors are rigidly detailed. In the UK, for instance, they can run a business or they can work or study, but they cannot work as a professional sportsperson or sports coach.

Similar schemes exist in other European countries, including Spain, Portugal, Malta and Cyprus. Their visa schemes are called 'golden visa'. The required amount for investment differs. In Greece, an investor must buy a property or invest in the country's economy with at least €250,000,¹⁹³ whereas the threshold in Spain is €500,000. In some countries, such as Austria and Montenegro, the exact required amount for investment is not specified. For instance, in Austria it ranges from €800,000 to €10 million. By meeting these requirements, in the last decade more than 100,000 investors have obtained the 'golden visa' in the EU.¹⁹⁴ They have invested FDI of at least €25 billion into the European economy.¹⁹⁵

The invested amount is vast, especially for small countries like Cyprus and Malta, which have gained from this 'citizenship for sale' programme. For instance, Cyprus has

¹⁹² Official Website of the Department of Homeland Security, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa-classification> (last accessed April 2019).

¹⁹³ See, Ministry of Foreign Affairs of Greece, 'Residence Permit in Greece by real estate acquisition or strategic investment', Law 4146/2013 available at: https://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf, (last accessed April 2019).

¹⁹⁴ Laure Brilluad and Maira Martini and Global Witness, 'European Gateway: Inside the Murky World of Golden Visas' (2018) Transparency International and Global Witness 12.

¹⁹⁵ *Ibid*, 3.

attracted €1.4 billion, which is equal to 7.5% of the country's current gross domestic product (GDP).¹⁹⁶

However, the selling of passports is not supported by all politicians in the EU some have expressed their disapproval of this matter. For instance, Reding, the Vice-President of the European Commission, stated:

'A passport is not only a paper or an official document. It conveys rights and obligations both to citizens and to all Member States of the Union... Member states should only award citizenship to persons where there is a 'genuine link' or 'genuine connection' to the country in question... It is a fundamental element of our Union. One cannot put a price tag on it'.¹⁹⁷

Moreover, Palan claimed it is a way of 'commercializing of state sovereignty'.¹⁹⁸ For instance, in Austria, politician Scheuch promised to facilitate granting citizenship of that country to a Russian investor in return for an investment of €5 million in their party.¹⁹⁹ After witnessing this kind of situation, experts have warned governments that cash-for-passport brings several problems into the government. It circumvents the ordinary naturalization process, supports money laundering and tax evasion, encourages criminals to hide, can result in diplomatic passports being issued to non-diplomats, and exerts other influences on political power.²⁰⁰ In addition, foreign investors might be criminals in their home countries. Before they are given citizenship they should be checked as they can put countries and society at risk. Such risks could be minimised by using due diligence assessment not only in the country but worldwide.

In conclusion, it should be noted that a citizenship-by-investment programme can succeed if the state granting the passports assesses the genuineness of individual investors.

3.9. Conclusion

This chapter explored the various conditions relating to diplomatic protection as they are presented in Article 27 of the ICSID Convention. Among various conditions, nationality

¹⁹⁶ Ibid

¹⁹⁷ Viviane Reding, 'Citizenship must not be up for sale', Speech at the European Commission at 15th January 2014,

http://europa.eu/rapid/press-release_SPEECH-14-18_en.htm (Last accessed April 2019).

¹⁹⁸ Ronen Palan, 'Tax Havens and the Commercialization of State Sovereignty', 2002 56 (1) International Organization 151-176.

¹⁹⁹ Jelena Dzankic, 'The Pros and Cons of IUS Pecuniae: Investor Citizenship in Comparative Perspective', EUI Working Papers RCAS 2012/14, (Robert Schuman Centre for Advanced Studies- EUDO Citizenship Observatory 2012) 12.

²⁰⁰ Micheal B Krakat, 'Genuine Links Beyond State and Market Control: The Sale of Citizenship by Investment in International and Supranational Legal Perspective', 2018 Vol. 30 (1) Bond Law Review 158.

remains a significant factor in explaining the relationship of an investor with a state. A textual and contextual analysis of Article 27 of the ICSID Convention reveals that, invoking diplomatic protection for foreign investments remains an exceptional remedy, and can only be applied after fulfilling certain conditions. The fundamental focus of these conditions is the failure of the contracting state to protect foreign investments and the exhaustion of available local remedies. The concept of nationality remains one of the most significant factors that can trigger the process of diplomatic protection in relation to foreign investments in accordance with ICSID norms. This chapter has explored various aspects of nationality in order to examine the relationship of the foreign investor with a state. The next chapter will examine the exhaustion of local remedies rule in relation to invoking diplomatic protection in foreign direct investment disputes.

Chapter Four: The Exhaustion of Local Remedies

4.1. Introduction

This chapter analyses the ‘exhaustion of local remedies’ rule in relation to the protection of foreign investments, which is a second essential condition for invoking diplomatic protection as a remedy. In investment disputes, a foreign investor can contend that local remedies have not been effective due to the reluctance of the contracting state to provide access, or that the remedies available were not adequate. Where remedies are inadequate for the purposes of justice, an aggrieved foreign investor has the right to invoke international jurisdiction. However, it is essential to establish if the contracting state is at fault, or directly or indirectly involved in denying justice to foreign investors. Article 44 (b) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), explains that state responsibility is not invoked where the exhaustion of local remedies rule is applicable, and where there is an effective local remedy that a claimant has not exhausted.

The rule of exhausting local remedies will be analysed in this chapter by using various case laws and by examining the opinions of international jurists. Foreign investors bear some responsibility for invoking diplomatic protection, and this responsibility includes respect for the sovereignty of the contracting state, providing adequate time for the host state for redress, avoiding the premature exercise of diplomatic protection, and any kind of abuse of diplomatic protection. The ILC Draft Articles clarify the use of the exhaustion of local remedies rule when: there is no adequate or effective redress available; where undue delay in redressing a grievance has occurred; where foreign investors have been excluded from exercising their rights in local systems of redress; and where adequate remedy has not been provided. Furthermore, invoking diplomatic immunity requires proving the state’s part in the denial of local justice. However, it might not always be possible to claim that corrupt practices have been involved in the judicial or executive branch of a state. The exhaustion of local remedies rule remains fundamental to resolving international disputes, but modern ICSID Convention takes a lenient view on this condition.

The exhaustion of local remedies rule in investment treaty arbitration is subject to customary international law. The ICSID and related international legal frameworks try to resolve issues under the local jurisdiction of the contracting state. Article 26 of the ICSID Convention provides an option for international arbitration with consent. The chapter will present a

detailed discussion on the exhaustion of local remedies rule, keeping in mind various BITs and multilateral agreements, regional agreements such as the North American Free Trade Agreement (NAFTA). ICSID has eased the conditions of the rule, and available case law shows that an international investor can go to an international tribunal without strictly exhausting all available national remedies. This flexibility has been introduced in response to the existence of under-developed remedial systems in various countries. The modern international legal interface for resolving international investor disputes calls for mutual agreement on using international methods of settlement.

This chapter aims to analyse the shift in global attitudes (ICSID, BITs, NAFTA) about the 'exhaustion of local remedies' rule as a condition for invoking diplomatic protection in international investment dispute cases. The chapter will explore traditional strict interpretations of the condition and its later evolution in terms of a broader interpretation. This will be done by examining the work of international forums that are active in resolving disputes.

4.2. The Exhaustion of Local Remedies under Customary International Law

The second prerequisite for the exercise of diplomatic protection is that a claimant is required to have exhausted all local remedies. The term 'local remedies' defines any legal remedies available (whether ordinary or special) in the state alleged to be responsible for causing the injury.¹ These remedies should be open to the injured person, and offered by local judicial or administrative courts or bodies.² Originating in Europe in the Middle-Ages, before the birth of the modern nation state, this requirement evolved as part of customary international law.³ It can be traced back to the ancient practice of reprisals.⁴ However, it was only in the 19th and 20th centuries, that this requirement became firmly established in international law in relation to diplomatic protection.⁵ In 1803, Chief Justice Marshall asserted that the British Government was, "a government of laws and not of men...if the laws furnish no remedy for the violation of a vested legal right."⁶ This view was soon articulated in the Calvo Doctrine

¹ ILC Draft Articles on Diplomatic Protection with Commentaries [2006] Article, 14 (2) 70.

² Ibid.

³ Chittharanjan Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press 2004) 22.

⁴ A A Cançado Trindade, 'Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law' [1976] 2 RBDI 501

⁵ Amerasinghe (n 3) p.28

⁶ *Marbury v Madison* [1803] 5 U.S. 137 163.

of 1868, which deemed that foreigners should be subject to the local laws of the state where the offence occurred, and must submit any disputes to its courts.⁷

The gist of the idea of local exhaustion is intended to apply to aliens, who must exhaust all domestic remedies available under the law of the host state. By way of explanation, an alien can seek reparation for the wrongful acts of the host state under the host state's national laws. This gives the host state the opportunity to redress alleged wrongs within the framework of its own domestic legal system, before international responsibility can be invoked.⁸ Bocharad explains that DP is limited for the following reasons:

- 1) A person going abroad is presumed to take into account the means furnished by local laws for the redress of wrongs.
- 2) The rights of sovereignty and independence support the demands of the local state for freedom from interference in its courts, on the assumption that they are capable of doing justice.
- 3) The home government should have the opportunity offer justice to the injured party in its own regular way, thus avoiding international scrutiny.
- 4) If an individual or minor official committed the injury, the exhaustion of local remedies is necessary to discover that the wrongful act or denial of justice was or was not a deliberate act of the state.
- 5) If the act was a deliberate act of the state, this rule provides an opportunity to ascertain whether the state wishes to leave the wrong un-righted.⁹

Amerasinghe criticises these arguments and asks what would happen if a state was unwilling to repair a wrong even after local remedies have been exhausted.¹⁰ In addition, Amerasinghe questions what remedies must be exhausted in order to satisfy the requirements of the rule, particularly with respect to extraordinary remedies.¹¹ However, these questions remain unanswered. Indeed, Jessup argues that the rule of exhaustion of local remedies is, "well

⁷ Nsongurua J. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 (1) *The American Journal of International Law* 4.

⁸ A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983) 1.

⁹ Edwin M Bocharad, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (The Banks Law Publishing Co., 1916) 817.

¹⁰ Chittharanjan Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press, 1967) 171.

¹¹ Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 144.

established” but “inadequately” because, “the alien must exhaust his local remedies before a diplomatic claim is made.”¹²

Even though the rule of local exhaustion divides the views of scholars, the rule still continues to be used in modern international law. Article 44 (b) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) explains that a state’s responsibility is not invoked where the exhaustion of local remedies rule is applicable, and where there is an effective local remedy that the claimant has not exhausted. Roberto Ago argues that, according to Article 44, the principle of the ‘exhaustion of local remedies’ is an essential and absolute condition for the determination of the existence of an internationally wrongful act.¹³ The purpose of this Article is to cover any case in which the exhaustion of local remedies rule applies, whether this is under treaty or general international law, or in spheres that are not necessarily limited to diplomatic protection.¹⁴ A similar view on the exhaustion of local remedies can be found in Article 14 of the International Law Commission [ILC] Draft Articles on Diplomatic Protection (2006). According to Article 14 of this legislation, those required to exhaust all local remedies include the following: natural persons, legal persons, foreign companies or parties mainly financed by public capital, non-nationals, and in exceptional circumstances, refugees and stateless persons (Article 8).¹⁵ However, injured aliens can exhaust only those remedies which might result in a binding decision.¹⁶

Local remedies are relevant to the settlement of certain international disputes involving states¹⁷ but this is applicable only in cases where a state is not directly aggrieved.¹⁸ This means that the law is not applicable between states, and the rule is not relevant if there is a direct breach of international law against to another state, for instance, when the injuries are against diplomatic or consular staff. In other words, heads of state, ministries, diplomatic agents, or consular agents who are already enjoying ‘special international protection’ in a

¹² Philip C Jessup, *A Modern Law Of Nations* (1st edition Macmillan 1948) 104.

¹³ ‘Sixth Report on State Responsibility’ [1977] II (1) Yearbook of the International Law Commission 22.

¹⁴ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries [2001] Article 44 (b) http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [121].

¹⁵ Ibid.

¹⁶ Ibid 72.

¹⁷ Amerasinghe (n 3) 3.

¹⁸ Ursula Kreibbaum, ‘Local Remedies and the Standards for the Protection of Investment’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 420.

foreign territory do not need to exhaust local remedies.¹⁹ The main idea behind this exception is that these people are classed as state organs, and they are accepted as a foreign state in itself.²⁰ For this reason, the rule is not applicable to them. Foreign companies who are mainly or partly financed by public capital are not outside the scope of this rule, and in these circumstances public funds cannot be used as grounds not to exhaust local remedies. However, in cases where there is direct injury to the state and to a citizen, the rule is not applicable.²¹ This happened in the case of the *Arrest Warrant of 11 April 2000*, where the ICJ Court stated the following:

“The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.”²²

In different ICJ cases, judges have, several times, confirmed the significance of the exhaustion of local remedies rule. For instance, in the *Interhandel* case (*Switzerland v. United States of America*) the International Court of Justice affirmed that, “the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”²³ In addition, the Court stated the following:

“Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”²⁴

¹⁹ Report of the Commission to the General Assembly on the Work of its Twenty-Ninth Session [1977] II (2) Yearbook of the International Law Commission 45.

²⁰ Ibid.

²¹ Amerasinghe, (n 10) 173.

²² *The Arrest Warrant of 11 April 2000 Case (Democratic Republic of the Congo v Belgium)*, (Preliminary Objections and Judgment of 14 February 2002) ICJ Rep 3 [40].

²³ *The Interhandel Case, (Switzerland v. United States of America)* (Preliminary Objections 1959) ICJ [8] <http://ijl.org/courses/documents/Interhandelcase.pdf>. (Last Accessed October 2017).

²⁴ Ibid.

Moreover, in the *Panevezys-Saldutikis Railway* case, Justice Hudson highlighted the ‘exhaustion of local remedies’, noting the following:

“It is a very important rule of international law that local remedies must have been exhausted, without redress before a State may successfully espouse a claim of its national against another State.”²⁵

The rule was accepted as a one of the main conditions of exercising DP. In principle, if a home state does not comply with this rule then it cannot espouse a national’s claim. An injured person should exhaust all the remedies of a court in the first instance, and no appeal to a higher court is allowed until the conditions of the rule have been met. An international claim can only be received if the redress was not satisfactory to the alien.²⁶ Only after that can the alien’s home state espouse a claim or bring it before an international tribunal. Until that time, the alien’s national state only has the potential right to intervene in a citizen’s claim.

Therefore, this rule has different functions, which include the following:

1. To ensure respect for the sovereignty of states.
2. To provide a state with the opportunity to remedy the behaviour of state organs within its own legal system.
3. To ensure that a deliberate act of the state has occurred.
4. To protect states against the premature exercise of DP.
5. To protect states against the abusive exercise of DP.
6. To limit the cases that can be brought before international organs.²⁷

Kreibaum believes that the ‘exhaustion of local remedies’ rule is designed to ensure respect for the sovereignty of the host state, and this is main reason why the rule continues to survive today.²⁸

²⁵ *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania) (Judgment 1939) PCIJ A/B 76 http://www.icj-cij.org/pcij/serie_AB/AB_76/04_Panevezys_Saldutiskis_Opinion_Hudson.pdf [47].

²⁶ Algot Bagge, ‘Intervention on the Ground of Damage caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders’ (1958) *British Year Book of International Law* 34.

²⁷ Ursula Kreibaum (n 18) 422.

²⁸ Amerasinghe (n 10) 142.

It is worth mentioning that the ‘exhaustion of local remedies rule’ is not applicable in all cases as a condition for exercising DP. For instance, if a local remedy is not provided by the host state, or the local remedies are ineffective, notoriously corrupt, or the decision would be unfair to foreigners, it is not reasonable to require foreigners to spend time and money using these local remedies.²⁹ This is clearly stated in Article 15 of the ILC Draft Articles. Local remedies need not be exhausted where the following applies:

- 1) There are no reasonably available local remedies to provide effective redress.
- 2) There is an undue delay in the remedial process, which is attributable to the state alleged to be responsible.
- 3) There is no relevant connection between the injured person and the host state.
- 4) The injured person is manifestly precluded from pursuing local remedies.
- 5) The state alleged to be responsible has waived the requirement that local remedies be exhausted.³⁰

Bochard argues that if the local judiciary is corrupt, or the possibility of local remedy is remote, then the foreigner should be excluded from exhausting local remedies.³¹ Accordingly, summing up in the *Panevezys-Saldutiskis Railway* case confirms that, “there can be no need to resort the municipal courts if those courts have no jurisdiction to afford relief...”³² Moreover, Wallace stresses that the rule must be adequate and effective and must be applied reasonably and not be a, “rule of infinite pursuit by platonically ideal parties with bottomless wallets to pay legal fees or professors wishing to create new legal theories.”³³ Indeed, the above-mentioned court decisions, as well as the various Draft Articles that deal with the exhaustion of local remedies, all confirm that the rule should be used in a good faith, effectively and satisfactory. When the rule is adequate to accomplish a purpose then the local remedies can be:

“...normally quicker, cheaper and more effective than international ones...They can be more effective in the sense that that an appellate court can reverse the decision of a lower

²⁹ Ibid 67.

³⁰ ILC Draft Articles on DP [Article 15] 77.

³¹ Edwin M. Bochard (n 9) 285.

³² The *Panevezys-Saldutiskis Railway Case* (n 25) [18]

³³ Don Wallace Jr., ‘Fair and Equitable Treatment and Denial of Justice: *Loewen v U.S. and Chattin v Mexico*’, in Todd Weiler (eds) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd 2005) 684.

court, whereas the decision of an international organ does not have that effect, although it will engage the international responsibility of the state concerned.”³⁴

In the past, this rule was applicable only between a host state and foreigners. However, nowadays, the rule is widespread and is implemented in different situations, including cases involving human rights. For instance, the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) provides that, “The Court may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.”³⁵ This means that the Convention requires only domestic remedies, and does not require other remedies within the framework of international organisations. This principle is explained in *Demopoulos and Others v. Turkey*, in which the Court held that:

“The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system.”³⁶

In the case of *LaGrand (Federal Republic of Germany v. United States of America)*, which came before the ICJ, Germany sought to exercise diplomatic protection for its citizens who were convicted of the murder of Karl and Walter LaGrand.³⁷ The U.S. argued against Germany’s exercise of diplomatic protection for its nationals on the grounds that the LaGrand brothers had not exhausted all domestic remedies before Germany began to espouse their claims.³⁸ However, the Court rejected the U.S.’s arguments and stressed that the U.S. had failed to carry out its obligation under the Vienna Convention on Consular Relations (1963), to inform the LaGrand brothers of their right to consult with their consular representatives in order to exhaust the local remedies available for them.³⁹

³⁴ Udombana (n 7) 9.

³⁵ The European Convention on the Protection of Human Rights and Fundamental Freedoms [1950] Article 35 (1).

³⁶ *Demopoulos and Others v. Turkey Case* (Reports and Judgments and Decisions 2010) [46113/99](#), [3843/02](#), [13751/02](#), [13466/03](#), [10200/04](#), [14163/04](#), [19993/04](#), [21819/04](#) [69].

³⁷ *LaGrand Case (Federal Republic of Germany v. United States of America)* (Judgment 2001) ICJ [10].

³⁸ *Ibid* [58].

³⁹ *Ibid* [60].

In the case of *Avena and other Mexican Nationals (Mexico v. U.S)* fifty two Mexican nationals faced death sentences in the U.S. The Mexican citizens claimed that they had not been advised or informed that they had the right to take consular assistance from their home state, but the U.S. claimed that they had requested the exhaustion of all local remedies and that only after this could Mexico espouse the individual claims of its nationals to exercise diplomatic protection.⁴⁰ The Court accepted the U.S. request stating that, “only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.”⁴¹

The exhaustion of local remedies rule continues to be an important tenet of international law. This is clearly demonstrated in the above noted court decisions, in addition to the various Draft Articles, Conventions and national laws that deal with the exhaustion of local remedies rule.

4.3. The Exhaustion of Local Remedies in Investment Treaty Arbitration

The previous section discussed the rule of the exhaustion of local remedies as part of customary international law. However, this rule does not carry the same level of importance in investor-state arbitration; scholars argue that the ‘exhaustion of local remedies’ rule in relation to investor-state disputes simply does not enjoy the same importance today as enjoyed in earlier times. As such, it is permitted under the Convention, but only with the agreement of the parties, according to their autonomy. Indeed, the exhaustion of local remedies rule is in opposition with the idea of investment arbitration. Under CIL, national courts play a significant role in the mechanism of the rule, but under the ICSID Convention different principles apply. The purpose of the ICSID is to encourage parties away from dealing with national courts in order to de-politicise disputes. In the preamble of the Convention it is declared that investor-state disputes can be subject to national legal processes but in certain cases, international methods of dispute settlement are appropriate.⁴² Nevertheless, the ‘exhaustion of local remedies’ rule is permitted under Article 26 of the Convention, under the following conditions:

⁴⁰ *Avena and other Mexican Nationals Case (Mexico v.U.S)* (Judgment 2004) [38].

⁴¹ *Ibid* [40].

⁴² Preamble of the ICSID Convention [1965].

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to 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.”⁴³

Therefore, Article 26 of the ICSID Convention deems that if *the exclusion of any other remedy*⁴⁴ rule is decided upon after the parties have agreed to arbitration, the investor may not seek any other remedies. In this case, arbitration would be the only remedy for the parties. At the same time, the second part of Article 26 allows for the exhaustion of local remedies only if there is consent between parties. The terms of consent should either be written in the treaty or contract itself, or in arbitral clauses, and both parties should be aware of the terms. Furthermore, once the parties unanimously ‘consent’ to arbitration, then neither party can unilaterally withdraw, change or restrict the process. However, the condition that local remedies must be exhausted may be withdrawn any time by either party, and then the parties can apply directly to ICSID arbitration.⁴⁵ As a result, a tribunal must examine issues on a case-by-case basis, and should decide whether the domestic remedies rule is compulsory in the context of an agreement between the parties. However, Kryvoi explains that the purpose of Article 26 is not to modify the rules of international law regarding to exhaustion of local remedies.⁴⁶ To date, three countries, namely, Israel, Costa Rica and Guatemala, have informed the Centre that they want to implement the exhaustion of local remedies according to Article 26 of the Convention.⁴⁷ However, later on, Israel withdrew that notification.⁴⁸

Nowadays, the exhaustion of local remedies rule is ignored in most BITs⁴⁹ and model BITs used by states such as Canada, Germany and the USA silent on this issue. Where a treaty is silent on this question, it may be assumed that any reference to arbitration is subject to the rule.⁵⁰ This is found mostly in older BITs⁵¹ and the Norway (2007) Model of BIT Article 15

⁴³ The ICSID Convention [1965] Article 26.

⁴⁴ Ibid.

⁴⁵ Christoph Schreuer (eds), *A ICSID Convention: Commentary* (2nd edition, Cambridge University Press 2009) 404.

⁴⁶ Yaraslau Kryvoi, *International Centre for the Settlement of Disputes (ICSID)* (2nd edition, Kluwer Law International 2010) 177.

⁴⁷ Schreuer (n 45) 404-405.

⁴⁸ Ibid 404.

⁴⁹ Paul Peters, ‘Exhaustion of Local Remedies: Ignored In Most Bilateral Investment Treaties’ (1997) XLIV *Netherlands International Law Review* 233-243.

⁵⁰ M Sornarajah, *The International Law on Foreign Investment* (3rd edition, Cambridge University Press 2012) 220.

also deals with this subject. The Netherlands-Jamaica BIT (1991) Article 9 (2) states the following:

“If such a dispute has not been settled amicably, within a period of three months from the date on which either party to the dispute requested amicable settlement, either party may pursue local remedies for the settlement of that dispute.”⁵²

In addition, other multilateral agreements require the exhaustion of local remedies. For example, Article 28 of the Southern African Development Community’s (SADC) Protocol on Finance and Investment states the following:

“Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from [the] written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.”⁵³

The multilateral North American Free Trade Agreement (NAFTA) does not explicitly waive the exhaustion of local remedies rule. In Articles 1121 (1) (b) and 1121 (2) (b) it is stated that investors can bring a claim before an international tribunal pursuant to NAFTA, but only if investors first, “...waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing party shall be alleged to be a breach”⁵⁴ It is interesting that, like other types of agreement under ICSID or BITs, the NAFTA treaty is not clear or straightforward about waiving the exhaustion of local remedies rule. As a result, different scholars have interpreted this question, and have concluded that Chapter Eleven – Investment, does not close the door completely on domestic litigation.⁵⁵ Rather, it serves to

⁵¹ Christoph Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in International Arbitration’ [2005] 1 *The Law and Practice of International Courts and Tribunals (LPICT)* 4.

⁵² Netherlands-Jamaica BIT [1991] Article 9 (2) http://arbitrationlaw.com/files/free_pdfs/netherlands-jamaica_bit.pdf

⁵³ Southern African Development Community (SADC), Protocol on Finance and Investment [2006] Article 28.

⁵⁴ NAFTA [1994] Articles 1121 (1) (b) and 1121 (2) (b).

⁵⁵ Benjamin Klafner, ‘International Commercial Arbitration as Appellate Review: NAFTA’s Chapter 11, Exhaustion of Local Remedies and Res Judicata’ (2006) 12 *University of California, Davis Journal of International Law & Policy* 414.

encourage foreign investors to pursue remedies in domestic courts in the hope that at least some investment disputes will be settled at a local level.⁵⁶

Dodge explains the main idea behind encouraging the use of local courts is that, in most instances, the domestic court systems of the United States and Canada will correct their mistakes, because a court judgment that violates Chapter Eleven is also likely to violate some provisions of domestic law.⁵⁷ However, Bjorklund argues that if a large amount of arbitrations waive the local remedies rule, then this will likely become ever more questionable.⁵⁸ It is also believed that if the rule is applied in the context of investor-state disputes, it could help to strengthen and integrate domestic and international systems for investor protection.⁵⁹ At the same time, it should be noted that Chapter Eleven permits investors to bring claims before a NAFTA tribunal directly if they wish to do so.⁶⁰ However, this is not a condition. In *Waste Management Inc. v. United Mexican States* the Tribunal explains as follows, “In common with almost all investment treaties, there is no requirement of local remedies.”⁶¹

It is true that there are other BITs which do not require local remedies. The *Austria-United Arab Emirates BIT* (2001) Article 10 (5) reads as follows, “If the investor chooses to file for arbitration, the host contracting Party agrees not to request the exhaustion of local settlement procedures.”⁶² Most BITs and investment model treaties do not encourage local remedies in investment treaty disputes.

It should be noted that the text of BITs might include amicable settlement periods, such as between three to six months. However, in practise, it has been shown that this period of time is not sufficient to reach to an amicable settlement, especially when the investment was millions of (USD) dollars. Furthermore, this waiting period can be dismissed on the grounds

⁵⁶ William S. Dodge, ‘National Courts and International Arbitration: Exhaustion of Local Remedies and Res Judicata under Chapter Eleven of NAFTA’ (2000) 23 *Hastings Int’l & Comp. L. Rev.* 382-383.

⁵⁷ William S. Dodge, ‘*Loewen v. United States*: Trials and Errors under NAFTA Chapter Eleven’ [2002] 52 (2) *DePaul Law Review* 573.

⁵⁸ Andrea K. Bjorklund, ‘Waiver and The Exhaustion of Local Remedies Rule In NAFTA Jurisprudence’ in Todd Weiler (eds), *NAFTA Investment Law and Arbitration: Pass Issues, Current Practice, Future Prospects* (Transnational Publishers 2004) 286.

⁵⁹ Matthew C. Porterfield, ‘Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?’ (2015) 41 *The Yale Journal of International Law* 5.

⁶⁰ William S Dodge (n 56) 383.

⁶¹ *Waste Management, Inc. v. United Mexican States* (Mexico’s Preliminary Objection concerning the Previous Proceedings’ Decision of the Tribunal 2002) ICSID Case No. ARB AF/00/3, [30]

⁶² *Austria-United Arab Emirates BIT* [2001] Article 10 (5)
<http://investmentpolicyhub.unctad.org/Download/TreatyFile/224>

that it is directory and procedural, rather than mandatory or jurisdictional in nature.⁶³ Also, such waiting periods are often treated more like ‘cooling off’ periods than as time to organise a serious attempt to settle the dispute domestically.⁶⁴ However, in reality, it is very rare that investment tribunals face this issue.

The case law of the ICSID Convention confirms that, “claimants are not required to exhaust local remedies before this Tribunal may hear their claims.”⁶⁵ Tribunals outside of the ICSID Convention have come to the same conclusion, that they do not require any local remedies in investor-state disputes.⁶⁶ There might be different reasons for not to requesting local remedies as the rule in investor-state disputes. However, it is obvious that the rule developed in an age when claims were relatively few in number, and the applicable international law was relatively stable. Furthermore, for practical purposes the local remedies rule usually has little or no effect on most claims.⁶⁷

At present, if, in all investor-state disputes, local remedies were only available or made a condition for the tribunal, then most claimants would go home empty-handed.⁶⁸ This would be risky for foreign investors from less developed countries.⁶⁹ Schreuer states that the ICSID Convention would be seriously affected by the intervention of domestic courts.⁷⁰ However, this does not mean that investor-state disputes do not need any involvement from domestic courts. Rather, an enforcement mechanism should be available to domestic courts.

Nevertheless, there are exceptional times when tribunals might insist on the exhaustion of all local available remedies before arbitration begins. This demand may be made in the following circumstances: (i) in a bilateral investment treaty that offers submission to ICSID arbitration; (ii) in domestic legislation; or (iii) in a direct investment agreement that contains

⁶³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (Decision of the Tribunal on Objections to Jurisdiction, 2003) ICSID Case No. ARB/01/13, [184]; Jan Paulson, *Denial of Justice in International Law* (Cambridge University Press 2005) 127.

⁶⁴ Schreuer (n 51) 4.

⁶⁵ *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A v. Argentine Republic* (Award, 2012) ICSID Case No. ARB/03/23, 261 [1126].

⁶⁶ *IA RosInvestCo UK Ltd v. Russian Federation* (Award, 2010) SCC Case No. V079/2005 [597]

⁶⁷ Richard B. Lillich, ‘The Effectiveness of the Local Remedies Rule Today’ [1964] 58 Proceedings of the American Society of International Law at Its Annual Meeting 102.

⁶⁸ George K Foster, ‘Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration’ (2011) 49 (1) Columbia Journal of Transnational Law 205.

⁶⁹ Won-Mog Choi, ‘The Present and Future of the Investor-State Dispute Settlement Paradigm’ (2007) 10 (3) Journal of International Economic Law 732.

⁷⁰ Schreuer (n 45) 399.

an ICSID clause.⁷¹ It should also be noted that the condition set that local remedies must be exhausted before resorting to ICSID arbitration is valid only up to a fixed time (if any) but not later.⁷² In investor-state disputes where a case involves a license, or when other local issues, such as safety and security issues, are in question, then as a primary solution local remedies should be sought first by investors. In *Maffezini v. Spain*, the Claimant was able to rely on the most favored-nation (MFN) principle, but the Tribunal explained the following:

“[I]f one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause.”⁷³

In the same *Maffezini v. Spain* case the Tribunal stressed that if the parties agreed on ‘fork in the road’ provisions, where an investor needs to choose between the local courts or international arbitration, the investor’s choice is final and irreversible.⁷⁴ At the same time, a member of Tribunal explained that, “the exhaustion of local remedies rule is imposed on a party to resort only to such remedies as are effective.”⁷⁵ The language of the Convention suggests that, on the one hand, in investor-state disputes it is not required to follow the exhaustion of local remedies rule. Nevertheless, on the other hand, there must be local remedies in *denial of justice* cases, as is the situation when national courts fail to provide fair and equitable treatment and justice to investors. Paulson names recognised denial of justice situations as: the refusal of access to a court to defend legal rights; the refusal to decide; unconscionable delay; manifest discrimination’ corruption’ or subservience to executive pressure.⁷⁶

In recent decades, the rise of ‘internationalised’ investments has revealed that the host state’s national laws are sometimes not enough to protect investors. The report of the Executive Directors to the ICSID Convention explains that, “...investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interests to agree to resort to international methods of settlement.”⁷⁷ Indeed, legal and

⁷¹ *Lanco International Inc. v. The Argentine Republic* (Preliminary Decision Jurisdiction of The Arbitral Tribunal, 1998) ICSID Case No. ARB/97/6, [39].

⁷² Schreuer (n 45) 404.

⁷³ *Emilio Agustin Maffezini v. The Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction, 2000) ICSID Case No. ARB/97/7 [63].

⁷⁴ *Ibid.*

⁷⁵ *Saipem S.p.A v. The People’s Republic of Bangladesh*, (Award, 2009) ICSID Case No. ARB/05/7, [183]

⁷⁶ Jan Paulson, *Denial of Justice in International Law* (Cambridge University Press 2005) 204-205.

⁷⁷ The Report of Executive Directors to the ICSID Convention [1965] Reports 25 [10].

arbitration costs for parties in recent investor-state disputes have averaged at over USD 8 million, with costs exceeding USD 30 million in some cases.⁷⁸ ICSID claims typically take more than four years to settle.⁷⁹ Presumably, because of this, states like Australia have openly declared that it will no longer include an arbitration clause in investment treaties, and, therefore, it will negotiate on the basis that investment disputes with foreign investors are heard in domestic courts.⁸⁰ In addition, there is significant support for the exhaustion of local remedies rule in the European Union (EU). In 2011, the European Parliament adopted a resolution on the EU's future of international of investment policy, in the belief that, "changes must be made to the present [investor-state] disputes settlement regime and... [to make an] obligation to exhaust local judicial remedies where they are reliable enough..."⁸¹ In the future investor-state dispute mechanisms must be structured to supplement domestic legal systems by requiring investors to exhaust local remedies first. It is assumed that this kind of settlement mechanism is appropriate in law abiding nations, where it gives investors a way to appeal to an agreed system of international arbitration for disputes, whilst respecting national legal systems.⁸²

4.4. Conclusion

The recent trend for the globalisation of trade has led to state intervention in foreign investment disputes becoming minimal. This move is reflected in the available provisions of international instruments that deal with international trade. This chapter has focused on analysing the 'exhaustion of local remedies' rule as a pre-requisite for invoking diplomatic protection, and state intervention, to protect its nationals. The chapter has looked at the narrow interpretation of the condition where the exhaustion of local remedies rule leads to state intervention in the shape of diplomatic protection. Resultantly, the ICSID and other

⁷⁸ *Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012, Organisation for Economic Co-operation and Development Investment Division* (Directorate for Financial and Enterprise Affairs Paris 2012) 18 [32].

⁷⁹ Joongi Kim, 'Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions', in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff Publications, 2015) 719.

⁸⁰ Leon E. Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 (1) *Journal of World Trade* 84.

⁸¹ European Parliament, Resolution of 6 April, 2011 on the Future European International Investment Policy [2012] 2010/2203 (INI), [31] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN>.

⁸² Ted R. Bromund, James M. Roberts, and Riddhi Dasgupta, 'Investor-State Dispute Settlement (ISDS) Mechanisms: An Important Feature of High-Quality Trade Agreements' (2015) *The Heritage Foundation* 4351.

related international institutions have created international forums for the resolution of international disputes. This chapter concludes that this new wider interpretation has come about due to two main reasons: Firstly, ascertaining the exhaustion of local remedies is a complex process, in which both foreign investors and contracting states may shift the burden on each other. Secondly, the lengthy process of local remedies may jeopardise the interests of foreign investors, and this can affect the growth of international trade and globalisation. Keeping in mind these two factors, the ICSID has interpreted the condition of the exhaustion of local remedies in a flexible way and for now it seems to continue as it is.

Chapter Five: The Collapse of DP and the Promise of the ICSID Convention

5.1. Introduction

This chapter will examine the roles of diplomats and arbitrators in the context of the thesis. This is because DP forms part of the role of diplomats, and, therefore, it is important to understand who diplomats are, and why they are important for investors. Furthermore, as noted in previous chapters, DP is not always provided to nationals. In some cases, requests are rejected. In this situation, diplomats are key persons who can make decisions or report back to the home state, and they can support or reject a national's claim. They do this after assessing relationships and the worthiness of protection. In some cases, even if they start to investigate a case, they might be asked return to their home state, or they might be transferred to another country. In such situations, investors have to make contact with new diplomats so that they can renew their claims and seek diplomatic protection. However, these procedures can be costly from a financial and moral perspective. If investors are not successful in their first application or communication with diplomats, they will be more hesitant to re-contact their embassies.

5.2. The Political Character of the ICSID Convention: Diplomats v. Arbitrators

Previous chapters of this thesis have explained that, in earlier centuries, the settlement process used in investor-state disputes was not as institutionalised as it is today, and numerous factors played an important role in the resolution of disputes. These factors included: home state involvement (diplomatic protection), state power, international law, and the role of politicians, especially diplomats, who were tasked to make decisions about disputes. During the 1950s, the use of 'gunboat diplomacy' or 'diplomatic protection' began to fade, because it had ceased to function properly. DP and other ideas about corporate legitimacy, appropriate business conduct, and foreign policy began to contribute to a new business climate.¹ This new climate also applied to investment disputes. In the 20th century, investment protection continued to play a significant role in diplomatic issues, even when

¹ Timothy L Fort, *The Diplomat in the Corner Office: Corporate Foreign Policy* (Stanford University Press 2015) 8.

BITs were introduced. At first, BITs were often used to promote or tie in diplomatic links between states.² At this time, diplomats were expected to be conflict managers and problem solvers as well as the main negotiators of international agreements and treaties between states, and the role of the diplomat was more complex than it is now.

Diplomats are trusted officials of state, and the decisions they make often reflect the positions of their home state. This is why, for some scholars, diplomatic practice is interpreted as an early example of govern-mentality.³ In the contemporary world, diplomacy is a highly legalised role.⁴ This aspect of the diplomatic role emerged due to the proliferation of international law. International conventions now clearly define a diplomat's role and responsibilities. In addition, it is expected that diplomats or consulates must protect their state's national interests. In 1961 diplomatic mission was legalised by the Vienna Convention on Diplomatic Relations (1961).⁵ According to Article 3 (b) of this Convention, it is the diplomat's function to protect the interests of his state, and its nationals (investors) within limits permitted by international law. The Vienna Convention on Consular Relations, 1963, provides similar protection.⁶ In Article 5 (a) of this Convention, individuals as well as corporations are mentioned.

In this part of the chapter, I compare the roles of diplomats and arbitrators in the context of the thesis. This is because DP forms part of the role of diplomats, and, therefore, it is important to understand who diplomats are, and why they are important for investors. Furthermore, as noted in previous chapters, DP is not always provided to nationals. In some cases, requests are rejected. In this situation, diplomats are key persons who can make decisions or report back to the home state, and they can support or reject a national's claim. They do this after assessing relationships and the worthiness of protection. In some cases, even if they start to investigate a case, they might be asked to return to their home state, or they might be transferred to another country. In such situations, investors have to make contact with new diplomats so that they can renew their claims and seek diplomatic protection. However, these procedures can be costly from a financial and moral perspective.

² Lauge Poulsen and Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' (2016) *Journal of International Dispute Settlement* 72-91.

³ Iver B Neumann, 'To be a Diplomat' (2005) *International Studies Perspectives* 86.

⁴ Edwin Egede and Peter Sutch, *The Politics of International Law and International Justice* (Edinburgh University Press 2013) 214.

⁵ The Vienna Convention on Diplomatic Relations (1961), entered into force on 24 April 1964.

⁶ The Vienna Convention on Consular Relations (1963), entered into force on 19 March 1967.

If investors are not successful in their first application or communication with diplomats, they will be more hesitant to re-contact their embassies.

In the 21st century, the diplomat's role is not significantly different from that of the lawyer, judge or arbitrator, but diplomats must be able to think from an international relations perspective in the first instance.⁷ They need to return home with some kind of achievement of their goals.⁸ This means they are often biased in favour of the national interests of their home state. Therefore, it is not realistic to expect neutrality or impartiality from diplomats, as it is required from arbitrators or judges. Accordingly, from a dispute settlement perspective, it must be understood that the role of the diplomat, including their attitudes and values, is usually influenced by foreign policy factors.⁹ These factors often affect the conclusion of disputes. This means that they do not seek to apply the law impartially. Therefore, when disputes are settled by diplomats, the results might be different from those deemed by judges or arbitrators. However, the international community has experienced the use of 'diplomacy' as a dispute settlement mechanism in investment or trade disputes. For example, in respect of the General Agreement on Tariff and Trade (GATT) (1947), it was concluded that the use of 'diplomacy' (state-to-state) was a weaknesses of the GATT system.¹⁰ Hudec describes the situation as follows:

...everything begins with the formal legal structure - the obligations interpretative precedents and the like. But the extent to which these sources come forward in any situation will vary greatly according to prevailing community. One must expect to find, therefore, that GATT law will be of a rather uneven quality, varying from issue to issue and significantly, from time to time.¹¹

Scholars argue that one of the main causes of this weakness is that disputes were settled by diplomats or GATT Secretariat Officials, rather than by lawyers. Secondly, diplomacy itself allows room for manoeuvre in every part of the process.¹² The successor of GATT was the World Trade Organisation (WTO). However, under this system, Pauwelyn notes that 57% of

⁷ Paul Sharp, *Diplomatic Theory of International Relations* (Cambridge University Press 2009) 52.

⁸ Robert E Hudec and J. Micheal Finger, *Developing Countries in the GATT Legal System* (Cambridge University Press 2011) 33.

⁹ Alisher Faizullaev, 'Diplomacy and Self' (2006) 17 (3) *Diplomacy and Statecraft* 517.

¹⁰ Hudec and Finger (n 8) 33.

¹¹ Robert E Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence' (1970) 4 *Journal of World Trade*, 665.

¹² *ibid* 615-665.

WTO panellists are Geneva based diplomats, and only 15% are experts in private law.¹³ Here it is worth to mention a brief history of GATT and discusses why it was dissolved after 50 years of functioning. It ceased with the foundation of WTO in 1995.

In 1947, GATT was signed by 23 countries and these countries became contracting parties to this agreement. Membership in GATT allowed for contracting parties to engage in a set of rules that promoted international trade, reduced import tariffs, and treated other nationals without any discrimination at the national level. Nevertheless, certain weaknesses accelerated the demise of GATT. For instance, agricultural and textile products, trade services, and the protection of intellectual property rights were not governed by GATT disciplines.¹⁴ Moreover, as mentioned earlier trade disputes were not settled, as they should be in modern times. At the time, it was accepted that GATT had the most developed and active systems of formal dispute settlement¹⁵ nonetheless, contracting parties did not settle their conflicts for years and ultimately lacked any enforcement mechanism.

In Uruguay, on 20 September 1986, GATT trade ministers launched eight rounds of trade negotiations between contracting parties. They discussed all the weaknesses and the overall functioning of the GATT system. The contracting parties successfully completed their Uruguay meeting on 15 December 1993 and they updated GATT (1947) and 128 countries signed it in 1994. The conclusion of the Uruguay meeting and signing of the agreements in 1994 transformed GATT into the WTO. On 1 January 1995, WTO officially started to operate. Currently it has 164 members and represents 98% of the world's trade.¹⁶ As previously noted, WTO's main aim was to rectify GATT's weaknesses and disadvantages. Importantly, WTO became an institution with a proper secretariat.

The functions of the WTO are described in Article III of the organization. According to that Article III, the WTO shall, first, facilitate the implementation, administration and operation, and further objectives of the Agreement and of the Multilateral Trade Agreements. Second, it shall provide a forum for negotiations among its members concerning their multilateral trade relations. Third, it shall govern the dispute settlement understandings between member states. Fourthly, the WTO shall administer the Trade Policy Review

¹³ Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars Trade Adjudicators from Venus' (2015) 109 *The American Journal of International Law* 772.

¹⁴ See. Meredith A. Crowley, 'An Introduction to the WTO and GATT', (2003) Issue Q IV *Economic Perspectives* Federal Reserve Bank of Chicago 42-57.

¹⁵ Abraham Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Harvard University Press 1995) 218.

¹⁶ World Trade Organization, 'Annual Report 2019', (2019) 7 Available at: https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf, (Last accessed June 2019)

Mechanism. Lastly, it shall cooperate as appropriate with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) and their affiliated agencies.¹⁷

As the successor of GATT, the WTO's main aim was to rectify previous weaknesses. Hence, the WTO provides an amended and upgraded version of GATT. Unlike GATT, the WTO covers agriculture and textile products, bank and insurance services, hotel and tour operators, transport companies, intellectual property rights, and efficient and enforceable dispute settlement. The WTO trade monitoring system allows for improved transparency and understanding of the trade policies in member countries of the institution.¹⁸

In GATT, as in other trade and investment sectors, dispute settlement mechanisms are removed from diplomacy to legally enforceable mechanisms, which are more efficient and reliable during a shorter time. Hence, dispute settlement mechanisms of the WTO are becoming more popular. According to the latest statistics, compare to 2017 in 2018 the number of registered disputes were doubled and, 38 new disputes were initiated by member states, which again confirms that the WTO is becoming more popular – not only in trade but for settling disputes among member countries too.¹⁹

After all, nowadays many contemporary diplomats have either practised as lawyers or have legal training, and lawyers usually advise all of them.²⁰ Even so, sometimes, their dispute settlement methods are not strong enough to satisfy conflicted parties. In other words, the methods used by diplomats are sometimes very low in legalism, and this allows disputing parties to reject any proposed settlement lawfully.²¹ Also, diplomats are not always able to solve conflicts between parties, and they need to request additional help and support from lawyers. These problems have incentivised some to request a move from diplomacy as a dispute resolution mechanism towards legalism, by the appointment of ad hoc arbitrators, in order to address particular disputes.²²

As a dispute settlement mechanism, arbitration was designed to be practical, in that arbitrators would be more involved in settling disputes between parties, rather than diplomats. Arbitrator participation in investment disputes has resolved a lot of avoidable

¹⁷ The Agreement Establishing World Trade Organization, Article III.

¹⁸ See, World Trade Organization, *WTO in Brief* (2018).

¹⁹ See, *Ibid* (n 16)

²⁰ Edwin Egede and Peter Sutch, *The Politics of International Law and International Justice* (Edinburgh University Press 2013) 242.

²¹ James McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts' (2000) 54 (1) *International Organization* 139.

²² *ibid* 137-180.

problems, which have prevailed with diplomat involvement. Moreover, it should be noted that not only diplomats, but judges, as generalists, may be relatively unfamiliar with the facts or laws in front of them, and arbitrators are often very highly appreciated for their expertise in their field.²³ Nowadays, arbitrators, not diplomats or judges, are at the centre of international investment dispute resolution, because they are more valued and trusted. Their role is vital in the global economy, to oversee disputes involving billions of dollars, and to make decisions that take into account transnational rules of law.²⁴ The move from diplomacy to rule of law, was a significant transformation around the world, and is classed as the most important legal development of the post-cold war age.²⁵

In the past, investors were not substantially active in the dispute resolution process. This was because governments appointed diplomats and judges, and the parties did not have any power of influence. With arbitration, one of the advantages for disputing parties is that they are free to select 'judges of their own choice'.²⁶ In other words, disputing parties are allowed to select their own arbitrators. In describing the role of the arbitrator, Park explains, 'in real estate the three key elements are "location, location, location" so in arbitration the applicable trinity is arbitrator, arbitrator, and arbitrator.'²⁷ This view is confirmed by a survey of International Arbitration from Queen Mary University of London, 2012. In this survey 76% of the respondents said they preferred to select their own arbitrators in two co-arbitration and three-member tribunals.²⁸ In general, the selection and appointment procedure for arbitrators is based on applicable international treaties and institutional rules. For instance, the 2012 U.S. Model of BIT provides that, 'Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.'²⁹

²³ Susan D Franck, Anne van Aaken, James Freda et al., 'Inside the Arbitrator's Mind' (2017) 66 *Emory Law Journal* 1119.

²⁴ *ibid* 1115.

²⁵ Cesare P R Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *International Law and Politics* 709.

²⁶ Article 37 of the Hague Convention for the Pacific Settlement of International Disputes (1907).

²⁷ William W Park, 'Income Tax Treaty Arbitration' (2002) 10 (4) *George Mason Law Review* 813.

²⁸ Queen Mary University of London, School of Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf/ (accessed March 2018).

²⁹ The U.S. Model BIT (2012) Art 27 (1).

Article 37 of the ICSID Convention applies a similar appointment system for arbitrators as that described above, and if parties cannot agree on the selection of arbitrators, then the tribunal appoints them. UNCITRAL rules have similar provisions, where each party selects their own arbitrators.³⁰ This selection process is one of the core elements of the arbitration process for many parties, and it is the main reason why they choose arbitration over other methods of dispute resolution in the first place.³¹ In other words, it helps place parties in an equal position. Diplomatic or political dispute settlement methods do not offer this kind of equality to the disputing parties.

The ICSID Convention Article 14 (1) requires that arbitrators who are selected to a tribunal are as follows, '[they] shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.'³² Furthermore, they have to share the same nationality as the people they are representing.³³ In UNCITRAL rules the arbitrator nationality requirement is not as strict as it is in the ICSID Convention. UNCITRAL approaches this issue as follows:

The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing the arbitrator of a nationality other than the nationalities of the parties.³⁴

Article 6 (7) of UNCITRAL states that arbitrators must be independent and impartial. If either party has justifiable doubts regarding an appointed arbitrator's 'independence' or 'impartiality' then they are allowed to request a disqualification.³⁵ The ICSID has a similar policy regarding the neutrality of arbitrators. Article 57 of the ICSID Convention clearly states that, 'A party may propose to a ... Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.'³⁶

³⁰ UNCITRAL Arbitration Rules, (with New Article 1 para 4, adopted in 2013) Art 9 (1).

³¹ Carly Coleman, 'How International is International Investment Dispute Resolution? Exploring Party Incentives to Expand ICSID Arbitrator Demographics' (2016) 26 *Transnational Law & Contemporary Problems* 146.

³² The ICSID Convention (1965) Art 14 (1).

³³ *ibid* Art 39.

³⁴ UNCITRAL Arbitration Rules (2013) Art 6 (7).

³⁵ *ibid* Arts 12 and 13.

³⁶ The ICSID Convention (1965) Art 57.

It is important to understand that at the beginning of any arbitration process, appointing unbiased arbitrators is very important. Taking the necessary steps at the beginning of the arbitration process can help manage time and money costs for the disputing parties. If this is not done, after the conclusion of arbitration, a lack of independence and impartiality might become grounds for commencing an annulment process of the award.³⁷

Preventing difficulties occurring before and after the arbitration process is possible only if the arbitrators are unbiased, impartial and independent during the investor-state conflict period. To date, in forty-seven ICSID cases, arbitrators have been challenged by either party.³⁸ However, only in four cases were the arbitrators disqualified.³⁹ In *Caratube v Republic of Kazakhstan*⁴⁰ the following was noted:

In these cases [the above mentioned disqualified arbitrators], Dr. Kim Yong Kim, the Chairman of the ICSID Administrative Council found that ‘Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias’. Therefore, the Claimants must show that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.⁴¹

In other words, disqualifying an arbitrator is not an easy task. The disputing parties must prove that a lack of independence or impartiality is not only possible but also highly probable, and these factors are manifest.⁴² Furthermore, Nwakoby and Aduaka (2015) state the following:

³⁷ The ICSID Convention (1965) Art 52 (1) (d).

³⁸ Peter Horn, ‘A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration’ (2014) 11 (2) *Journal of Business and Law* New York University 351-352; <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx> accessed 4 April 2018.

³⁹ *ibid* Horn. The four cases are: *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision (21 February 2006); *Blue Bank International & Trust (Barbados) Ltd., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision (12 November 2013); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision (13 December 2013); *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision (20 March 2014).

⁴⁰ *ibid* *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*.

⁴¹ *ibid* para 57.

⁴² Greg C Nwakoby and Charles Emenogha Aduaka, ‘Challenge of Arbitrator under ICSID’ (2015) 36 *Journal of Law, Policy and Globalization* 173.

No arbitrator and more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral cultural and professional education and experience. What is required, when it comes to rendering judgment in a legal dispute, is the ability to consider and evaluate the merits of each case, without relying on factors that have no relation to such merits.⁴³

Attention is drawn to the idea that arbitrators should not confuse and combine non-linked merits to the case. This scenario might help to define the main difference between diplomats and arbitrators. For diplomats, it would be very difficult to solve investor-state disputes without assessing the importance of the dispute and their state's interest. However, for arbitrators it is not a case. Their task is solving investor-state disputes in a fair and efficient ways. In recent years, no empirical proof has been unearthed to show that arbitrators make worse decisions than national court judges. However, there is proof that national court judges, even in developed states, like the United States of America, are biased.⁴⁴ Under such circumstances, it would be almost impossible to ask or to expect diplomats to settle investment disputes.

5.3. The Functions of the Home State and the Host State in Investor-State Arbitration

Foreign investment is a vital part of the international political economy, and the protection of investors is one of the core elements of maintaining this system.⁴⁵ Historically, home states have sought to protect their investors using local courts or diplomatic channels, but this has not always been an easy task, especially for weaker and less developed states. As explained in previous chapters, in the past, imperial states have applied 'gunboat diplomacy' against developing countries. The most prolific era for using this system was during the 19th and 20th centuries, and the actions taken by powerful states were seen as legal. Even wars between states were accepted as legal actions by imperial states.⁴⁶ Powerful and developed countries

⁴³ *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB 07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan Arbitrator (12 August 2010) para 40.

⁴⁴ Susan D Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55 (1) *Virginia Journal of International Law* 67.

⁴⁵ Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 (2) *Harvard Law Journal* 441.

⁴⁶ Oona A Hathaway and Shapiro J Scoot, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster 2017) 51.

have also used diplomatic protection, taking sanctions and applying political pressure to achieve their goals. For investors, these methods have not always been the most painless or most preferable protection systems, and for home states, these methods of protection have sometimes been accompanied by negative diplomatic, political and economic consequences. These kinds of protection mechanisms are not satisfactory, even for the most developed countries like the United States. Vandeveldel explains this situation as follows, ‘It complicates the situation and impedes the conduct of a foreign policy in the broad national interest. Moreover, an investment dispute will be always a political problem and can become a foreign policy nightmare.’⁴⁷

In an attempt to avoid these kinds of situations, in the 1930s the idea of BITs was floated. Idelson explains that the protection of countries and companies would be, ‘...much easier for the State concerned if the rights of such nationals were defined by elaborate treaties and not allowed to rest on general principles of International Law. Those principles were formulated in times when the economic life of nationals was much simpler than it is today.’⁴⁸

BITs allow parties to settle conflicts at an investor-state level, while investment arbitration means that arbitrators can guide parties towards working out their own remedies. BITs allow host states to attract more investments from abroad. In general, BITs protect, liberalise, promote and regulate investments.⁴⁹ The first BIT was signed in 1959 between Germany and Pakistan, and linked a capital exporter state with a capital importer, and was one of the first phases of implementing an international investment regime. Article 3 (I) of this first BIT states that, ‘Investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party.’ This was done to promote and encourage both parties to work in both countries. However, this first BIT did not include an investor-state dispute settlement (ISDS) clause.

The first BIT to include an ICSID clause was between the Netherlands and Indonesia in 1968. However, this did not mark the beginning of investor-state arbitration. Yackee claims that investor-state arbitration did not even begin with the Chad-Italy BITs, but in 1864 when investor-state arbitration was recorded between the Suez Canal Company (the investor) and

⁴⁷ Kenneth J Vandeveldel, *United States Investment Treaties Policy and Practice* (Kluwer Law and Taxation Publishers 1992) 23.

⁴⁸ W.E.Beckett, ‘Diplomatic Claims in Respect of Injuries to Companies’ (1931) 17 Transactions of the Grotius Society 194.

⁴⁹ Kenneth J Vandeveldel, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010) 4-5.

Egypt where Napoleon III (Louis-Napoleon) the Emperor of France, was the arbiter of the dispute.⁵⁰

Nowadays, investor-state arbitration remains a popular investment dispute settlement mechanism used by states and investors. However, state-to-state arbitration or direct diplomatic or economic intervention by the home state of the investor is also used. However, when using these settlement mechanisms, investors are less active in the process, and there is a chance that they might not be compensated. In investment arbitration there is no such risk. Furthermore, in modern times, it is very difficult to imagine any foreign ministers of developed or developing countries who would welcome other alternatives except for arbitration.⁵¹ The next part of this chapter will explore different points of view about the different mechanisms available. This discussion will pose the question of what BITs mean for developing and developed countries. Here it should be mentioned that 'developing countries' also include 'third world', 'less-developed' or 'underdeveloped' countries, and, these countries are, increasingly, being referred to as countries in the 'south'.⁵² Developed countries are, traditionally, classified as those in the 'west' or the 'north' and are often referred to as 'high income' countries.⁵³

5.4. The Political Aspects of Investment Arbitration for Developing Countries

There is no globally accepted multilateral instrument for the regulation of foreign investment.⁵⁴ Nowadays, multilateral or bilateral treaties between states protect 'foreign investment'. The definition of 'investment treaty' is explained by Salacuse as, 'an international agreement embodied in one or more written documents by which two or more

⁵⁰ Jason Webb Yackee, 'The First Investor-State Arbitration: *The Suez Canal Company v Egypt (1864)* (2016) 17 *Journal of World Investment & Trade* 402.

⁵¹ O Thomas Johnson Jr. and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P. Sauvant (eds) *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press 2012) 692.

⁵² Avinash Dixit, 'Governance, Development, and Foreign Direct Investment' a Max Weber Lecture No.2012/01 (2012) 4.

⁵³ Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 (2) *Wisconsin International Law Journal* 356.

⁵⁴ Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005) 26 (1) *Northwestern Journal of International Law & Business* 101.

states agree to certain legal rules to govern investments undertaken by nationals of one treaty party in the territory of another treaty party.’⁵⁵

BITs started to become popular after the first BIT between Pakistan and Germany was issued in 1959. In the decades that followed, states began to sign their first BITs. However, until the 1990s only a limited number of BITs had been signed. BITs were seen not only as legally binding documents between states, but as instruments to promote economic diplomacy.⁵⁶ In other words, when signing BITs, developing countries had strong expectations that BITs would help strengthen relationships between parties, and increase trade, foreign aid, security assistance, and technology transfer.⁵⁷ A combination of nurturing these hopes and the collapse of the Soviet Union resulted in more BITs being signed between capital exporters and capital importers.⁵⁸ At the time, developed countries took advantage of being capital exporters and, during the negotiation process they became the final decision makers. However, this dynamic began to change after some years. Now, more than 3,000 BITs have been signed and almost 2,500 of these BITs are in force.⁵⁹ This means that most countries have signed at least one agreement.⁶⁰

It is common for developing states to be eager to sign BITs with developed states. This ‘paradoxical’ behaviour has been noted by Kaushal, who explains that in 1974 a Charter of Economic Rights and Duties of States⁶¹ allowed developing countries national sovereignty and full control over the investments of foreign investors in their territories. Moreover, this Charter gives permission for disputes to be settled in the national court of the host state, but international arbitration is not mentioned. However, by signing BITs, developing countries can lose their rights and give their sovereignty away.⁶² Nonetheless, to date BITs have been very popular between developed and developing states. Since 2000 they have become more popular, even if only with developing countries. For this reason, BITs between developing

⁵⁵ Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 141.

⁵⁶ Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) 71.

⁵⁷ Jeswald W Salacuse, ‘The Treatification of International Investment Law’ (2007) 13 *Law and Business Review of the Americas* 159.

⁵⁸ Poulsen (n 49) 142. During the mid 1990s an average of four treaties were signed every week.

⁵⁹ <http://investmentpolicyhub.unctad.org/IIA> accessed 15 May 2018.

⁶⁰ The UNCTAD International Investment Agreements Navigator shows that only Kosovo, Western Sahara, French Guiana and Svalbard, and the Jan Mayen Islands have not signed any BITs.

⁶¹ Charter of Economic Rights and Duties of States, G.A. Res.3281 (XXIX), U.N. Doc. A/9631.

⁶² Asha Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50 (2) *Harvard International Law Journal* 501.

countries are often described as: 'south-south' bilateral investment treaties.⁶³ Over the past few decades, 'south-south' investment treaties have become more popular because more developing countries have become capital exporters, and so they are using BITs to protect their investments in different countries.

Nevertheless, as Craven claims, 'every treaty, in some respect is a manifestation of inequality - whether it is in terms of a substantive lack of equilibrium in the respective burdens and benefits, or in terms of the unequal bargaining power of the contracting parties.'⁶⁴ This situation also applies to investment treaties. For example, China is a 'developing' country, albeit one with great economic and financial power. However, when the Chinese Government sign a BIT with another developing state it is classed as a 'south-south' agreement, but both states are not usually on the same economic level. However, Alvarez explains that this kind of treaty is no longer a one sided tool for the imposition of western power. States who sign such agreements not only protect developed countries investors, but their own investors in other developed countries.⁶⁵ A similar argument is explored by Miles, who comments that the imperialist dynamics of some 'south-south' agreements have come to resemble those of the 'north-south' which, 'remains the same but in new hands.'⁶⁶ Finally, it is worth noting that the template of the 'south-south' BIT is almost the same as that of the 'north-south', without much difference.

Usually, BITs cover the interests of three parties: the investor, the host country where the investment takes place, and the home country of the investor.⁶⁷ Before BITs, the Hull Rule protected investors.⁶⁸ Guzman claims that BITs offer more efficient protection than the Hull Rule ever did. Moreover, BITs provide an aggrieved investor access to binding arbitration, with an enforcement mechanism, which is efficient and effective in comparison to the Hull

⁶³ Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties', in Tomer Brode and Marc L. Busch and Amelia Porges, *The Politics of International Economic Law* (Cambridge University Press 2011) 186.

⁶⁴ Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 *Nordic Journal of International Law* 338-339.

⁶⁵ Jose E Alvarez, 'The Once and Future Foreign Investment Regime' in Mahnoush H. Arsanjani, Jacob Katz Cogan et al. (eds) *Looking to the Future Essays on International Law in Honor of W. Muheal Reisman* (Martinus Nijhoff Publishers 2011) 626.

⁶⁶ Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 91.

⁶⁷ Jeswald W Salacuse, *The Three Laws of International Investment: National Contractual and International Framework for Foreign Capital* (Oxford University Press 2013) 18-22; Jeswald W Salacuse (n 48) 46-49.

⁶⁸ See Chapter 1 of this thesis.

Rule.⁶⁹ Indeed, investors can benefit from BITs in two ways: BITs discourage treaty breaches and provide compensation for any treaty breaches that still exist.⁷⁰ However, the protection offered to investors via BITs should be understood correctly, but BITs legally protect investors nonetheless. Indeed, Alvarez explains that BITs do not provide a fool-proof method of forcing compliance on a restrained state.⁷¹

Generally, when the first BITs were signed, they were signed between capital exporting states (developed states) and capital importing states (developing states). Developing countries signed BITs with other states in order to attract more foreign direct investment (FDI) into their market. A BIT was an invitation for potential investors from a developed country to invest in LDCs. As Salacuse and Sullivan explain, ‘this was a grand bargain: a promise of protection of capital in exchange for the prospect of more investment.’⁷²

Soon, BITs became the most important international legal mechanism for the encouragement and governance of FDI⁷³ and were the predominant method of regulating FDI.⁷⁴ Therefore, BITs became national policy in the western world, and western countries began to compete with each other to sign more investment agreements in developing countries. In countries such as the USA, BITs were a foreign policy tool used as, ‘a means to facilitate liberalisation of the economies of developing countries.’⁷⁵ The USA began to recognise that developing countries might want to sign BITs in order to privatise and liberalise their economies. International institutions such as the IMF and the World Bank also supported this view; signing BITs with developing countries became a condition to get support from these institutions.⁷⁶ Allee and Peinhardt find that host states that depend upon *foreign aid* from

⁶⁹ Andrew T Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’, in Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 74.

⁷⁰ Emma Aisbett, Matthias Busse and Peter Nunnenkamp, ‘Bilateral Investment treaties as deterrents of host country discretion: the impact of investor-state disputes on foreign direct investment in developing countries’ (2018) 154 (1) *Review of World Economics* 125.

⁷¹ Alvarez (n 58) 620.

⁷² Jeswald W Salacuse and Nicholas P Sullivan, ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain’ in Karl P Sauvant and Lisa E Sachs (n 62) 121.

⁷³ Zachary Elkins, Andrew T. Guzman and Beth A Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties: 1960-2000’ (2000) 60 (4) *International Organization* 811.

⁷⁴ Todd Allee and Clint Peinhardt, ‘Evaluating Three Explanations for the Design of Bilateral Investment Treaties’ (2014) 66 (1) *World Politics* 50.

⁷⁵ Jeswald W Salacuse, ‘The Treatification of International Investment Law’ (2007) 13 *Law and Business Review of the Americas* 160.

⁷⁶ Asha Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50 (2) *Harvard International Law Journal* 507.

actors such as the World Bank are more willing to include ICSID in their BITs.⁷⁷ However, in general, LDCs do not usually wish to change their behaviours or their national laws, or even substitute their own legal systems or institutional quality, except to attract more FDI from the developed world.⁷⁸

It soon became obvious for LDCs that adopting international policies and legal systems is important in order to attract FDI. However, by signing BITs, LDCs do not seek to unite their national laws with those of different countries, and BITs are no substitute for a weak investment environment.⁷⁹ If all parties to a BIT have a weak investment regime, their investment treaty might be interpreted as having symbolic importance, and nothing more.⁸⁰

The main expectation of LDCs when they enter into BITs is to attract more investment. Accordingly, for them, they must understand that FDI is vulnerable to uncertainty, including uncertainty stemming from poor government efficiency, policy reversals, the weak enforcement of property rights, and the legal system in general.⁸¹ However, scholars do not always support this view. In 1986, Sornarajah, said that, 'in reality attracting FDI depends more on the political and economic climate for its existence rather than on the creation of a legal structure for its protection.'⁸² This view is supported by other scholars, including Hallward-Driemeier, who after analysing twenty years of bilateral FDI flows, came to the conclusion that:

It is not a condition to sign BITs to attract more FDI, and little evidence has been found that BITs have stimulated additional investment. Those countries with weak domestic institutions, including the protection of property, have not gotten significant additional benefits; BITs have not acted as a substitute for broader domestic reform.⁸³

⁷⁷ Todd Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions' (2010) 54 (1) *International Studies Quarterly* 20.

⁷⁸ Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries' (2005) 33 (10) *London School of Economics and Political Science, World Development* 1582 .

⁷⁹ Jennifer L Tobin and Susan Rose Ackerman, 'When BITs have some bite: The political-economic environment for bilateral investment treaties' (2011) *Review of International Organizations* 2.

⁸⁰ *ibid* 5.

⁸¹ A Bènessy-Quére, Maylis Coupet and Thierry Mayer, 'Institutional Determinants of Foreign Direct Investment' (2007) 30 (5) *The World Economy* 765.

⁸² Muthucumaraswamy Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 (1) *Journal of World Trade* 82.

⁸³ Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit...and They Could Bite' (August 2003) Policy Research Working Paper, No. 3121, The World Bank Development Research Group 8-22.

Nevertheless, one recent study finds that signing BITs positively affects some sectors, and increases FDI in signatory countries.⁸⁴ Here, it is worth mentioning that if the economic situation of a host country is stressful and vulnerable, they sometimes appear keen to sign BITs with capital-exporters, even if the investment is not significantly large from the developed countries.

Over time, many developing countries have come to realise that BITs do not attract more FDI, as they expected. For instance, Brazil has signed more than twenty BITs, but only one has been ratified.⁸⁵ Furthermore, this did not stop the country attracting more FDI from abroad. If disputes arise with Brazilian investors or against Brazil, these disputes are resolved using inter-state mechanisms, domestic procedures, or negotiation.⁸⁶

Recent research by Poulsen and Aisbett found that almost half of developing countries that have undertaken investor-state arbitration have come away with fines of hundreds of millions of dollars fines against the developing countries. After this experience of investment arbitration, developing countries have come to understand that adopting BITs can bear considerable risk, and now sign BITs with more caution.⁸⁷ These results have also slowed down the signing of BITs.⁸⁸ Developing states are beginning to question BITs and are re-evaluating their participation in them.⁸⁹ In other words, although BITs can have a positive impact on FDI flows into developing countries, this works only for those countries that have not had BIT claims brought to arbitration.⁹⁰

For some countries, being a respondent in investment arbitration has changed their behaviour. Ecuador is an example of this. One Ecuadorian official has explained that in the, 'early days of the BITs [Ecuador] did not understand the responsibilities and obligations of BITs, but they started to understand only when they were sued.'⁹¹ When referencing Swiss investment

⁸⁴ Liesbeth Colen, Damiaan Persyn and Andrea Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) 83 *World Development* 193-206.

⁸⁵ The Brazil-Angola BIT was signed on 01/04/2015 and entered into force on 11/10/2017.

⁸⁶ Poulsen (n 49) 199.

⁸⁷ Lauge Poulsen and Emma Aisbett, 'When Claim Hits Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 (2) *World Politics* 273.

⁸⁸ Srividya Jandhyala, Witold J Henisz and Edward D Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 (6) *Journal of Conflict Resolution* 1056.

⁸⁹ Kathryn Gordon, Joachim Pohl, 'Investment Treaties over Time- Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02, 10-11.

⁹⁰ Emma Aisbett, Matthias Busse, and Peter Nunnenkamp, 'Bilateral Investment Treaties as Deterrents on Host Country Discretion: The Impact of Investor-State Disputes on Foreign Direct Investment in Developing Countries' (2018) 154 (1) *Review of World Economics* 146.

⁹¹ Poulson (n 49) 148.

negotiations and claims, Poulson notes that in the 1990s most developing countries were not aware what they were signing.⁹² In another article, Poulsen attempts to explain why BITs have not been helpful for developing countries for attracting FDI into their markets. Poulson argues the following:

1) From an investor's point of view, the reduction of risk may often be much lower than assumed.

2) Developing states often work with financial institutions such as the World Bank, OPIC, the European Bank for Reconstruction and Development, and the Asian Development Bank, and developing countries become dependent on these agencies rather than using legal protection available in treaties. (They include these institutions' protection systems in their investment policies.)

3) Obtaining investment insurance as an alternative to a BIT is a more straightforward way of avoiding political risk. Poulson explains that investors can obtain compensation much more quickly and more easily, even if the host states refuse to pay for damages.

4) In the absence of a BIT investors can protect their assets using carefully signed contracts, and using a BIT is not the only way of attracting FDI into a developing country's market.⁹³

The next section of this research explores what BITs mean for developed countries. It will investigate why many countries, after being sued in investment arbitration, have decided to denounce the ICSID convention. It will also look at why some states do not renew expired BITs.

5.5. The Political Aspects of Investment Arbitration for Developed Countries

Previous sections of this chapter have explored the main reasons why developing countries sign BITs. This is mainly because they want to attract FDI. However, in developed states the situation is different. In other words, developed countries do not perceive BITs in the same way as developing countries do. The main goal of the developed country when entering into a BIT is not to attract foreign investment, but to protect the interests of their investors. In the

⁹² *ibid* 160.

⁹³ Lauge Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl Sauvant (ed), *Yearbook on International Investment Law and Policy 2009/2010* (Oxford University Press 2010) 566-570.

1960s when the first BITs were signed, officials of capital exporting states recognised three ways of protecting investors: using a substantive code; using an investment insurance institution; and using a convention on investor-state arbitration.⁹⁴ At this time, scholars such as Broches encouraged developing and developed countries to negotiate investment treaties and to adopt BITs with investor-state arbitration clauses.

The role of developed states in the foundation of BITs is significant. However, it is important to ask which countries are classed as ‘developed’, and what makes a country a ‘developed’ state? According to the UN Human Development Index 2018⁹⁵ or a Financial Times Stock Exchange (FTSE) March 2018 report almost all European countries are classed as developed, but outside of Europe only a few countries are counted as being developed. Nevertheless, there are some exceptions to this rule, even among European States. These are the some European states that export less, are poorer, and are smaller than other European states, and these places include: Estonia, Latvia, Lithuania, Bulgaria, Croatia, Malta, Romania, Slovakia, and Slovenia. The FTSE identifies developed states outside of Europe as: Australia, Canada, Hong Kong, Israel, New Zealand, Singapore, and the USA.⁹⁶

The negotiation process for BITs in developing and developed states is different. Ackerman and Tobin explain that the identity of treaty partners (either in developing or developed states) has an effect on investment, property rights, and the discussion process for BITs.⁹⁷ Therefore developing countries are in the process of signing agreements accepted a deal that are more favourable to the stronger more developed countries.⁹⁸ A similar explanation has been offered by the BIT expert Salacuse (2017), who claims that, as a treaty partner, the, ‘richer [developed country] is better than the poorer.’⁹⁹ He explains why developed countries are different from developing or poor countries, noting that: firstly, developed countries have large numbers of potential investors; secondly, large capital exporting countries usually have

⁹⁴ Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (Oxford University Press 2018) 70.

⁹⁵ UNDP, *Human Development Indices and Indicators*, 2018 http://hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf, (Accessed May, 2019).

⁹⁶ FTSE Classification of Markets, ‘FTSE Country Classification-March 2018 Interim Update’, FTSE Russell, (2018) 8 http://www.ftse.com/products/downloads/FTSE-Country-Classification-Update_latest.pdf/ (accessed September, 2018).

⁹⁷ Susan Rose-Ackerman and Jennifer Tobin, ‘Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties’ (2005) 293 Yale Law & Economics Research Paper 17.

⁹⁸ *ibid* 11.

⁹⁹ Jeswald W Salacuse, ‘Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries’ (2017) 56 (1) Harvard International Law Journal 146.

more negotiating power and can obtain higher levels of protection in comparison to the poor partners; thirdly, richer and more developed countries have sufficient funding for diplomatic and political institutions in order to persuade investment treaty partners, and to protect their investors abroad; finally, the enforcement process of awards and the signing of BITs (with the USA and Germany) sends a positive message to international capital markets which might benefit from investment. However, establishing an investment agreement between two or more developing countries does not send the same positive message to the market, especially for the investors from developed countries.¹⁰⁰

In developed countries BITs are accepted as the, ‘handiwork of powerful investors.’¹⁰¹ This is because investors often lobby their home states to sign an investment treaty with other developing states. For instance, the German companies and investors such as Daimler-Benz, Liebherr, and Mann initiated Germany-China BITs. Other well-known companies, such as Siemens lobbied their home government to sign an investment treaty with China. The lobbying process began in 1979, and the treaty was concluded in 1983.¹⁰² However, nowadays, developed countries investors are less interested in BITs. In 2000, when the European Commission asked about the role of BITs for European investors, almost half of the respondents (300 investors) replied that they never heard of the treaties and only 10% had used BITs in their investment activities.¹⁰³ Yackee found a similar result. She asked 200 USA top companies whether BITs could influence an investor’s decision, and he found that BITs do not always matter to investors when they decide whether to and where to invest.¹⁰⁴ These results confirm that the function of BITs for developed countries and for their investors is perceived differently from how developing countries perceive the function of BITs.

The example above clarifies that, paradoxically, on the one hand, strong investors might influence home states and push them to sign investment treaties. At the same time, the same companies might not take into consideration BITs when they want to invest in developing countries. One reason for this might be because BITs are not usually popular between developed countries. Only a few agreements have been set up between developed countries.

¹⁰⁰ *ibid.*

¹⁰¹ Jan Paulsson, ‘The Power of States to Make Meaningful Promises to Foreigners’ (2010) 1 (2) *Journal of International Dispute Settlement* 344 .

¹⁰² Jonathan Bonnitcha, Lauge Poulsen and Micheal Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 187.

¹⁰³ Martin H Thelle, Eva R. Sunesen and Joseph Francois, ‘E.U.- China Investment Study’ (June 2012) Final Report 57.

¹⁰⁴ Jason Webb Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2011) 51 *Virginia Journal of International Law* 400.

Additionally, investors from developed countries do not ask their home states to sign BITs with other developed states. They believe that the domestic legal systems in the host countries are sufficient to deal with their needs and are not discriminatory.¹⁰⁵ However, when developed states sign BITs with developing countries, the developed countries have two advantages: Firstly, developed countries can negotiate protection for their investors on a bilateral basis; and Secondly, developed countries can use BITs to inject western arguments, ideas, and content from customary international law into developing countries.¹⁰⁶ For developed countries, trying to protect all investors via diplomatic channels is not practicable anymore. For instance, the USA comes first in the global diplomacy index. The country has more than 167 embassies and 90 consulates all over the world.¹⁰⁷ When countries like the USA have embassies and consulates that operate almost in every country, trying to espouse investors' claims and providing DP is not an easy task.

The USA also ranks first for FDI inflows and outflows.¹⁰⁸ In the USA, signing a BIT is a low-cost foreign policy tool, which is used to promote investment and to protect American investors abroad.¹⁰⁹ The protection of American investment abroad is an important element of USA foreign policy. This protection policy has been an explicit goal of USA foreign policy since the earliest days of the independence of the country.¹¹⁰ The USA signed its first BIT on 29th September 1982 with Egypt, and then on 27th October 1982 with Panama.¹¹¹ In both countries American investors were protected. The Reagan administration provided investors with direct access to the ICSID, and this was interpreted as giving an 'added bonus' to investors.¹¹² Also, with the emergence of BITs, the USA decided not to deal with all the claims of investors.¹¹³ If there were any questions regarding compensation for expropriation, again BITs were used as a codified document, where, it was established "the fair market value of the property as of the date of expropriation, including interest from the date of

¹⁰⁵ Ryan J Bubb and Susan Rose-Ackerman, 'BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment' (2007) 27 *International Review of Law and Economics* 296.

¹⁰⁶ Bonnitcho, Poulsen and Waibel (n 94) 98.

¹⁰⁷ Lowy Institute Global Diplomacy Index 2017 Country Ranking, https://globaldiplomacyindex.lowyinstitute.org/country_rank.html# (Last Accessed June 2018).

¹⁰⁸ World Investment Report: Investment and New Industrial Policies, UNCTAD (2018) Geneva and New York.

¹⁰⁹ Adam S Chilton, 'The Political Motivations of the United States' Bilateral Investment Treaty Program' (2016) 23 (4) *Review of International Political Economy* 616.

¹¹⁰ Kenneth J Vandeveld, *U.S. International Investment Agreements* (Oxford University Press 2009) 11.

¹¹¹ International Investment Agreements Navigator, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223/> accessed 6th June 2018.

¹¹² Noel Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas 1893-2013* (Princeton University Press 2013) 402.

¹¹³ Vandeveld (n 102) 27.

expropriation to the date of payment”.¹¹⁴ In addition, USA BIT policy was used to settle investment disputes at investor-state level. Specifically, it is prohibited for American investors to ask for support from their home state once an ICSID arbitral decision has been made.¹¹⁵

There is a political dimension for both 'south-north' parties who sign BITs. Chilton explains that BITs are not expensive and the Government does not need to outlay significant funds to implement BITs. Secondly, he claims that, with BITs, the Government makes 'redundant' promises, because foreign investors already have full access to the USA courts. Thirdly, he explains that local politicians sell BITs, which provide that American investors are protected abroad. Lastly, the negotiation of any new BITs requires little effort.¹¹⁶ Alvarez was part of the USA BIT negotiation team in the days when USA BIT policy was being devised. He comments as follows:

For many, a BIT relationship is hardly a voluntary 'un-coerced' transaction. They [U.S. BIT partners] feel that they must enter into the arrangement, or that they would be foolish not to. For Latin American countries, the BIT represents a return to the earlier days of reliance on FDI before they learned to fear becoming dependent. But the truth is to date the U.S. model BIT has been regarded as, generally speaking, a 'take it or leave it' proposition, with the United States calling the shots and the BIT partner as supplicant... A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft.¹¹⁷

In other words, the USA signs BITs with states that are ready and willing to accept the USA BIT model.¹¹⁸

When using BITs, investment treaty arbitration is an efficient settlement mechanism that is used by 'developed states' like the USA, but BITs have emerged under different circumstances in different countries. In the USA investors lobbied their government to sign

¹¹⁴ Maurer (n 104) 402.

¹¹⁵ Kenneth J Vandavelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 (2) (1) Cornell International Law Journal 265-266.

¹¹⁶ Chilton (n 101) 621.

¹¹⁷ Jose E Alvarez, 'The Development and Expansion of Bilateral Investment Treaties - Remarks' (1988) 82 Proceedings of the ASIL Annual Meeting 552-553.

¹¹⁸ Vandavelde (n 107) 211-212.

BITs with the developing world. However, in the case of the UK, BITs was a government policy, and investors did not play any crucial role in the process.¹¹⁹ In practice, it is rare to see a claim against a developed country, such as the USA or the UK. To date, only two investment treaty claims have been brought against the UK. When developing countries began to be sued by investors, they hesitated to sign new BITs. Being a respondent in the arbitration process is not the same for developing countries, as it is for developed countries. For instance, when Germany was a respondent in *Vattenfall v. Germany*¹²⁰ a German official said that, ‘Overall, the German government's experience with the international dispute settlement in this case was positive’ and he, ‘stressed the benefit of the international arbitration mechanism in creating an environment in which the disputing parties face strong incentives to find constructive solutions to their disputes.’¹²¹

Over the last a few years, the BIT process has changed across EU- Member States. On 25th October 2010 the European Council adopted *Conclusions on a Comprehensive European International Investment Policy*¹²² and the Commission drafted *Towards a Comprehensive European International Investment Policy*.¹²³ The aim of these documents is to deliver better results as a union than might be achieved by the member states individually.¹²⁴ The Commission stipulates two main items: Firstly, relating to internal policy, that all investment agreements should take into consideration the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, and development policy; and Secondly, relating to external policy, that states should promote the rule of law, human rights, and sustainable development.¹²⁵ In this regard, in the 20th Century, the aim of BITs was to protect investments and investors, but the situation is different in the 21st century; the EU has plans to protect their investments abroad while trying to develop other values such as human rights, environmental sustainability, and health and safety.

¹¹⁹ Bonnitcha, Poulsen and Waibel (n 94) 188.

¹²⁰ *Vattenfall AB and others v. Federal Republic of Germany*, (2012) ICSID Case No. ARB/12/12.

¹²¹ Yoram Z Haftel and Alexander Thompson, ‘When Do State Renegotiate Investment Agreements: The Impact of Arbitration’ (2018) 13 *Review of International Organizations* 30.

¹²² Council of the European Union, ‘Conclusions on a comprehensive European International Investment Policy’, 3041st Foreign Affairs Council Meeting, Luxembourg, 25th October, 2010 www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf, (Last accessed June 2018).

¹²³ Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, *Towards a Comprehensive European International Investment Policy* www.trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf (Last accessed June 2018).

¹²⁴ *ibid* 6.

¹²⁵ *ibid* 9.

On the 1st December 2009 the Lisbon Treaty entered into force. After this date, the commercial and FDI policies of the member states was transferred from individual states to EU level.¹²⁶ The EU signed trade agreements with other developed states: EU-New Zealand, EU-Australia, EU-Singapore, EU-USA (The Transatlantic Trade and Investment Partnership, TTIP), and EU-Canada (CETA). For example, the provisional CETA entered into force on the 21st September 2017. These trade agreements are similar to the previous BITs applied by member states. For instance, in the CETA agreement investors are allowed to use the ICSID Convention to gain settlement. It is worth noting that the EU is not a contracting party to the ICSID Convention. However, according to Article 8.25 of the ICSID, if there is conflict between an investor from the EU and Canada, they can go to the ICSID to settle their investment dispute. In this regard, under the CETA agreement, the EU, or members of the EU, can be a respondent in investment disputes according to Article 8.23, and the agreement obliges a determination of the respondent. Agreements such as the CETA between developed states are similar to the 'north-south' agreements that were used for a long period of time. However, establishing BITs between developed countries raises questions about why developed countries are still signing BITs between themselves? Lowe suggests that, 'for countries [developing or developed], buying investment guarantees that are provided by BITs is much easier than building a reputation as a safe place for investments. A reputation takes many years to build, but a BIT can be signed with the stroke of a pen.'¹²⁷ BITs have a history of almost 60 years, and this system has worked until today for all types of states. It is not always easy for states to change their behaviour and their investment policy. These kinds of issues make it difficult to find alternative different solutions to BITs.

5.6. Does the ICSID Convention Only Stand Up for Developed Countries?

During the 19th and 20th centuries, developed countries were able to directly protect their investments and investors in developing countries. However, the foundation of arbitration institutions, such as the ICSID and UNCITRAL, has worked to change this system in order to try to establish 'win-win conditions' for both developing and developed countries. International law emerged during a time when many developing countries were still under the

¹²⁶ Consolidated Version of the Treaty on the Functioning of the European Union, www.ur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN Art 3 para 2 and Art 207, (Last accessed June 2018).

¹²⁷ A Vaughan Lowe, 'Changing Dimensions of International Investment Law' (2007) Working Paper No.4/2007, *Legal Studies Research Paper Series* (Oxford University Press 2007) 52.

direct control of developed states, and these developing states were not able to participate directly in international legal environments.¹²⁸ The previous chapters of this research confirm that, even during the negotiation process for BITs, developing countries were not placed on the same negotiating level as developed countries. Research also finds that developed countries adopted the role of 'rule makers' and developing countries became the 'rule takers'.¹²⁹ For these reasons, developed states gained more chance to protect their investors in comparison to developing states.

It is widely agreed that, 'today's investment regime emerged when the western 'developed' countries tried to protect their investors in their colonial empires and facilitate for future investments in these countries.'¹³⁰ After some time, it became noticeable that developed states were winning far more investment arbitration cases in comparison to developing countries, and this was not merely a hypothetical finding, but one statistically proven by researchers. Schultz and Dupont found that between the periods of 1998-2010 developed countries were 1.7 times more successful in investment arbitration in comparison with developing countries.¹³¹ Moreover, Franck finds that the economic or financial circumstances of a state have a bearing on the results of investment arbitration; sometimes but not always, developed countries win more cases than upper-middle income countries and lower-middle income states.¹³² Therefore, this means that high-income states are stronger than developing countries, in this regime. Scholars also believe that if a dispute settlement mechanism favours stronger parties to such an extent, then international law is pursued less fully.¹³³ Here, it is important to note that the Government of the USA has never lost an investment arbitration case as a respondent, but USA investors have lost more than they have won.¹³⁴

The USA uses the Office of the Assistant Legal Adviser for International Claims and Investment Disputes (L/CID), which is the largest office in the Department of State's Office of the Legal Adviser. This officially, 'represents the United States and co-ordinates activities

¹²⁸ Antonius R. Hippolyte, 'Correcting TWAAIL's Blind Spots': A Plea for a Pragmatic Approach to International Economic Governance' (2016) 18 International Community Law Review 37.

¹²⁹ Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', (2016) 19 Journal of International Economic Law 562.

¹³⁰ Salacuse (n 48) 101.

¹³¹ Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', (2015) 25 (4) The European Journal of International Law 1167.

¹³² Franck (n 38) 60.

¹³³ Schultz and Dupont (n 123) 1167.

¹³⁴ Kevin P Gallagher and Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal' (2011) Working Paper No. 11-01 Global Development and Environment Institute 8-10.

within and outside the Department with respect to all aspects of international claims and investment disputes.¹³⁵ Furthermore, the Department works closely with the Government of the USA to protect its interests and those of American investors abroad.¹³⁶ This could be interpreted as a 'home states protection' for investors who want to invest and work abroad. This kind of home state support and protection has been widely interpreted and explained by the scholars. For instance, Schultz and Dupont argue that investment arbitration has its 'haves' and 'have-nots'.¹³⁷ The 'haves' are the strong parties, and this signals an unequal application of the legal regime. Secondly, when 'haves' are characterised, their economic power is taken into consideration, and they can afford better legal counsel in comparison to 'poorer' states. Thirdly, the 'haves' are high-income countries, and are usually the home states of the investors in investment arbitration. Therefore, economic power disparities seem to be a factor of success.¹³⁸ It can be seen that power politics are still alive.¹³⁹ However, 'power politics' in the era of the ICSID Convention means that the 'risky business' of investors has become 'risky politics' for the LDCs.¹⁴⁰ Moreover, some scholars interpret the BIT process as a 'hand-tying' process for developing states.¹⁴¹ Also, they argue, it is expected to address political problems too.¹⁴² For instance, Alvarez explains the situation in terms of USA BIT policy as follows:

The U.S. 'cookie-cutter' approach to BIT negotiation results is a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more

¹³⁵ International Claims and Investment Disputes, Department of State's Office of the Legal Adviser <https://www.state.gov/s/l/c3433.htm> accessed 13 August 2018.

¹³⁶ Lisa J Kubiske, 'U.S. Investment Treaties: Working For Investors and Government', Deputy Assistant Secretary for International Finance and Development, Bureau of Economic and Business Affairs (16 March 2015) OECD Conference Centre, Paris <https://2009-2017.state.gov/e/eb/rls/rm/2015/239372.htm> (Last accessed August 2018).

¹³⁷ Schultz and Dupont (n 123) 1147-1168.

¹³⁸ *ibid* 1166.

¹³⁹ Daniel Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton University Press 2008); Maria A Gwynn, *Power in the International Investment Framework* (Palgrave Macmillan Publishers Ltd 2016); Jose E Alvarez, 'Contemporary International Law: An Empire of Law or Law of Empire', (2009) 24 (5) *American University International Law Review*; Andrew Reddie, 'Power in International Trade Politics: Is ISDS a Solution in Search of a Problem' (2017) 19 (4) *Business and Politics*, Daniel Behn, Tarald Laudal Berge, Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2017) PluriCourts Research Paper No. 17-05.

¹⁴⁰ <https://www.iisd.org/itn/2014/08/12/risky-business-or-risky-politics-what-explains-investor-state-disputes/> accessed 7 May 2018.

¹⁴¹ Allee and Peinhardt (n 67) 47-87.

¹⁴² Tim Buthe and Helen V. Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis' in Karl P Sauvants and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 72.

like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft.¹⁴³

The above facts pose some questions, namely, why and how are developed countries more successful in investment arbitration? Does the ICSID Convention only stand up for developed countries? Does being rich influence the outcome of investment arbitration? Does a fragmented form of DP still survive for capital export states? These questions do not have one correct answer. Nevertheless, it would not be wrong to claim that investment arbitration has helped to depoliticise disputes between host states and investors. In recent decades the process was approved by states that preferred to settle their disputes via third party participation, but not at a state-state level. Before institutions such as the ICSID came into existence, investment disputes were settled on a state-state level, and this served to politicise almost all investment claims. However, it should be noted that, in Tokyo in 1964 during an ICSID Convention meeting, many developing countries from Latin America voted against the ICSID Convention.¹⁴⁴ The main reason for their hesitation or saying 'no' to ICSID was because, in the past, western developed countries had mistreated developing countries. However, when the ICSID Convention was founded, delegations from developed countries (the Europeans and Americans) believed that they would never be respondents in investor-state arbitration, because this mechanism would be primarily used in developing countries.¹⁴⁵ Indeed, scholars confirm that developing countries have typically featured as respondents in investors-state arbitration.¹⁴⁶

The situation has changed now. Both developed and developing countries are seen to be respondents in the process of investment arbitration. And, when all types of countries (developing or developed) can become respondents in investor-state disputes, this changes a state's behaviour. However, many Latin American states, specifically Bolivia and Ecuador for instance, have decided to denounce the ICSID Convention, after having being several time respondents in investor-state arbitration. However, Australia has also rejected investor-state

¹⁴³ Jose E. Alvarez, 'Remarks' (1992) 86 *American Society of International Law* 553.

¹⁴⁴ Andreas F Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008) 540.

¹⁴⁵ Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (Oxford University Press 2018) 77.

¹⁴⁶ Ucheora Onwuamaegbu, 'Limiting the Participation of Developed States: Impacts on Investor-State Arbitration' (September 2016) Paper No. 11 *Investor-State Arbitration Series* 6.

arbitration for BITs.¹⁴⁷ Between January 2003 and February 2017 Australian investors invested more than 20.9 billion US dollars in the USA.¹⁴⁸

Interestingly, in the Australia-USA Free Trade Agreement (AUSFTA), there is no investor-state settlement mechanism between parties. The Australian Government explains this situation as follows; ‘This is in recognition of the Parties’ open economic environments and shared legal traditions, and the confidence of investors in the fairness and integrity of their respective legal systems.’¹⁴⁹ When the investors for both parties are not allowed to directly claim, they have only one choice, which is to apply for DP, or for any other home state support. However, the situation in Australia and in the USA is different. The legal systems of both countries are established and reliable, and for investors investing in these countries, there is usually no political risk. Moreover, both countries are not classed as weak in the rule of law or as corrupt. These kinds of legal and political circumstances allow BIT parties to remove investor-state dispute settlement clauses from BITs. In other words, in these countries there is no reason to fight for domestic dispute resolution over delegation to the ICSID or *vice-versa*, because in neither case, no one can influence the dispute outcome.¹⁵⁰

After reviewing what scholars and states say about investment policies, it is worth looking at ICSID statics to assess whether the ICSID stands up only for developed countries. As previously noted, the ICSID was founded in 1965. The first dispute submitted to the ICSID was in 1972, which was five years after its inception, and this might be thought of as a slow start. The first ICSID arbitration case was registered against a developing country was *Holiday Inns S.A. and others v. Morocco*.¹⁵¹ Until the 1980s only nine cases were registered with the ICSID Secretariat, and, again, all of them were against developing countries.¹⁵² However, from 1981, ICSID cases began to increase rapidly. After this, in almost every year, cases were submitted, and, not surprisingly, they were against developing countries. After

¹⁴⁷ Leon E Trakman, ‘Australia’s Rejection of Investor-State Arbitration: A Sign of Global Change’, in Leon E. Trakman and Nicola W. Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 344-373.

¹⁴⁸ Australian Trade and Investment Commission, *Australia’s Investment Footprint in the U.S.: Mapping Australia’s Foreign Direct Investment in the US* Commonwealth of Australia (2017) 10.

¹⁴⁹ Department of Foreign Affairs and Trade, *Australia-US Free Trade Agreement: Guide to the Agreement* (March 2004) 121 www.dfat.gov.au/fta/ausfta/guide/ausfta_guide.pdf.

¹⁵⁰ Allee and Peinhardt (n 70) 19.

¹⁵¹ *Holiday Inns S.A. and Others v. Morocco* (1972) ICSID Case No. ARB/72/1.

¹⁵² The ICSID cases went against these countries: Côte d’Ivoire, Jamaica (several times), People’s Republic of the Congo (more than one time), and Nigeria.

1987 and until 30 June 2018, 586 cases were recorded.¹⁵³ Up until 2017, 113 developing countries were respondents in at least one investor-state dispute.¹⁵⁴ The UNCTAD 2018 report shows that in investor-state cases, the majority of the respondents were developing countries, and developed country investors brought most of the investment cases against developing countries. The main investor home countries were the USA, the Netherlands, the UK, Germany, Canada, and France.¹⁵⁵ Furthermore, states such as the USA and the UK never lost their investor-state disputes. According to one researcher, high-income respondents are about 22 percentage points more likely to receive a final award by a tribunal, relative to lower and middle-income respondents. Also, middle-income governments lose about twice as many cases as high-income states.¹⁵⁶ Another researcher found that foreign investors win only 17% of their cases against developed countries, but have won 62% of ITA cases against developing countries. This is almost four times more than developed countries.¹⁵⁷ Moreover, investors who win against poor countries settle 80% of their disputes; they either win or settle their cases.¹⁵⁸

The above statistics show that there are economic or trade policy ‘haves’ and ‘have-nots’ and the international investment regime make it harder or easier to win, depending on the poverty or wealth of the country.¹⁵⁹ For instance, it is true that investors are simply more willing to pursue claims against weak and poorer countries than they are to pursue claims against wealthy states. They believe that, with their limited resources, it is difficult for poorer countries to protect their interests under ICSID jurisdiction. In other words, investors know that being economically poor will create problems when trying to fund a defence. A recent survey confirms that investment arbitration costs on average about 4.5 million USD for respondent states.¹⁶⁰ In some cases, the amount might be up to 30 million USD.¹⁶¹ If

¹⁵³ ICSID Caseload Statistics (Issue 2018-2) 7.

[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20\(English\).pdf/](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf/)

¹⁵⁴ UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations, New York and Geneva 2018) 92.

¹⁵⁵ *ibid* 93.

¹⁵⁶ Anton Strezhnev, ‘Why Rich Countries Win Investment Disputes: Taking Selection Seriously’, Selected Working Papers, Harvard University Department of Government, 22 September 2017).

¹⁵⁷ Daniel Behn, Tarald Laudal Berge, Malcolm Langford, ‘Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration’, PluriCourts Research Paper No. 17-05 (2017) 33.

¹⁵⁸ *ibid*.

¹⁵⁹ Thomas Schultz and Cedric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study’ (2014) 25 (4) *The European Journal of International Law* 1168.

¹⁶⁰ Global Arbitration Review Online News, ‘*Counting the Costs of Investment Treaty Arbitration*’ (24 March 2014) http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf, (Last accessed August 2018).

investors are international companies, and they have enough capital to protect their own interests in the host states from early on in the arbitration process, these investors are at an advantage in comparison to weaker countries. When the poor and rich states are viewed through the lens of an investor they are not equal. This allows investors to make a decision about whether to initiate claims against developing and developed countries.

The home states of investors (in developing or developed countries) never become involved in the arbitration process in investor-state disputes against host countries. In other words, officially, home states do not try to protect investors after the commencement of the arbitration process (and if they do, this information is not publicly available). Investment cases against countries are settled by third party tribunals, and even enforced by third party funding. It is very difficult to find any data to suggest that developed home states become directly involved in investment disputes on any grounds to protect their nationals. Nevertheless, Sornarajah claims, ‘power continues to dictate the course of developments in international foreign investment arbitration.’¹⁶² Just not in the outcomes of investor-state disputes. Accordingly, just as is the case in other trade and economic deals involving BITs, during the negotiation process, powerful states are more advantaged. However, after the commencement of arbitration, powerful states are not in a privileged position. In other words, they are placed on an equal level with weak states.

The arbitration process is a rule based dispute settlement mechanism designed to resolve disputes between parties, and it gives more advantage to weaker states in order to force powerful states to hold to the terms of agreements. However, powerful states prefer to use the ICSID or other third party institutions to settle investor-state disputes, because, at the end of the process, this allows them to enforce an award internationally under international law. Paulsson argues that arbitral tribunals are instruments of the rule of law and their purpose is not to favour the rich, but to enable states to make trustworthy promises. Decisions should be respected in order to achieve the long-term benefits of the rule of law, and these rules are preconditioned to create healthy international relations between states.¹⁶³

¹⁶¹ *Libananco Holdings Co. Limited v. Republic of Turkey* (2012) ICSID Case No. ARB/06/8.

¹⁶² M.Sornarajah, ‘Power and Justice in Foreign Investment Arbitration’ (1997) 14 *Journal of International Arbitration* 139.

¹⁶³ Jan Paulsson, ‘The Power of States to Make Meaningful Promises to Foreigners’ (2010) 1 (2) *Journal of International Dispute Settlement* 349.

It is worth noting that developed countries do not usually commence an arbitration processes, and, in this way, they differ from developing countries because developed countries systematically achieve ‘what they want’ from the BITs they sign.¹⁶⁴ This does not require any DP or home state involvement in the dispute process. In other words, the powerful states have changed their method of protection. In the past they used direct reaction to an investment dispute but now they use legal means according to international rules, and before the initiation of an arbitration process. The USA is a good example. In 1993 the USA pressured Costa Rica to ratify the ICSID Convention. Moreover, the USA has BITs with almost all non-OECD countries, and American investors are the most active in taking developing countries into arbitration.¹⁶⁵ This confirms that a powerful state can take action before the arbitration process begins.

Lastly, another reason why developed countries are successful in investment disputes, before and after the arbitration process, is because of the quality of management of the country, especially *political regime stability, democratic values, quality of the judiciary system, protection of property rights, and levels of political corruption*. At this point, as a country, Switzerland is a good example of quality management. The country is not as politically and economically powerful as other countries, such as the USA or the UK, for example, but Switzerland allows investors to invest in their country with minimum risk. As Vogler stated, people often believe that Swiss banking secrecy law is key for a country’s financial and investment success.¹⁶⁶ However, he claimed that until 1935 Switzerland had no national banking law or official banking secrecy within the country. After 1935, when the Swiss law on Banks and Savings Banks entered into force this marked the birth of modern banking secrecy.

Before the Swiss Banks Law (1935) and especially during the 18th and 19th centuries, Geneva and Basel banks conducted business among the wealthy clients of foreign countries.¹⁶⁷ At that time, there was nothing like Article 47 of the Swiss Banking Act. According to this Article, all employees or representatives of the financial institutions must keep clients’ information secret, even after they stop working for the bank or institution. A bank employee breaching the client’s secrecy is prosecutable under Article 47; in the early

¹⁶⁴ Todd Alle and Andrew Lugg, ‘Do BITs Reflect the Interests of Powerful States’, Paper Prepared for the 2016 Annual Meeting of the International Studies Association, Atlanta (16-20 March 2016) 12.

¹⁶⁵ Gallagher and Shrestha (n 126) 7.

¹⁶⁶ Robert U. Vogler *Swiss Banking Secrecy: Origins, Significance, Myth*, Vol.7 (Association for Financial History 2006) 5.

¹⁶⁷ *Ibid*, p.44

years it was 50'000 CHF or up to six months in prison, and currently it is 250'000 CHF or three years in prison.¹⁶⁸ Hence, Article 47 has become harsher in terms of fines and imprisonment. This change indicates that client confidentiality is crucial for Swiss authorities. However, it does not mean that financial institutions' clients or investors can earn and keep their illegal capital in Swiss banks. The Swiss bank secrecy law should not be interpreted as an instrument that supports tax fraud. The bank or financial institution is obliged to revoke the confidentiality if a customer is prosecuted for a serious crime or if there is tax fraud or criminal activities by the account owners.¹⁶⁹ Nevertheless, if there is no tax fraud but only tax evasion, in that case the Swiss government does not provide administrative or legal assistance to foreign countries; this scenario allows bank account owners to conceal their capital in Swiss banks.¹⁷⁰ The main reason is that according to Swiss terminology, 'tax evasion' simply means non-declaration of funds and is a minor infringement of the law, sanctioned by monetary fines or prosecuted by tax administrative authorities. By contrast, 'tax fraud' signifies active deception, such as lying or using false documents to mislead the authorities; this is a criminal offence and is penalised with imprisonment and is pursued by prosecutors.¹⁷¹ According to the Financial Secrecy index Switzerland has the most secretive jurisdiction, with a score of 76.¹⁷²

In addition, Swiss Bankers Association claims Swiss banks manage 27.5% of the global assets that are managed cross-border, and half of the assets under management derive from other countries.¹⁷³ According to the 2019 Index of Economic Freedom, the Swiss economic score is 81.9, which makes the country the fourth freest in the world and first in the region.¹⁷⁴ All these data confirm that Switzerland is one of the most secure countries for investment. However, the secrecy law of Switzerland is not enough to attract such a vast amount of investment or capital to the country. Vogler stated that secrecy is only one element among

¹⁶⁸ KPMG, 'Swiss Federal Act on Banks and Savings Banks', *KPMG Financial Services*, dated 8 November 1934 (version as at 1 January 2019), available at <https://assets.kpmg/content/dam/kpmg/ch/pdf/ch-banking-act-en.pdf> (Last accessed July, 2019).

¹⁶⁹ Faust Kalam, *Tax Heavens: The Demonization of a Swiss Whistleblower*, (Lulu 2010) 90.

¹⁷⁰ *Ibid*

¹⁷¹ Peter Nobel and Beat Braendli, 'Switzerland', in Sandra Booyen and Dora Neo (eds), *Can Banks Still Keep a Secret: Bank Secrecy in Financial Centres Around the World*, (Cambridge University Press 2017) 319-320.

¹⁷² Financial Secrecy Index 2018, <https://financialsecrecyindex.com/en/> (Last accessed June 2019).

¹⁷³ The Swiss Banking Centre <https://www.swissbanking.org/finanzplatz-in-zahlen/the-swiss-banking-centre/> (Last accessed June 2019).

¹⁷⁴ The Index of Economic Freedom, <https://www.heritage.org/index/country/switzerland>, (Last accessed June 2019).

many other reasons for the country's success regarding FDI. Other main reasons why Switzerland's banks attract investors to the country are as follows:

- 1- Political and legal stability and economic prosperity in the country.
- 2- Economic prosperity from the constant potential of a strong and convertible currency.
- 3- The country has an open and globally networked economy.
- 4- The country not only offers foreign investors protection against falling value but its prosperity increases the value.
- 5- Swiss banks attract foreign capital not only because of the law of secrecy but also because the country's banks have simplified their transactions and minimized political and economic issues for foreign investors.
- 6- The Swiss banks' secrecy policy does not encourage criminal or unethical behaviour by clients.¹⁷⁵

In conclusion, Switzerland's BITs with other countries and its secrecy law are unlikely to be the main reasons it attracts capital into the country. Historically, the country has a legal background and is one of the countries in which the protection of property rights is strongly enforced. An independent, fair judicial system operates throughout the country. All these facts indicate that the country should be assessed as a whole. This provides clear understanding of why the country attracts investors and that the secrecy law alone is not enough to attract foreign direct investment. In other words, even if a well-managed country has not signed BITs with other states, it can still attract investors into their market.

At the same time, even if countries such as Ecuador or Venezuela sign BITs with other countries, including well managed countries, it is not easy for them to attract foreign investors, because they do not maintain the same management values as countries such as Switzerland, Norway, and some other Western countries. In 'Why is Africa Poor' (2010) by Acemoglu and Robinson, it is argued that the reason, "African nations are poor today is that their citizens have very bad interlocking economic and political incentives. Property rights are insecure and very inefficiently organised, markets do not function well, and states are weak and political systems do not provide public goods."¹⁷⁶ However, most Western societies

¹⁷⁵Ibid (n 166) 71-72.

¹⁷⁶Daron Acemoglu and James A Robinson, 'Why is Africa Poor' (2010) 25 Economic History Society of Southern Africa Routledge Taylor & Francis Group 22.

have well developed political and national judicial systems. In these countries property rights and investors rights are more secure in comparison to the weaker countries. This provides more opportunity for developed countries to win in investor-state arbitration cases. This might provide an answer to the question ‘Does the ICSID stand for developed countries’ as ‘No’.

History reveals that developed countries have used ‘gunboat diplomacy’ to protect their investors’ interests abroad. However, nowadays, this is not common. The main reason for this is because there are enough institutions, such as ICSID, which work to help settle disputes between investors and host states, according to international legal norms and regulations. In other words, investors do not need home protection anymore. At the same time, for more experienced, developed countries, it is more efficient to rely on diplomatic rather than legalistic dispute settlement with smaller partners.¹⁷⁷ This is because legalistic dispute settlement takes a long time, but diplomatic methods for settling disputes usually progress more quickly.

It is worth mentioning that very large multinationals (usually set up in developed countries) are still able to rely on DP in their home countries, and can obtain similar protections and legal guarantees to those provided for in BITs. For that reason, as Poulsen claims, BITs and their protections are important not for wealthy investors, but for medium-scale investors.¹⁷⁸ The same rule applies for developed countries. Finally, it is understandable why developed and powerful states and/or multinational companies do not need support or help from institutions such as the ICSID. This is because they have enough experience, money and power to protect their interests with their partners, and in host countries. Nowadays, it is an accepted rule that investor-state arbitration is respectable for all types of states and investors. Probably for this reason, it is noted that, ‘Arbitration is good when it corrects misbehaviour by foreign host states.’¹⁷⁹ Looking into the history of the ICSID, it can be seen that it approves this dispute settlement mechanism for both states and investors.

5.7. Withdrawing from the ICSID Convention

¹⁷⁷ Laura Gomez-Mera and Andrea Molinari, ‘Overlapping Institutions, Learning, and Dispute Initiation in Regional Trade Agreements: Evidence from South Africa (2014) *International Studies Quarterly* 279.

¹⁷⁸ Poulsen (n 86) 546.

¹⁷⁹ Guillermo Aguilar Alvarez and William W Park, ‘The New Face of International Investment Agreement: NAFTA Chapter 11’ (2005) 28 (2) *Yale Journal of International Law* 368-369.

Several years ago, the scholars Alvarez and Topalian suggested that, ‘the international investment regime is the enemy of the state.’¹⁸⁰ Indeed, some academics and states began to see the ICSID as an ‘enemy of the state’ and decided to denounce the ICSID Convention. This happened when it was perceived that the institutions surrounding the Convention and the Convention itself did not serve the interests of certain governments, and these governments decided to change their policies so that they could exit or withdraw from the agreement. In particular, at the beginning of the 2000s, some Latin American states started to believe that belonging to the ICSID went against their interests, and, on these grounds, in May 2007 the World Bank received a notice of withdrawal from the ICSID Convention. This was the first time this had happened in the history of the World Bank. The writer of the letter was the Republic of Bolivia. The official Bolivian statement suggested that the Convention has the following problems:

- 1) It is an unbalanced arbitration tribunal where only multi-nationals can challenge states.
- 2) It is a tribunal that deliberates behind closed doors, and makes its own rules and decisions which cannot be challenged.
- 3) It is a very expensive tribunal for developing countries.
- 4) Large investors seek damages of millions of dollars because they claim not only for investments but for loss of future profits.
- 5) The World Bank acts as both judge and jury through Corporate Investment Funds, and is involved as a shareholder in many private companies controlled by multi-national companies.
- 6) The ICSID Convention is a violation of Bolivia's constitutional law.¹⁸¹

Similar views were offered by President Evo Morales, who said that the, ‘ICSID is an international organisation where investors bring their grievances and no country, except perhaps the United States, will win.’¹⁸² The Bolivian denouncement was followed by other states: on 6 July 2009 by the Republic of Ecuador, and on 24 January 2012 by Venezuela, who also submitted notices of withdrawal to the World Bank. The Ecuadorian President also offered a similar view, and claimed that withdrawal was important for, ‘the liberation of our countries because ICSID signifies colonialism, slavery with respect to transnationals, with

¹⁸⁰ Jose E Alvarez and Gustavo Topalian, ‘The Paradoxical Argentina Cases’ (2012) 6 World Arbitration and Mediation Review 492.

¹⁸¹ Nicolle E Kownacki, ‘Prospects For ICSID Arbitration in Post-Denunciation Countries: An ‘Updated’ Approach (2010) 15 UCLA Journal of International Law and Foreign Affairs 544.

¹⁸² Susan D Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 (2) Harvard International Law Journal 448.

respect to Washington, and with respect to the World Bank.¹⁸³ Argentina also signalled its intention to follow its neighbours' steps and withdraw from the ICSID Convention, but, to date, it has not officially sent a letter to the World Bank.¹⁸⁴

These statements paved the way for scholars to agree that investor-state dispute settlement mechanisms can sometimes harm the global economy and international relations.¹⁸⁵ Indeed, academics began to argue that, 'With increased political, economic and legal scrutiny on international investment dispute resolution it has become a global hot button issue.'¹⁸⁶ Nevertheless, in practise, investor-state conflicts have not switched to inter-state disputes. The governments of Bolivia or Ecuador are allowed to give official statements and change their home state policies on investment arbitration, because every sovereign state is allowed to do this under international law.

The comments made by both Bolivia and Ecuador might be reasonable from their point of view, but, more generally, it is difficult to justify or confirm that the ICSID Convention works only in the interests of the USA and/or developed countries. The main winners of ICSID cases are indeed wealthy countries, but this is not simply because the ICSID is biased against the interests of developing countries. It is worth noting that ICSID and/or other investor-state dispute settlement mechanisms try to be impartial and neutral, and they aim to work for both parties at the same level during the arbitration process. The main problem is that, before a dispute arises, some states are not in an equal position.

States are free to sign BITs or to join the ICSID, or to renegotiate or withdraw from the ICSID Convention. Indeed, Schreuer comments on this matter. He explains that the treaty obligations of the host state are owed to the home state of the investor. Furthermore, the withdrawal of an offer to arbitrate by denunciation of an international treaty may violate an obligation to the investor's home state.¹⁸⁷ In addition, Schreuer notes that the investor is powerless and cannot fight against a state's decision because investors are not counterparties

¹⁸³ *ICSID in Crisis: 'Straight-Jacket or Investment Protection'* (10 July 2009)

www.brettonwoodsproject.org/2009/07/art-564878/ (Last accessed August 2018).

¹⁸⁴ Federico Lavopa, Lucas Barreiros and Victoria Bruno, 'How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' (2013) 16 *Journal of International Economic Law* 871.

¹⁸⁵ Dr. Kaha Kassem, 'Political Character of Investor-State Disputes' (2015) 42 *Journal of Law, Policy and Globalization* 167.

¹⁸⁶ Susan D Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55 (1) *Virginia Journal of International Law* 15.

¹⁸⁷ Christoph H Schreuer, Loretta Malintoppi et.al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 213.

in BITs.¹⁸⁸ In addition, according to the Vienna Convention on the Law of Treaties (1969) Article 39, home states and host states are free to make a decision on an investor's rights and obligations, and they can even terminate an investor's right to arbitration by amendment or modification of the BIT.¹⁸⁹

Withdrawing from the ICSID Convention is regulated by Articles 71 and 72 of the Convention. According to the terms of Article 71 of the Convention, withdrawal takes effect after six months, 'Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.'¹⁹⁰ This means that during this six months, the Convention is still valid and enforceable. However, Article 72 of ICSID states as follows:

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.¹⁹¹

According to Article 71, at the first stage, it seems that states can fully denounce the Convention and that it will not apply anymore. However, Article 72 of the Convention introduces an exception and contradiction to the general rule of Article 71.¹⁹² In other words, according to Article 71, any member state of the Convention can unilaterally withdraw from the ICSID Convention, and, after a six month period, a state (Bolivia for instance) ceases to be party to the ICSID. This means the state will not be bound by new rules and obligations. However, paradoxically Article 72 protects investors even after an official denouncement has been completed. The Tribunal's view on this matter is important. As already mentioned, withdrawal by Bolivia was a first occurrence in ICSID history, and, hence, investors did not know what would happen after the six month period.

¹⁸⁸ *ibid* 1280-1282.

¹⁸⁹ Frederic G Sourgens, 'Keep the Faith Investment Protection Following the Denunciation of International Investment Agreements' (2013) 335 *Santa Clara Journal of International Law* 381.

¹⁹⁰ The ICSID Convention (1965) Art 71.

¹⁹¹ *ibid* Art 72.

¹⁹² Oscar M Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and The Limits of the Contract Analogy', in Christina Binder, Ursula Kriebaum, and et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 253-277; Christoph Schreuer, 'Denunciation of the ICSID Convention on Consent to Arbitration', in Micheal Waibel, Asha Kaushal and et.al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law International 2010) 353-368.

In *Euro Telecom International N.V (E.T.I.). v. Bolivia*¹⁹³ the question of whether to register a case or not to register a case was raised. However, Article 36 (3) of the ICSID Convention obligates the Secretariat to register cases if they are not outside the jurisdiction of the Centre. In this case the Secretariat ETI's claim was jurisdictional, and this allowed the firm to register against Bolivia on 31 October 2007. This was only a few days before the official denouncement of the Convention by the Government of Bolivia. As the Respondent, the State of Bolivia objected to the claim, but the UK and the USA froze the assets of the third party Entel (which belongs to the Bolivian Government), then, after some time, the national courts of these countries asked for the release of the assets on the grounds that Entel was not a party to this dispute. However, the ICISD pushed the Respondent state to participate in the arbitration process and to settle it.¹⁹⁴ This case is not publicly available, but details of the compensation paid to investors were published.¹⁹⁵ Furthermore, this case raised questions such as: What would have happened if the ETI had submitted its claim against Bolivia after the six month period? These kinds of question were asked during the drafting period of the ICSID Convention. Specifically, this question was asked by Mejia-Palacio:

What will happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose- would that disputes still be under the jurisdiction of the Centre?

In answer to this question, Broches replied as follows:

If the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre.¹⁹⁶

Moreover, Broches details different scenarios:

If the arbitration clause has no definite duration and if it is terminated by the one of the parties the jurisdiction to the Centre come to the end. At the same time, if the State withdraws from ICSID before it is accepted by any investor, no investor could later bring a

¹⁹³ *E.T.I Euro Telecom International N.V. v. Plurinational State of Bolivia*, ICSID Case No. ARB/07/28 (31 October 2007).

¹⁹⁴ Kownacki (n 163) 556.

¹⁹⁵ The ICSID website gives this information.

¹⁹⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968) II (2) Washington, International Centre for Settlement of Investment Disputes 1009-1010.

claim before the Centre. However, if the State's offer has been accepted by one of the investors then conflicts arises between the State and the investor, even after the date of denunciation, will still be within the jurisdiction of the Centre'.¹⁹⁷

Broches' comments can be interpreted as, if consent is given by the state before the date of the denouncement, then only in this case will the ICSID Convention be applicable, even after withdrawal from the Convention (Article 72). The withdrawal process as outlined in Article 72 is very significant, because, without this Article, all the rights and obligations of the withdrawing state, including those that arise about consent, would cease from the date withdrawal takes effect.¹⁹⁸ Here, it is noteworthy that Articles 25 and 72 deal with the question of 'consent' of the parties. Article 25 (1) of the ICSID Convention deals with the question of 'consent to ICSID jurisdiction'.¹⁹⁹ In this respect, Schreuer provides a broad explanation that withdrawal, 'does not affect consent to the jurisdiction of the ICSID (Article 25) given prior to the denunciation or an agreement between the host state and the investor which contains consent to jurisdiction benefits from Article 72 and will not be affected by the Articles 70 and 71.'²⁰⁰ In addition, because of the consent between the parties, withdrawal itself does not avoid new claims from investors. Alternatively, if all withdrawing states seek to prevent foreign investors bringing a claim against them, then they have to remove their 'consent' from national laws, contracts, and from BITs.²⁰¹

In the cases outlined above, the states have officially withdrawn from the ICSID Convention. However, this does not mean that these states cannot subsequently be taken into investor-state arbitration. If the main aim of these countries is to close all doors to foreign investors, and stop them from accessing investment arbitration, then their aim will not be successful. The main reason for this is because other options are open to investors. For instance, according to Article 8 of the UK-Bolivia BIT, disputes between investors and host states can be settled under different institutions such as using the ICSID, or an Additional Facility of the ICSID, or the ICC, or using *ad hoc* arbitration under UNCITRAL Rules. For example, Article 13 of the UK-Bolivia BIT has a 'survival clause', whereby the BIT will be in force for

¹⁹⁷ *ibid.*

¹⁹⁸ Schreuer (n 174) 363.

¹⁹⁹ Article 25 'When the parties have given their consent, no party may withdraw its consent unilaterally.'

²⁰⁰ Schreuer, Malintoppi et al. (n 169) 1280.

²⁰¹ Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (Oxford, Oxford University Press 2018) 237.

twenty years after the termination of the BIT.²⁰² Similar BIT clauses exist between Canada and the Republic of Venezuela.²⁰³ Here, Article XII allows the parties to settle their investment disputes under ICSID Rules or Additional Facility Rules of the ICSID if either party is not party to the ICSID Convention. Furthermore, if these avenues are not available, then the parties are allowed to submit their disputes to an *ad hoc* tribunal, established under UNCITRAL Rules. Also, the dispute settlement hierarchy of each BIT must be followed.

As previously discussed, the BIT, the ICSID, and the Additional Facility Rules of the ICSID are the main dispute settlement mechanisms that parties can use. Otherwise, as in *Nova Scotia Power Incorporated v. Venezuela*²⁰⁴ a tribunal might request to apply the above mentioned rules, but then if they are not applicable, to apply UNCTIRAL rules. In this case, the Tribunal highlighted the importance of hierarchical dispute settlement mechanisms, explaining as follows:

ICSID or the Additional Facility Rules are adopted as the primary dispute resolution mechanism, and the Treaty only authorises access to UNCITRAL if ICSID or the Additional Facility Rules are not available. In the Canada-Venezuela BIT, the investor has no right to initiate proceedings under the UNCITRAL Arbitration Rules if arbitration under ICSID or the Additional Facility Rules is available. In such circumstances, the investor must initiate whichever ICSID procedure is applicable.²⁰⁵

Finally, after taking everything into account, it could be argued that withdrawing states cannot make a complete exit from international investment arbitration. The exit is only a 'partial exit' and that this kind of exit was not wanted by Bolivia and Ecuador. Therefore, exiting is more symbolic than material.²⁰⁶ The main reason for this is that after withdrawal, foreign investors can still file a claim against these countries. For instance, after officially withdrawing from the ICSID Convention, Bolivia faced different arbitration claims. These claims were submitted under UNCITRAL Rules. Specifically, the cases were as follows:

²⁰² UK-Bolivia, BIT, entered into force on 16 February 1990, Article 13.

²⁰³ Canada-the Bolivarian Republic of Venezuela BIT, entered into force in 1998.

²⁰⁴ *Nova Scotia Power Incorporated (Canada) v The Bolivarian Republic of Venezuela*, UNCITRAL Case PCA 35146, Award on Jurisdiction (22 April 2010).

²⁰⁵ *ibid* para 95.

²⁰⁶ Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, 'Backlash and State Strategies in International Investment Law' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge, Cambridge University Press 2018) 79.

- 1) *Guaracachi America, Inc. and Rurelec PLC v. Bolivia* (UNCITRAL, PCA Case No. 2011-17).
- 2) *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15).
- 3) *Iberdrola S.A. and Iberdrola Energía, S.A.U. v Bolivia* (UNCITRAL, PCA Case No. 2015-05).²⁰⁷

The main reason why Argentina has not submitted its withdrawal from the ICSID Convention might be because they have perceived that withdrawal would be ineffective, and they could still face investor-state arbitration. Therefore, withdrawal is not effective in terms of preventing claims.

Lastly, it should be noted that states that have withdrawn are still ratified by the New York Convention, which allows for winning parties to enforce awards under the national laws of states. Until now, withdrawing states have willingly exited from the ICSID Convention, but have not denounced the New York Convention. This kind of behaviour allows us to understand that some countries are not against investor-state arbitration under different institutions, but are against the ICSID Convention.

5.8. The Union of South American Nations (UNASUR)

After withdrawing from the ICSID Convention, Bolivia, Ecuador and Venezuela founded the UNASUR Centre for Investment Disputes. In their region, there are also other alternative institutions to the ICSID, such as The Members of the Bolivarian Alliance for the People of Our America (ALBA) which was created as an alternative to the ICSID Convention. In the context of this research, the main difference between ALBA and UNASUR, is that UNASUR is founded and promoted mainly by the Ecuadorian Government. In the case of Ecuador, its main aim in creating UNASUR was to change the ICSID's dispute settlement mechanism and set up an alternative arbitration centre.²⁰⁸

In 2009, at the 39th Session of the General Assembly of the Organisation of American States, Ecuador's Foreign Minister, Fander Falconi, suggested that UNASUR should create an

²⁰⁷ Jose Carlos Bernal Rivera and Mauricio Viscarra Azuga, 'Life After ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID (12/08/2017) *Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivia-withdrawal-icsid/> (Last accessed October 2018).

²⁰⁸ Silvia Karina Fiezzoni, 'UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal' (12 January 2012) *Investment Treaty News* <https://www.iisd.org/itn/2012/01/12/unasur/>.

arbitration centre for investor-state or state-to-state disputes, for twelve member countries²⁰⁹ who would be free from foreign tutelage.²¹⁰ UNASUR is a successor of the South American Community of Nations (CSN) which was created in 2004, but the organisation's name was changed to the Union of South American Nations (UNASUR) at the South American Energy Summit of April 2007.²¹¹ This dispute settlement centre is promoted by the Head of the Ecuadorian Government, but is supported and encouraged by other member countries of the union because the region decided that it needed its own arbitration centre for investment disputes. There might be several reasons for making this decision, but there are at least two known reasons why this region set up its own investor-state dispute settlement centre. First of all, nowadays, Latin American countries are not only capital importers but they are capital exporters.²¹² Therefore, they needed protection for their own investors in the region. Secondly, when this new Centre was set up, the ICSID Convention was not the most desired dispute settlement mechanism for the region. In relation to the ICSID Convention, among UNASUR member states, Argentina has been the Respondent in 54 cases, Venezuela in 45 cases, and Mexico in 21 cases, under both ICSID Additional Facility Rules and/or UNCITRAL Rules. In contrast, only three UNASUR member countries have been respondents in more than 120 cases. Under such conditions, at the end of 2010 in Guyana, UNASUR member states decided that Ecuador should work on a 'Dispute Settlement System' and prepare a draft treaty which would be discussed three months after the first meeting.²¹³

The Ecuadorian Government became Chair of UNASUR, a system of dispute resolution based on three documents as follows:

- 1) A set of proposed rules and operations for an arbitration centre.
- 2) The UNASUR Arbitrators and Mediators Code of Conduct.

²⁰⁹ Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

²¹⁰ Katia Fach Gomez, 'Latin America and ICSID: David Versus Goliath?' (2011) 17 Law and Business Review of the Americas 224.

²¹¹ The Official Website of UNASUR: History <https://www.unasursg.org/en/node/179> accessed on 4 October 2018.

²¹² Omar E Garcia-Bolivar, 'Permanent Investment Tribunals: The Momentum is Building Up' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 399.

²¹³ Maria Jose Luque Macias, 'Reliance on Alternative Methods for Investment Protection through National Laws, Investment Contracts and Regional Institutions in Latin America' in Steffen Hindelang and Markus Krajewski *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2015) 304-305; Silvia Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Convention' (2011) 2 Beijing Law Review 140.

3) A proposal for the creation of a legal dispute centre in the area of investment disputes for member countries.

In 2014, foreign ministers, finance ministers, consultants from the central banks, and general attorneys of the member countries consensually agreed on 80% of the proposal.²¹⁴ This meant that there was no still consensus on the whole draft of the proposed Treaty. Later on, it was clarified that the member countries could not reach agreement specifically on certain matters as follows:

- 1) On some definitions of ‘nationality’.
- 2) On state-to-state dispute settlement between member states.
- 3) Protecting or not protecting investors from the indirect actions of the host state.
- 4) The degree of transparency of the proceedings.
- 5) The recognition and enforcement of arbitral awards as issued by the Centre.
- 6) The composition of the list of arbitrators and mediators.
- 7) The availability of the appeal mechanism to the parties.
- 8) Whether an *ad hoc* of a permanent tribunal would be adopted as a form of dispute settlement to the Centre.²¹⁵

As noted previously, the creators of UNASUR found the ICSID Convention problematic, and so they aimed to draft a proposal that was easy to understand. Unfortunately, for English speakers it is only possible to read and comment on this proposal using secondary sources.²¹⁶ The proposed UNASUR Treaty works as follows:

- 1) Article 2 of the UNASUR Treaty does not affect other conflict resolution mechanisms and obligations contained within international agreements signed and ratified by the member countries.
- 2) Article 2 of the proposed Treaty's agreement can be interpreted as: if there are existing agreements (BITs, for instance) between parties, and if these agreements have not been

²¹⁴ TeleSUR ‘South America Forms Alternative to Free Trade Kangaroo Courts’ (19 January 2016) <http://www.telesurtv.net/english/news/UNASUR-Close-to-Forming-Investor-Dispute-Center20160119-0036.html/> (Last accessed October 2018).

²¹⁵ Alejandro Garcia Jimenez, ‘On the Settlement of Investment Disputes Between China and Latin America’ (2017) 34 China Legal Science 50.

²¹⁶ Silvia Karina Fiezzoni, ‘The Challenge of UNASUR Member Countries to Replace ICSID Arbitration’ (2011) 2 Beijing Law Review 134-144; Katia Fach Gomez and Catharine Titi, ‘UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement’ (2016) 7 (3) Investment Treaty News 3-7.

terminated, then the Centre cannot settle disputes between parties. As previously mentioned, terminating BITs is not an easy task, and can usually take between ten to twenty years.

- 3) The Centre has no jurisdiction for any disputes concerning health, the environment, education, taxation, and energy issues, unless they are specified in treaties between the member states.
- 4) There are no circumstances under which tribunals will be allowed to resolve any disputes that involve the national laws of the UNASUR member states.²¹⁷
- 5) Article 3 of the proposed Treaty requires investors to apply for an exhaustion of local remedies, which is prohibited under Article 26 of the ICSID Convention. As explained in the previous chapters the 'exhaustion of local remedies' rule has disadvantages for foreign investors, because, usually, investors do not want to use the national courts of a respondent (the host) state. Nevertheless, the positive side of this issue is that, by insisting on this rule, UNASUR member countries might improve the efficiency of their national courts.
- 6) UNASUR's prepared draft requires that before starting an arbitration process, parties must try to settle their disputes using mediation or negotiation during a six month period, unless otherwise agreed. If the parties are able to settle disputes during this six month period through mediation or negotiation, they will be asked to sign an agreement of settlement by the mediators, which will automatically complete the dispute (see Article 5). However, for some reason, dispute settlement mechanisms such as mediation, negotiation or consultation through diplomatic channels are promoted over arbitration, which is seen as a last option.²¹⁸
- 7) Article 6 of the proposed Treaty allows for a home state's involvement in investor-state arbitration at a UNASUR Centre. Specifically, before initiating the arbitration process, the investor must inform their home state that there might be a case to be brought against a host state, and the national state of the investor might then take on a mediation role and

²¹⁷ *ibid* Fiezzoni 140.

²¹⁸ Maria A Gwynn, 'Investment Disputes, Sovereignty Costs, and the Strategies of States: GEG Working Paper' (July 2017) 132 *The Global Economic Governance Programme* 18.

try to settle the dispute between the parties.²¹⁹ Here, there is the involvement of the home state of the investor in the dispute. This coin has two sides: one is that the home state will want to protect its own investors; and the second is that the national state of the investor would wish to settle the dispute between the parties as soon as possible, through diplomatic channels.

- 8) Article 19 of the Draft Treaty establishes the exclusivity of the UNASUR Arbitration Centre. This Article can be interpreted in two ways: firstly that, in submitting their disputes to the Arbitration Centre, all parties confirm that they will settle their disputes only through arbitration; or secondly, that all parties confirm that they will abandon the use of any other alternative dispute settlement mechanism in relation to their investment conflict. Accordingly, the same Article prohibits other parties (for instance, shareholders) from bringing a claim on the same matters to a different arbitration centre.²²⁰ In short, Article 19 tries to prevent '*treaty shopping*' among the parties, a tactic commonly used under the ICSID Convention.
- 9) The recognition and enforcement of awards is mentioned in Article 22 of the draft proposal. However, in this respect the members could not come to one conclusion and, therefore, enforcement issues are still to be negotiated between parties. For instance, Colombia and Venezuela proposed that arbitral tribunals should grant pecuniary compensation against the losing party.²²¹ Therefore, in this respect, the ICSID Convention is more successful in its recognition and enforcement mechanisms, which have been proficiently established. However, the proposed Treaty is similar to the ICSID Convention in how it treats the annulment of awards (see Article 52 of the ICSID Convention). According to the Draft Treaty, awards can be rendered in certain conditions which are very similar those specified in the ICSID Convention. These grounds are: a) If the arbitral tribunal was not properly constituted; b) if it exceeds its powers; c) if it is corrupt; d) if it lacks of rules of procedure; and e) if the award did not state the reasons upon which it was based.²²²
- 10) Lastly, it should be noted that ICSID awards are confidential and are not open to public scrutiny. However, Ecuador's proposed Draft Treaty (Articles 23-26) requires the

²¹⁹ Fiezzoni (n 198) 141.

²²⁰ *ibid.*

²²¹ Gomez and Titi (n 198) 3-7.

²²² Fiezzoni (n 198) 142.

arbitration process to be transparent. Specifically, all relevant evidence documents, records, hearings, and final awards should be available for public scrutiny. The only exception to this matter is for state special security and defence matters, which are to be mutually agreed by states.²²³

According to Ecuador's Draft Treaty, UNASUR's arbitration centre will settle disputes between states and between investors and states. This Draft Treaty favours the involvement of the home state more than other arbitration treaties do. This principle is, hypothetically, possible to put into practise, but in reality it will be difficult. For example, the member countries have not reached a consensus agreement yet about the terms of the Treaty, and this reveals the problem of differences of opinion and how to solve them. Moreover, there is a risk that if the home and host states involve themselves in investor-state disputes, it might end up in 'gunboat diplomacy' where only the strong parties will be able to protect their investors against the weaker more developing countries. In addition, Argentina and Brazil have a complicated relationship, punctuated by ups and downs and conflict, and both countries have their own reasons for joining UNASUR. On the one hand, Argentina wants to join because it sees an opportunity to reach certain goals, including cementing intellectual leadership in the region within UNASUR.²²⁴ On the other hand, it would not be wrong to claim that Brazil has not ratified the ICSID Convention but has ratified UNASUR. This is because Brazil is a leading country in the region and, in joining UNASUR, it seeks to retain this leadership, and solve almost all of its investment disputes using the Arbitration Centre of UNASUR.

Ecuador's proposed Draft Treaty and the ICSID Convention have similarities and differences. For this reason, UNASUR Arbitration has been described by some scholars as a 'hybrid' system of dispute settlement.²²⁵ However, the region's emerging 'hybrid system' might be useful for finding a solution to the problems of the ICSID Convention. Under this new 'hybrid' system, investors who do business in Latin America will be better served, because the system offers new alternative routes to solve their investment disputes.²²⁶ In the past, investors were limited in this scope, but now, within UNASUR, investors will have more

²²³ *ibid* 141.

²²⁴ Detlef Nolte and Nicolas Matias Comini, 'UNASUR: Regional Pluralism as a Strategic Outcome' (2016) 38 (2) *Contexto Internacional* 560.

²²⁵ Kendall Grant, 'ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration' (2015) 52 (3) (10) *Osgoode Hall Law Journal* 1149; Daniela Páez-Salgado and Fernando Perez-Lozado, 'New Investment Arbitration Centre in Latin America: UNASUR, a Hybrid Example of Success or Failure' (27 May 2016) <http://arbitrationblog.kluwerarbitration.com/2016/05/27/unasur/> (Last accessed September 2018).

²²⁶ *ibid* Páez-Salgado and Perez-Lozado.

options, and their lawyers will be able to make more relevant choices and decisions. At the same time, the 'hybrid mechanism' will satisfy more investment participants in the region and will allow for regional cooperation and collaboration in some conflicts, especially in bias and cost problems.²²⁷

In conclusion, it is worth mentioning that very positive progress has been made in the Latin American region, in their efforts to establish a regional arbitration centre. Nevertheless, this kind of regional institution for investment dispute settlements cannot be active from the first day of being established. For instance, in the 1980s, the Unified Agreement for the Investment of Arab Capital was signed among Arab States, and this came into force in 1985. This agreement established the Arab Investment Court, and the aims of the Agreement are similar to those of UNASUR, in that it allows the settlement of investment disputes between national investors of member countries.²²⁸ However, the Arab Court only began to operate in 2003, almost eighteen years after the agreement was signed. In 2003, a Saudi Company named Tanmiah Consultancy, Management & Marketing decided to sue the Tunisian Government.²²⁹ The Court's decision was rendered on 12 October 2004.²³⁰ The Arab Investment Court is not the only dispute settlement mechanism open to investors and member countries for settling disputes in the Arab world. In other words, the creation of the Arab Investment Court does not prevent the use of the ICSID Convention. For example, in *Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt Case*²³¹, a Kuwaiti investor sued Egypt and settled the dispute using an ICSID tribunal.

The examples given above confirm that creating a new dispute mechanism establishment does not happen 'overnight', and that the process needs time. However, ultimately, there will be lots of advantages for UNASUR member states in having their own dispute settlement centre. One of the main advantages is that the Centre will be owned by Latin American countries, which is better for the business interests of the region. At the same time, it would be premature to argue that the system will be successful and that it will meet the expectations of the parties that use it. As one scholar has claimed that, 'it is hard to know whether they

²²⁷ Grant (n 207) 1149.

²²⁸ Unified Agreement For the Investment of Arab Capital in the Arab States, League of Arab Agreement Article 29 of the (1981)

²²⁹ *Tanmiah v. Tunisia Case*, The Arab Investment Court (2006) 7 JWIT 699

²³⁰ Walid Ben Hamida, 'The First Arab Investment Court Decision' (2006) 7 (5) The Journal of World Investment & Trade 700.

²³¹ *Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt*, Parties Settle their ICSID Claim, ICSID Case No. ARB/11/6 (2016).

will be able to sustain and strengthen their efforts, or will, with time, simply fade in the background.’²³²

5.9. Conclusion

The fundamental focus of this chapter was to identify the concept of DP and to analyse the characteristics and distinguishing features of the ICSID. This chapter also focused on examining the political aspects of investment arbitration for both developing countries and developed countries. Moreover, a textual and contextual analysis of Articles 71 and 72 of ICSID was undertaken. It can be concluded that alternative institutions to the ICSID are available for use in certain jurisdictions, such as the UNASUR.

²³² Micheal Shifter, ‘The Shifting Landscape of Latin American Regionalism’ (2012) 111 *A Current History* 56

Chapter Six: Enforcement Mechanisms Used in Investor-State Disputes

6.1. Introduction

In the new global world of trade, an increase in the number of international investments has also increased the possibility of international disputes occurring between investors and host states. There are several dispute resolution methods that are available to resolve disputes, such as diplomatic protection, bringing a case against a host state in the national courts, and international investment arbitration. International investment arbitration is one of the most effective methods for the resolution of international investments disputes. In recent years, investment arbitration has become more popular, and is usually used by international investment communities after signing international treaties, such as BITs and MITs. Because of these international treaties, investors can now obtain arbitral awards in compensation for damages arising from the actions or acts of omission of host states. In order to obtain desirable coverage, investors need effective enforcement mechanisms. There are several judicial and extra-judicial solutions that can be used to resolve disputes between investors and states. However, questions have been raised as to whether the mechanisms currently available are effective for solving the problem of the enforcement of international investment arbitral awards. In this chapter, issues relating to the timely and effective enforcement of investment arbitration awards will be explored, together with the different judicial and extra-judicial methods available to a winning party.

6.2. The Power of the ICSID When Granting a Stay of Enforcement

The aim of arbitration is to enforce awards voluntarily. However, it is in the interests of all parties to achieve a binding award, and to contractually enforce an award.¹ The most valuable characteristics of arbitration are its role in enforcing awards and the goal of satisfying disputing parties.² Enforcement mechanisms are the most important elements of an effective system of dispute resolution.³ In other words, the effectiveness of international arbitration

¹ Christoph Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 1099.

² *International Arbitration Survey: Improvements and Innovations in International Arbitration* (Queen Mary University of London School of Arbitration and White & Case 2015) 2.
www.arbitration.qmul.ac.uk/docs/164761.pdf (Last accessed February 2017).

³ Alan S Alexandroff and Ian A Laird, 'Compliance and Enforcement' in Peter Muchlinski, Federico Ortino and et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1172.

ultimately depends on whether an arbitral award can be enforced.⁴ At the same time, one of the first questions usually posed to counsel by clients is whether and how an award can be enforced.⁵ ‘Recognition’ and ‘enforcement’ tools are a necessity when the losing party will not honour an award, and the enforcement of an award is often needed by claimants in order to obtain the fruits of victory.⁶ If the losing party refuses to pay an arbitral award, then the successful party finds they have earned a hollow victory.⁷ These unexpected surprises can be reduced if enforcement mechanisms are available. Nowadays, winning parties can refer to different international conventions, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention of 1958), or the ICSID Conventions. Before these conventions were introduced, individuals had substantive duties or rights under international law, but they could not enforce their rights directly on the international stage.⁸ However, in the last decades, the international community has promoted multilateral co-operation in order to ensure uniform and simplified enforcement and recognition procedures for arbitration awards.⁹

Those who draft international conventions believe that in order to meet the concerns of all parties, it is necessary to create a special enforcement regime for awards of investment arbitration.¹⁰ However, achieving this goal poses challenges, because all parties are not always in an equal position (in state-to-state arbitration). Secondly, any convention must address the legal obligations of different legal systems. In other words, although states might be party to a convention, investors are not always party to the same convention. This is broadly explained by Professor Lauterpacht as follows:

For the first time a system was instituted under which non-state entities - corporations or individuals - could sue states directly; in which state immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host state; in which the operation of the local remedies rule was excluded; and in

⁴ Alber Jan Van Den Berg, ‘Recent Enforcement Problems under the New York and ICSID Convention’ (1989) 5 (1) *Arbitration International* 2.

⁵ R Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet Publishing, 2009) 3.

⁶ Christopher Dugan and Don Wallace Jr. et al., *Investor-State Arbitration* (Oxford University Press 2008) 675.

⁷ Andrea K Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes’ (2010) 21 *The American Review of International Arbitration* 211.

⁸ Norgaard Carl Aage, *The Position of the Individual in International Law* (Munsgaard 1962) 82.

⁹ Frank G Dawson and Ivan L Head et al., *International Law, National Tribunals and the Rights of Aliens* (Syracuse University Press 1971) 283.

¹⁰ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) *ICSID Review - Foreign Investment Law Journal* 301-302.

which the tribunal's award would be directly enforceable within the territories of the state parties.¹¹

In the early 1960s, when the ICSID Convention was being drafted, one other important treaty, the New York Convention (1958), had just entered into force. At the time, the New York Convention was coined the most effective example of international legislation in the entire history of commercial law.¹² However, the founders of the ICSID did not want to apply the New York Convention as an enforcement tool in investor-state arbitration. Nevertheless, the New York Convention was the only successful enforcement mechanism in place for awards given in commercial and investment disputes. In the very first Working Paper of the Draft ICSID Convention¹³, it is suggested that awards rendered under the Convention will be granted the 'most favorable treatment', whether or not a country's 'internal law' is pursuant to the, 'Geneva Convention of 1927 on the execution of foreign arbitral awards, or the New York Convention'.¹⁴ Moreover, this is confirmed in the annulment proceedings of *Compañía de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* as follows:

[O]ne of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention governing commercial arbitration in the Member States.¹⁵

Generally speaking, in the early days of the Convention, the question of 'enforcement' was qualified as 'somewhat academic'¹⁶ and it was never a concern for the founders.¹⁷ Indeed, it was estimated that member states of the Convention would abide by and comply with awards voluntarily and this would not pose practical problems.¹⁸ The main reason behind this

¹¹ Elihu Lauterpacht, Foreword to *The ICSID Convention: A Commentary* (Cambridge University Press, October 2008) ix.

¹² Marika Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 1.

¹³ Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors on 5 June 1962 in *Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention (The History of the ICSID Convention)* (1968) II (1) Documents 1-43 (Washington D C) 19-46.

¹⁴ *ibid* 46.

¹⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* ICSID Case No. ARB/97/3, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007, para 35, (Rule 54 of the ICSID Arbitration Rules) 15.

¹⁶ The History of the ICSID Convention (n 13) 304.

¹⁷ Stanimir A Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 326.

¹⁸ Schreuer (n 1) 1107.

expectation was that, at the time, the ICSID was one of five organisations of the World Bank Group, and this was supposed to provide confidence that disputing parties would resolve matters, and that awards would be executed voluntarily. However, policy makers among the World Bank's staff perceived that it was necessary to apply the principles of 'disputes over defaults on external debt', 'expropriation', and 'breach of contract' if there might be harm to a country's international credit standing. This also applied if the country was not making reasonable efforts to settle external debt disputes that had a significant effect on the country's creditworthiness, or on its ability to implement bank financed projects or service bank loans.¹⁹ Nevertheless, there was no broadly accepted policy or statements to apply to the non-payment of awards, and there was no one single enforcement tool. The only consideration was that conduct by the parties might lead to an adverse reaction from other states and might affect the standing of the state concerned in the international business community.²⁰ This is confirmed in *Mr. Patrick Mitchell v Democratic Republic of Congo* as follows, '...a state's refusal to enforce an ICSID award may have a negative effect on this state's position in the international community with respect to the continuation of international financing or the inflow of other investments.'²¹

If the ICSID Secretariat or, occasionally, the World Bank is informed of a delay in the paying of an award, then the Secretariat or the Bank must remind the debtor party of the importance of fulfilling obligations under the Convention.²² For these reasons, when the ICSID Convention was founded, the drafters' main purpose was to ensure that no party could impair the validity of the award once the post-award remedies had been exhausted.²³ With this aim in mind, the authors of the Convention established, 'a complete, exclusive and closed jurisdiction system from national law' for arbitration proceedings, awards and the review of awards.²⁴ Also, the recognition and enforcement of awards is now a, 'required interaction of international and domestic law' and this has led to the creation of a, 'mixed juridical

¹⁹ Operational Manual, 'Disputes over Defaults on External Debt, Expropriation, and Breach of Contract', OP 7.40 para 2 <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b08231b9e1.pdf> accessed 16 January 2017.

²⁰ Schreuer (n 1)1107; Alexandrov (n 17) 327.

²¹ *Mr Patrick Mitchell v Democratic Republic of Congo* ICSID ARB/99/7, Decision on the Stay of Enforcement of the Award rendered on 9 February 2004, para 41.

²² Antonio R Parra, 'The Enforcement of ICSID Arbitral Awards' in R Doak Bishop (n 5) 137-138.

²³ Ruqiya B H Musa and Martina Polasek, 'The Origins and Specificities of the ICSID Enforcement Mechanism' in Julien Fouret (ed) *Enforcement of Investment Treaty Arbitration Awards* (Global Business Publishing Ltd, 2015) 17.

²⁴ Broches (n 10) 288.

structure.²⁵ Sometimes enforcement processes are seen as being of interest to the host states more than to private parties, and as a means by which successful states can enforce awards against private parties.²⁶ However, the obligation to comply by awards applies equally to both parties, and there is no difference between a host state and a foreign investor in this respect.²⁷

In general, the ICSID does not have any formal role with regard to the enforcement of ICSID awards.²⁸ Nevertheless, the language of the Convention imposes two separate obligations: *Firstly*, it requests disputing parties to comply with an award. Article 53 (1) of the Convention states the following:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.²⁹

Article 53 restates the principles of the customary international laws of *pacta sunt servanda* and *res judicata*.³⁰ *Res judicata* is one of the most essential and settled rules of law used in international tribunals.³¹ According to this principle, parties may not seek any other remedies before any tribunal, until the awards are binding in all contracting states. In other words, ICSID awards are not subject to review, and when the award is rendered, the losing party must comply with it immediately.³² These characteristics make it impossible to imagine that any other awards could be more authoritative.³³ At the same time, this self-contained regime does not completely isolate the ICSID Convention from general international law and domestic rules. These rules are relevant, and the provisions of the Convention are to be interpreted according to the customary rules on treaty interpretation as reflected in Articles

²⁵ *ibid* 288.

²⁶ History of the ICSID Convention (n 13) 304.

²⁷ Schreuer (n 1) 1106.

²⁸ David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012/2013) OECD Working Papers on International Investment (OECD Publishing) 32.

²⁹ The ICSID Convention (1965) Art 53 (1).

³⁰ Broches (n 10) 287.

³¹ Andreas Zimmermann and Christian Tomuschat et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 1471.

³² Martin Hunter and Javier Garcia Olmedo, 'Enforcement/Execution' of ICSID Awards against Reluctant States (2011) 12 *The Journal of World Investment & Trade* 309.

³³ Kristina Andelic, 'Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead', in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff and Hotei Publishing 2015) 499.

31-33 of the Vienna Convention on the Law of Treaties (VCLT).³⁴ Also, the finality of the decision must be balanced against the need to ensure that justice has been administered fairly.³⁵ The only exceptions are stated in Article 53 (2), which allows disputed parties to analyse awards if there is disagreement on the interpretation (Article 50), or revision (Article 51), and annulment by an *ad hoc* committee appointed by the panel of ICSID arbitrators (see Article 52).

Secondly, according to Article 54 member states of the Convention must recognise and enforce/execute awards. However, in terms of ‘enforcement’ and ‘execution’, it is crucial to emphasise that there is no clear picture as to how these two terms should be treated, namely, either synonymously or separately.³⁶ Schreuer argues that in the case of Article 54 of the Convention, the words are essentially identical in meaning.³⁷ Article 54 requests the enforcement of pecuniary obligations, which apply to member states of the Convention, including host states, but not investors. However, it would be wrong to conclude from this provision that an ICSID tribunal cannot order non-pecuniary relief when it deals with every question submitted to them.³⁸ The article acknowledges state responsibility to implement adequate legislation in order to ‘recognise’ and ‘enforce’ awards, but Article 54 does not prescribe any particular method to be followed in domestic implementation, even though it requires each member state meet the requirements of the Article.³⁹ Article 54 (1) states the following:

Each contracting state shall recognise 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.⁴⁰

The language of the Convention implies that only final judgments are enforceable for

³⁴ Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015) 98

³⁵ Emmanuel Gaillard (ed), *The Review of International Arbitral Awards*, IAI Series on International Arbitration N6 (JurisNet and International Arbitration Institute 2010) 1.

³⁶ Hunter and Olmedo (n 32) 309.

³⁷ Schreuer (n 1) 1135.

³⁸ Christopher Schreuer, ‘Non-Pecuniary Remedies in ICSID Arbitration’ (2004) 20 (4) *Arbitration International* 325.

³⁹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) para 42.

⁴⁰ ICSID Convention (1965) Art 54 (1).

member states. Professor Schreuer notes that the finality of awards excludes any examination of their compliance with international public policy or international law in general.⁴¹ At the same time, the Convention does not oblige a contracting state to execute an ICSID award if an equivalent judgment in its own courts cannot be executed (Article 54 (3)).⁴²

It is understandable that a key ingredient in the validity of any judgement, of course, is the jurisdiction of the original court, and the lack of such jurisdiction in the foreign court is one of the principal grounds upon which the enforcement of foreign judgements is denied.⁴³ But, it is remarkable that Article 54 enforcement arises when there is a breach of Article 53.⁴⁴ Particularly, Article 54 comes into play only when the losing party violates Article 53 and refuses to comply with an award.⁴⁵ In fact, Article 54 does not allow a losing state to avoid its obligation under Article 53, and it is obliged to satisfy an ICSID award in full.⁴⁶ However, the ad hoc committee in *Enron Corporation Ponderosa Assets, L.P v Argentine Republic*, refused this principle, claiming that, ‘The obligations under Articles 53 and 54 are separate and independent.’⁴⁷ Moreover, the same committee defined its position and differentiates Article 53 and Article 54. The Argentine Government stated the following:

Articles 53 and 54 of the ICSID Convention complement each other and have to be read in conjunction. According to Argentina, Article 53 of the ICSID Convention establishes the final and binding nature of ICSID Awards while Article 54 establishes the way in which ICSID Awards have to be complied with.⁴⁸

This theory was rejected in a letter from the United States Department of State to Ms. Claudia Frutos-Peterson, Secretary of the Ad Hoc Committee. In *Siemens v. Argentina*, Argentina makes an incorrect interpretation of Articles 53 and 54 of the ICSID Convention.⁴⁹ As

⁴¹ Schreuer (n 1) 1141.

⁴² Lucy Reed, Jan Paulsson et al., *Guide to ICSID Arbitration* (2nd Edn, Kluwer Law International 2010) 185.

⁴³ Dawson and Head (n 9) 257.

⁴⁴ Schreuer (n 1) 1106.

⁴⁵ Alexandrov (n 17) 322; Guido S. Tawil, ‘Binding Force and Enforcement of ICSID Awards: Untying Articles 53 and 54 of the ICSID Convention’ in Albert Jan Van Den Berg (ed.) *50 Years of the New York Convention: ICCA International Arbitration Conference* (ICCA Congress Series 14, Kluwer Law International 2009) 331.

⁴⁶ *ibid* Tawil 331.

⁴⁷ *Enron Corporation Ponderosa Assets L.P v Argentine Republic*, ICSID Case Number ARB/01/3, Annulment Proceeding, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award rendered on 7 October 2008, para 75 (Rule 54 of the ICSID Arbitration Rules) 36.

⁴⁸ *ibid* para 56.

⁴⁹ Department of State of U.S., Office of the Legal Adviser International Claims & Investment Disputes, Letter from United States Department of State to Ms. Claudia Frutos-Peterson, Secretary of the Ad Hoc Committee in *Siemens v. Argentina* (1 May 2008) para 7, 3 available at <http://ita.law.uvic.ca/documents/Siemens-USsubmission.pdf/> (Last accessed February 2017).

discussed above, the interrelation between Articles 53 and 54 has sparked debate among scholars and has raised questions at tribunals. Alexandrov tries to give an explanation in order to clarify the two articles, stating that the two obligations should not be conflated, and under Article 54, the enforcement mechanism cannot be interpreted so as to weaken or diminish obligations under Article 53.⁵⁰ Broches promotes a similar view as follows; ‘Just as Article 53 affirmed the absolute binding force of the award on the international law level, Article 54 affirms its external finality, i.e., vis-à-vis domestic courts. The award is *res judicata* in each and every contracting state.’⁵¹ In addition, Broches claims that, ‘in the absence of this article, ICSID awards would be probably regarded as ‘foreign awards’ for the purposes of recognition or enforcement in all states, including the states party to the dispute, and the state whose national was the other party to the dispute.’⁵²

It is essential to note that the recognition and enforcement of awards can be initiated at the same time in different countries, but with the condition to avoid double or multiple recoveries. The ICSID Secretariat published Case Load statistics from 1972 to until 31 December 2016, and these show that more than 534 investment disputes were registered with the ICSID.⁵³ However, there were only nine cases where it was publicly known⁵⁴ that enforcement mechanisms were demanded and availed for private parties.⁵⁵ In other words, these statistics confirm that the ICSID’s practise to award creditors has been successful in obtaining the recognition and enforcement of ICSID awards. It would not be wrong to assume that this significant degree of voluntary compliance is, probably, due the fact that

⁵⁰ Alexandrov (n 17) 325.

⁵¹ Aron Broches, ‘The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’ (1972) 136 (II) *Recueil des Cours de L’Academie de la Haye (Collected Courses of the Hague Academy of International Law)* (A W Sijthoff 1972) 400.

⁵² *ibid* 401.

⁵³ ICSID Case Load-Statistics (Issue 2017-1) Part 1, 8

[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) accessed 27 February 2017.

⁵⁴ *SARL Benvenuti & Bonfant v People’s Republic of the Congo*, ICSID Case Number ARB/77/2, Award (8 August 1980); *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, ICSID Case Number ARB/82/1, Award (1988); *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, ICSID Case Number ARB/83/2, Award (1986); *AIG Capital Partners Inc. and Another v Republic of Kazakhstan*, EWHC Comm 2239 (2005); Order of the Federal District of New York in *Siag v The Arab Republic of Egypt* Number M-82, 2009 WL 1834562 (S.D.N.Y. June 19 2009); *Sempra Energy Int’l v Argentine Republic*, Number M-82 (S.D.N.Y. Nov 14 2007); *Enron Corp. v Argentine Republic*, Number M-82 (S.D.N.Y. Nov 20 2007); Blue Ridge of Investments, LLC as a purchaser and assignee of the Award rendered in favour of CMS in the case *CMS v Argentina*; *Ares International Srl and MetalGeo Srl*, ICSID Case Number ARB/05/23, Award (28 February 2008) as mentioned in para 8 of *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Case Number ARB/05/18 and ARB/07/15, Decision of the Ad Hoc Committee on the Stay of Enforcement of Award (12 November 2010).

⁵⁵ Inna Uchkunova and Oleg Temnikov, ‘Enforcement of Awards under the ICSID Convention: What Solutions to the Problem of State Immunity?’ (2014) 29 (1) ICSID Review 200.

effective international enforcement measures are generally available to the winning party.⁵⁶ Furthermore, in practise, the payments of the awards are, mostly, kept confidential, and even if the successful party is not paid promptly, they hesitate to make the fact known.⁵⁷ Indeed, to date, no ICSID award has been refused for recognition and enforcement in national courts.⁵⁸

In conclusion, Alexandroff and Laird argue that without the touchstones of legal rules, such as the principles of *pacta sunt servanda* or *good faith*, it would be impossible to designate the rules as a ‘law’, rather than simply ‘politics’ or ‘diplomacy’.⁵⁹ In this context, it would not be wrong to argue that the ‘enforcement’ mechanism is one of the touchstones of the Convention, and without this instrument it would be very difficult to achieve success in investment arbitration.

6.3 Enforcement Against the Assets of State-Owned Enterprises (SOEs)

It is estimated that 22% of the world’s largest 100 firms are now effectively under state control.⁶⁰ State Owned Enterprises (SOEs) are continuing to increase their investments and are becoming leading players in the international investment sector.⁶¹ Sovereign investors tend to make long-term investments that are associated with a taking high risks.⁶² Usually, it is government policy to support sovereign investors, but in limited circumstances, they might grow more than expected, especially in energy sectors. For instance, the Iraq Petroleum Company (an SOE) has developed to such an extent that they have the power of a ‘state within a state’.⁶³ For this reason it would be wrong to put SOEs and private companies in the same category, because they are different. When there is a good relationship between the home and host states, then private investors and SOEs can take advantage of this, but it is SOEs that benefit more.⁶⁴ This shows that by investing abroad, SOEs do not take the same degree of political risk as private investors. However, in rare circumstances, they may have fears that, ‘they might be subject to discriminatory or arbitrary governmental, regulatory or

⁵⁶ Van Den Berg (n 4) 2.

⁵⁷ Antonio R Parra, ‘The Enforcement of ICSID Arbitral Awards’ in R Doak Bishop (n 5) 136.

⁵⁸ Sylvia Tordova and Baiju S Vasani, ‘Enforcement of Investment Treaty Awards against Assets of States, State Entities and State-Owned Companies’ in Fouret (n 23) 90.

⁵⁹ Alexandroff and Laird (n 3) 1172.

⁶⁰ OECD, *State Owned Enterprises as Global Competitors A Challenge or an Opportunity* (2016) 13.

⁶¹ UNCTAD, *World Investment Report 2013, Global Value Chains Investment and Trade for Development* (United Nations, Printed in Switzerland 2013) 13.

⁶² Peter Kunzel et al., ‘Investment Objectives of Sovereign Wealth Funds: A Shifting Paradigm’ in *IMF Working Paper No. 11/19* (International Monetary Fund 2010) 5.

⁶³ Paul Stevens, ‘National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle’ (2008) I (1) *Journal of World Energy Law & Business*, 11.

⁶⁴ Jing-Lin Duanmu, ‘State-owned MNCs and host country expropriation risk: The role of home state soft power and economic gunboat diplomacy’ (2014) 45 *Journal of International Business Studies* 1056.

administrative treatment motivated more by political considerations than by genuine cause to be concerned with the nature, scope or purpose of their operations.⁶⁵

Private investors often do not have strong political support and do not expect their interests to be protected by their home state over a short period of time.⁶⁶ However, some SOEs might make use of relevant ministries to take diplomatic action to ask for special support or help from the host state. In practise, if it is necessary, they might sign a special treaty for one specific project. For instance, on 7th of September 1994, The Russian Federation and Ukraine signed the Treaty for Co-operation in the Development of Fuel and Energy Complexes. This shows that sovereign investors have power to conclude special treaties for specific projects.⁶⁷ However, it does not mean that sovereign investors are always welcomed or appreciated in the host state. Sometimes, they are not allowed to invest in ‘strategic’ or ‘sensitive’ industries because of concerns about the national security of the host state, transparency, moving sovereign wealth funds (SWFs) in or out of the markets, and the possibility of distorting asset prices and protectionism concerns about fuelling FDI.⁶⁸ From another point of view, it could be argued that SOEs are not welcome in vital areas of investment because they are perceived as a threat when they are fully owned by foreign governments, or when they do not have any commercial objectives in the host state.⁶⁹ Nevertheless, this does not mean that prohibiting countries are against investment in their home state; rather they are trying to stabilise their markets and protect their national interests.

Poulsen argues that rather than opposing sovereign investors, states should balance their defensive and offensive state interests.⁷⁰ But, in this respect, governments often have different policies regarding SOEs. For instance, in the USA ownership restrictions are placed on particular sectors, such as energy, shipping, air transportation, telecommunications, and

⁶⁵ Paul Blyschak, ‘State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected?’ (2011) 6 (2) *Journal of International Law and International Relations* 14; Lu Wang, ‘Non-Discrimination Treatment of State-Owned Enterprise Investors in International Investment Agreements?’, (2016) 31 (1) *ICSID Review* 45-57.

⁶⁶ Jing-Lin Duanmu (n 64).

⁶⁷ Sabine Konrad, ‘Protection of Investments Owned by States’, in Bungenberg and Jorn Griebel et al. (eds) *International Investment Law: A Handbook* (Nomos Verlagsgesellschaft 2016) 546.

⁶⁸ Wouter P F Schmit Jongbloed ‘Sovereign Investment: An Introduction’ in Karl P Sauvant et al. (eds) *Sovereign Investment: Concerns and Policy Reactions* (Oxford University Press 2013) 10-16.

⁶⁹ Sebastian Miroudot and Alexandros Ragoussis, ‘Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds’ in Roberto Echandi and Pierre Sauve, *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 58.

⁷⁰ Lauge N Skovgaard Poulsen, ‘States as Foreign Investors: Diplomatic Disputes and Legal Fictions’ (2016) 31 (1) *ICSID Review* 14.

financial services.⁷¹ Moreover, the 2012 US Model BIT clearly notes that, ‘Nothing in this Treaty shall be construed to preclude a party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.’⁷² Similar policies operate in other countries, such as Canada, Germany and Russian Federation.

As it was noted earlier, SOEs expect to be treated and protected like individual private investors. Some BITs allow and expressly provide that SOEs are investors, and they can bring claims against host states. For instance, in the Free Trade Agreement (FTA) of the United States of America - Republic of Korea Article 11.28, the definition of investor is given as, ‘Investor of a party means a party or state enterprise thereof, or a national or an enterprise of a party, that attempts to make, is making, or has made an investment in the territory of the other party...’⁷³ Another example can be cited from the China-Mexico BITs where an ‘enterprise’ is defined as, ‘any entity constituted or organised under the applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.’⁷⁴ However, those who draft BITs still need to consider whether the BITs may require adjustments to substantive treaty protections.⁷⁵

It is interesting to note that Article 25 (1) of the Convention on the jurisdiction of the ICSID permits the settling of disputes between a contracting state of the Convention and a national of another member state. The Convention does not allow the settling of conflicts between SOEs operating as a government agency, and another state. In other words, the ICSID cannot be used as a mechanism to resolve disputes between private parties or between states. It is clearly noted that the ICSID excludes any claims by states against other states, even in a subrogation context.⁷⁶ In the case of SOEs, if the respondent has attribution to the state, only in these cases will the ICSID have jurisdiction. However, in investment arbitration it is rare that SOEs that act as a claimant submit to ICSID arbitration, as in the case of *CSOB v Slovak*

⁷¹ Jongbloed (n 68) 19.

⁷² The US 2012 Model BIT, Art 18 (2).

⁷³ Free Trade Agreement between the United States of America and the Republic of Korea (30 June 2007) Article 11.28.

⁷⁴ Agreement Between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection Of Investments (11 July 2008) Art 1.

⁷⁵ Lauge N Skovgaard Poulsen, ‘Investment Treaties and the Globalization of State Capitalism: Opportunities and Constraints for Host States’ in Roberto Echandi and Pierre Sauve (n 69) 81.

⁷⁶ Mark Feldman, ‘State Owned Enterprises as Claimants in International Investment Arbitration’ (2016) 31 (1) ICSID Review 25.

Republic.⁷⁷ In this case, the Respondent argued that CSOB's major shares were owned by the Czech Republic and that it was performing state functions. For this reason, they were not private investors, and their dispute was handled as a state-state dispute, and not as an investor-state dispute.⁷⁸ After analysing the functions of the CSOB, the Tribunal focused on the activities of the Claimant and concluded that the actions taken by the Claimant promoted government policies and/or the purpose of the State, but were commercial rather than governmental in nature.⁷⁹ From a tribunal's perspective, focus must be on the nature of the activities and not on the purpose.⁸⁰

In different cases, ICSID tribunals⁸¹ will apply *prima facie* tests and confirm jurisdiction, unless the responding state is able to show the 'manifest absence of a link' to the SOE.⁸² Architect of the ICSID Convention, Broches, claims the following:

For the purpose of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another contracting state' unless it is acting as an agent for the government or is discharging an essentially governmental function.⁸³

Broches' words can be simplified as: if the SOE is an *agent for the government* or is *discharging an essentially governmental function* then ICSID Convention will not apply, and will not be able to protect an investment. Nonetheless, it should be noted that Broches' test is not enough to determine if there is a link between an SOE and a respondent state.

In practise, tribunals may apply different kinds of influential tests. An example can be given in the case of *Maffezini v Spain*, where the Tribunal applied two analyses: (a) whether the conduct of the entity is 'governmental' and is empowered by the internal law of the state, or

⁷⁷ *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic*, ICSID Case Number ARB 97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999).

⁷⁸ *ibid* para 22.

⁷⁹ *ibid* para 20.

⁸⁰ *ibid*.

⁸¹ *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case Number ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para 146; *Noble Energy Inc and Machala Power Cia Ltda v Ecuador and Consejo Nacional de Electricidad*, ICSID Case Number ARB/05/12, Decision on Jurisdiction (5 March 2008) paras 165 and 166; *L.E.S.I. SpA and ASTALDI SpA v People's Democratic Republic of Algeria*, ICSID Case Number ARB/05/3, Decision on Jurisdiction (12 July 2006) para 78.

⁸² Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) Chinese Journal of International Law 558.

⁸³ Broches (n 51) 355.

(b) whether an entity is an organ of the state, or whether its acts may be attributed to the state.⁸⁴

It is worth noting that in the case of *Adel A. Hamadi Al Tamimi v Sultanate of Oman*, a dispute arose due over the investment of the USA citizen Mr Adel A Hamadi Al Tamimi in the development of a limestone quarry in Mahda, Oman.⁸⁵ The Claimant's lease agreement was signed via his two companies Emrock Aggregate and Mining LLC (Emrock) and SFOH Limited (SFOH), with the Omani state-owned enterprise Oman Mining Company LLC (OMCO).⁸⁶ OMCO was established in 1981 and the Omani Ministry of Oil and Minerals mainly owns it.⁸⁷ The dispute between the parties started because of Article 10.15 of the Free Trade Agreement (FTA), and when OMCO terminated the lease agreement of the Claimant. In this dispute, Mr Al Tamimi presented two main arguments: Firstly, regardless of OMCO's status, the actions of the Ministry of Environment and Climate Affairs precipitated and purported lease termination; and, secondly, OMCO is in fact an organ of the Omani State.⁸⁸ Therefore, the Claimant attempted to attribute all the charges to the Sultanate of Oman, under the principles of customary international law.⁸⁹ The Tribunal took the view that OMCO was a state-enterprise,⁹⁰ but it would not permit the attribution of the actions of OMCO to the Sultanate of Oman.⁹¹ In addition, the Tribunal confirmed that OMCO had been established as a 'limited liability company' under company law act of the country, with the purpose of exercising ordinary commercial activities.⁹² Moreover, for the Tribunal, OMCO's conduct in terminating the lease agreement was nothing more than what it was expressed to be a commercial response to the Claimant's alleged various and repeated breaches of contract.⁹³ Here, it is seen that the Tribunal applied Broches' test and decided that OMCO's decision was not linked to the Government, even if a Ministry of the State owned 99% of the

⁸⁴ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case Number ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 78-79, 29.

⁸⁵ *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case Number ARB/11/33, Award (3 November) 2015.

⁸⁶ *ibid.*

⁸⁷ *ibid* para 52.

⁸⁸ *ibid* para 156.

⁸⁹ *ibid* para 159.

⁹⁰ *ibid* para 317.

⁹¹ *ibid* para 316.

⁹² *ibid* para 326.

⁹³ *ibid* para 333.

company. Here, the main rule applies that if the entity is not a state then it is an investor, and if it is an investor then it is not a state.⁹⁴

As previously noted, SOEs are taking advantage of their home state's support and protection in host countries, whereas this is not the case for private investors. Moreover, if another state is 'behind' the investment, then the host state will not interfere with the investment, and in cases of enforcement, then SOEs have more chance of gaining enforcement at state-state level in comparison with private investors.⁹⁵ However, this can be regarded as two sides of the same coin, and in limited situations SOE assets may be attached to satisfy an award against the home state of the enterprise. The execution against an SOE is not easy task, however, especially if the home state has used the SOE as a shield.⁹⁶

Although the above does not apply to ICSID cases, there is a precedent where a winning private party were able to enforce an award against an SOE, including the home state of the enterprise. In *TMR Energy Ltd v State Property Fund of Ukraine*,⁹⁷ the TMR (Cyprus) company obtained an award against the State Property Fund of Ukraine (SPF), which is an SOE of the Ukraine. In this case, the Court applied different tests to identify whether the SPF was an organ of the Ukrainian State. Briefly, the Court found that the Parliament of Ukraine created the SPF and it was body of the State, and the budget of the SPF was paid by the budget of the Ukraine.⁹⁸ This allowed the winning party to enforce the award against the home state of the enterprise.

In general, an ideal award leaves each side believing it has won.⁹⁹ However, it is not an easy task for a tribunal to satisfy both disputing parties. In investor-state arbitration, the disputing parties know that if the losing party does not comply with the award voluntarily, then their asset might be seized using legal enforcement proceedings, wherever property exists. Otherwise, the award 'floats' until enforcement seeks to anchor it within a given legal system.¹⁰⁰ It is strongly encouraged that parties (for both political and economic reasons)

⁹⁴ Konrad (n 67) 553.

⁹⁵ *ibid* 547.

⁹⁶ Tonova and Vasani (n 58) 97.

⁹⁷ *TMR Energy Limited v State Property Fund of Ukraine* 411 F 3d 296 (DC Cir 2005).

⁹⁸ *TMR Energy Limited v. State Property Fund of Ukraine*, (United States of Court of Appeals, No-03-7191, June 17, 2005) <http://caselaw.findlaw.com/us-dc-circuit/1182433.html> (Last accessed August, 2017).

⁹⁹ Jeremy P Carver, 'The Strengths and Weaknesses of International Arbitration Involving a State as a Party: Practical Implications' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Queen Mary University of London 1986) 270.

¹⁰⁰ David D Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 *The American Journal of International Law* 118.

comply with arbitral awards voluntarily.¹⁰¹ Commonly, non-compliance of awards is minimised internationally, but cannot be avoided. As mentioned earlier, when an award is granted, it becomes an executing title.¹⁰² This final award can be enforced against the property of the investor without any struggle. However, the situation is different if the debtor is a state or a state agency.

Disputes can arise over the enforcement process of an award, where the state or a state agency might not comply, and in order to prevent payment state immunity is pleaded. 'State immunity' is recognised as one barrier to automatic enforcement. According to Fox, 'State immunity is the most intransigent, the extent to which an order of a national court for recognition and enforcement of an arbitral award can be executed against State property.'¹⁰³ Indeed, it could be argued that the current legal framework for the enforcement of awards and judgements against sovereign states is far from adequate.¹⁰⁴ The main idea behind this rule revolves around the sovereign equality of the states. At the same time 'state immunity' is a jurisdictional doctrine that prohibits the national court of one state from exercising jurisdiction over other states.¹⁰⁵ In other words, this rule facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts.¹⁰⁶ However, it should not be a barrier for states in respect of the compliance of awards. States are free to comply with awards. Rudolf and Schreuer explain that state immunity is a procedural bar for the execution of awards, but it should not affect the obligation of the state to comply with awards where the losing party cannot rely on state immunity and, therefore, cannot comply with awards.¹⁰⁷ Article 55 of the Convention states that, 'Nothing in Article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.'

¹⁰¹ Joseph R Profaize, 'Emerging Issues in the Enforcement of Foreign Arbitral Awards' in Kevin W Lu, Gero Verheyen and Srilal M Perera (eds), *Awards in Investing with Confidence Understanding Political Risk Management in the 21st Century* (The World Bank 2009) 165.

¹⁰² Georges R Delaume, 'ICSID Arbitration' in Lew (ed) (n 99) 35.

¹⁰³ Hazel Fox, 'State Immunity and the New York Convention' in E Gaillard and D di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May Publishing 2008) 858.

¹⁰⁴ George K Foster, 'Collecting From Sovereigns: The Current Legal Framework For Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals For its Reform' (2008) 25 (3) *Arizona Journal of International & Comparative Law* 666.

¹⁰⁵ Alexis Blane, 'Sovereign Immunity as a Bar to the Execution of International Arbitral Awards' (2009) 41 (2) *New York University Journal of International Law and Politics* 459.

¹⁰⁶ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 487.

¹⁰⁷ Rudolf Dolzer and Christopher Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 312; Also see Schreuer (n 1) 1107.

Article 55 confirms that Articles 53 and 54 do not guarantee that the winning party will automatically enforce the award. Alternatively, immunity from execution is the single most common reason for non-enforcement permitted by the Convention.¹⁰⁸ However, it should be understood that consent to arbitrate under the Treaty does not automatically constitute a waiver of the execution of immunity¹⁰⁹ but it waives pure jurisdictional immunity for the transaction.¹¹⁰ In other words, it does not waive immunity for the execution of awards. This means that the Convention relies on municipal laws relating to sovereign immunity from execution, which determine whether a state's assets can be attached¹¹¹ and no exceptions should be made regarding domestic law by virtue of the Convention, other than as provided by municipal law.¹¹² Additionally, at least one other scholar believes that the only barrier to execution under most municipal laws is sovereign immunity.¹¹³ Accordingly, investors should play it safe in advance by including a contract clause that explicitly waives immunity from execution in contracts or arbitration agreements with the investing states. The Model Clause 15 of the ICSID could be one solution for investors. The clause reads as follows:

The host state hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an arbitral tribunal constituted pursuant to this agreement.

Such a clause or 'waiver of immunity' should be demanded in the enforcement stage of the award. This might encourage the state to promptly seek an amicable settlement through negotiation.¹¹⁴ Also, in the recognition process, state immunity cannot be used.¹¹⁵ For instance, in the case of *SOABI v Senegal*, a case administered in the French courts, a clear distinction was made between the recognition of an award and its execution. For the *Cour de Cassation* there was no sovereign immunity with respect to the recognition of an award and immunity from execution under Article 55; it arises only when actual measures of execution

¹⁰⁸ Dhisadee Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May 2007) 223.

¹⁰⁹ Bjorklund (n 7) 223.

¹¹⁰ Blane (n 105) 464.

¹¹¹ Susan Choi, 'Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions' (1995) 28 *New York University Journal of International Law & Politics* 180.

¹¹² Vincent O Nmehielle, 'Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention) (2001) 7 (1) (Art 4) *Annual Survey of International & Comparative Law* 31.

¹¹³ Jacob S Kenneth, 'Reinvigorating ICSID With a New Mission and with Renewed Respect for Party Autonomy' (1992) 33 *Virginia Journal of International Law* 134.

¹¹⁴ Georges R Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations' (1990) 5 (2) *ICSID Review* 255.

¹¹⁵ Schreuer (n 1) 1153.

are taken.¹¹⁶ In this context, it is not wrong to argue that, for investors, the nature of the host state's domestic laws of immunity might be essential for winning in disputes, because the success of achieving an award depends upon the immunity laws of the state where the execution is sought. Each state determines its own municipal law on immunity and different states have different immunity rules.

Some states, such as Hong Kong or the People's Republic of China follow the doctrine of 'absolute immunity'. This doctrine was traditionally applied in China, and deems that the national courts of the country do not have jurisdiction to adjudicate commercial matters that name another state as a respondent, unless the state waives its immunity.¹¹⁷ In the judgement of *FG Hemisphere Associates LLC v Democratic Republic of the Congo*¹¹⁸, the Chinese Ministry of Foreign Affairs Office in Hong Kong confirmed the following:

The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'.¹¹⁹

However, absolute immunity is not applied universally. States such as the United States of America and the United Kingdom adopt a 'restrictive' approach to immunity. The national law of the state distinguishes properties classed for 'commercial' or 'public' purposes. Examples of public purpose projects are military property projects and central bank assets or diplomatic or consulate buildings which are immune from execution. Moreover, in some countries there are small differences when they apply 'restrictive approach immunity'. For instance according to the United States of America's Foreign Sovereign Immunities Act of 1976 (FSIA) contracts for the repair of an embassy building, a national airline's ticket sales to USA passengers, and a defence ministry's purchase of military supplies, are admitted as commercial activities even if these projects are to further a public function.¹²⁰ Moreover, the

¹¹⁶ *ibid* 1132.

¹¹⁷ Shen Wei, '*FG Hemisphere Associates v Democratic Republic of the Congo*' (2014) 108 (4) *American Journal of International Law* 777.

¹¹⁸ *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, High Court of the Hong Kong SAR (12 December 2008).

[http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=\(firm\)&TP=JU/](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=(firm)&TP=JU/) (Last accessed September 2018).

¹¹⁹ See *Democratic Republic of Congo v FG Hemisphere Associates* (2011) HKCFA, para 44; David Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors' OECD Working Papers on International Investment (2010/02) 13.

¹²⁰ George K Foster (n 104) 674.

USA federal courts might come to the opposite conclusion in a similar case. For instance, in *LETCO v Republic of Liberia*, the Federal Court of the USA ruled against the use of a bank account held by the Liberian Embassy; the account was used for both commercial and public purposes. For this reason, the Court assumed that funds in the bank account might be used for commercial activities, such as transactions to purchase goods or services from private companies, and these activities are not immune from attachment.¹²¹ However, in the similar case of *Birch Shipping Corp. v Embassy of the United Republic of Tanzania*¹²² the Federal Courts did not allow the execution of an award.

Another interesting example can be cited from the United Kingdom State Immunity Act (SIA, 1978). This provides that state properties used for commercial activities can be awarded execution, as well as those intended for commercial purposes.¹²³ One well-known case was *AIG v Kazakhstan*, where the Claimant attempted to enforce ICSID awards against funds invested by Kazakhstan's Central Bank for the purposes of funding 'National Funds' known as 'London Assets'.¹²⁴ In this case, the Claimant tried to execute awards against the Kazakhstan Republic, but according to the High English Court, the 'London Assets' were not at any time either in use or intended for 'commercial purposes', according to the meaning of S.13 (4) of the SIA.¹²⁵ For this reason, the 'London Assets' were immune from execution, but at the same time the judge noted that this did not mean that an award is ineffective or null.¹²⁶

6.4. Diplomatic Protection in the ICSID Convention: Article 27

In the past, especially in the 19th and 20th centuries, protections for investors were used by powerful states only. These states used forms of threat, the use of force, or military intervention, now known as a 'gunboat diplomacy'.¹²⁷ However, by the beginning of the 20th century, the use of force began to be interpreted differently, and it was not tolerated any longer in the arena of international agreements. For instance, in 1907 a group of states agreed

¹²¹ Rosemary Rayfuse and Elihu Lauterpacht (eds) *ICSID Reports Vol. 2* (Cambridge University Press 1994) 395.

¹²² *Birch Shipping Corporation v. The Embassy of the United Republic of Tanzania*, United States District Court, District of Columbia (1980), Misc. No. 80-247, 507, F. Supp. 311.

¹²³ The United Kingdom State Immunity Act 1978, Chapter 33, S.13 (4).

¹²⁴ [2005] EWHC 2239 (Comm) Case Number 2004/536, October 20 2005, para 9.

¹²⁵ *ibid* para 95 (8).

¹²⁶ *ibid* para 83.

¹²⁷ Jonathan Gimblett and O Thomson Johnson, Jr., 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P Sauvants (ed) *Yearbook on International Investment Law & Policy Vol. 2010-2011* (Oxford University Press 2012) 651.

to the Second Hague Peace Conference, which respected the limitations of the employment of force for the recovery of contract debts, and not to allow the use of force to collect debts if claims were submitted to inter-state arbitration.¹²⁸ Moreover, legal scholars began to support for these ideas. In 1931 the famous arbitrator Dr. Idelson proclaimed the following:

Protection of nationals (including companies) would be much easier for the state concerned if the rights of such nationals were defined by elaborate treaties and not allowed to rest on general principles of international law. Those principles were formulated in times when the economic life of nations was much simpler than in its today.¹²⁹

These views expedited and facilitated the foundation of the ICSID Convention. However, before the establishment of the ICSID Convention, DP was the more popular dispute settlement mechanism used among powerful states. This was because it was a less objectionable, and advocated the right to use military intervention in the protection of nationals.¹³⁰ Later, in 1965 after a long debate, the Washington [ICSID] Convention was established, which embodied following principles:

- 1) Recognition of the principle that a non-state party, as an investor, might have direct access, in his own name and without requiring the espousal of his cause by his national government, to a state party before an international forum.
- 2) Recognition that local courts are not necessarily the final forum for the settlement of disputes between a state and a foreign investor. This does not imply that local remedies cannot play a major role.
- 3) Offering a means of settling directly, on the legal plane, for investment disputes between the state and the foreign investor, and insulating such disputes from the realm of politics and diplomacy.
- 4) Awards rendered pursuant to the Convention to be recognised by, and enforceable in all, contracting states, as if they were final judgments of national courts, regardless whether the state in which enforcement is sought is or is not a party to the dispute in question.

¹²⁸ The Second Hague Peace Conference (1907) Article 1 of the Convention, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf> (Last accessed June 2017).

¹²⁹ W E Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1931) 17 Transactions of Grotius Society 194.

¹³⁰ M.Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 121.

5) The Convention does not lay down standards for the treatment by states of the property of aliens, nor does it prescribe standards for the conduct of foreign investors in relation to host states. Accordingly, the Convention is not concerned with the merits of investment disputes, but with the procedures for settling them.¹³¹

These principles for investors provide direct access to international arbitration. By allowing the investor to litigate a claim directly, the investor's sovereign state can distance itself from the dispute.¹³² This progression represents the 'emancipation' of the individual from their home state, and provides the most progressive form of 'emancipation', enabling individuals to be on an equal footing with states in international proceedings and enjoy *jus standi*.¹³³ Orrega calls this the 'minimisation of state intervention' and notes it as a turning point.¹³⁴ These changes were conceptualised as the acquisition of the partial legal personality of investors under international law.¹³⁵

Under the terms of the ICSID Convention, investors have entered into a new field where their rights and investments are protected by international institution. Accordingly, under the terms of this new investor-state arbitration, it is assumed that investment disputes will be 'depoliticised' and that investment disputes or confrontations between host and home states will be minimised.¹³⁶ 'De-politicisation' is an important goal of the ICSID Convention but it is not an absolute one.¹³⁷ Bjorklund believes that investor-state dispute settlement will never be entirely depoliticised. For her, the international investment regime has attempted to limit political considerations by 'legalising' disputes between investors and host states, and by introducing a neutral forum for the resolution of legal claims, and the second main goal is removing DP.¹³⁸ DP is a state tool, as Lauterpacht claims, 'a state is a political institution and all questions, which affect it as a whole, in particular in its relations with other states, are,

¹³¹ Settlement of Investment Disputes Consultative Meeting of Experts, First Session, Summary Record of Proceedings, Geneva, February 17-22 1964, 3-4.

¹³² Danielm Price, 'Some Observations on Chapter Eleven of NAFTA' (2000) 23 *Hasting International and Comparative Review* 427.

¹³³ Gerhard Hafner, 'The Emancipation of the Individual from the State under International Law' (2011) in 358 *Recueil des Cours* (Martinus Nijhoff Publishers 2013) 404.

¹³⁴ Francisco Orrego Vicuna, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge University Press 2004) 64.

¹³⁵ August Reinisch, 'Investors' in Math Noortmann August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 271.

¹³⁶ Ibrahim F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) I (1) *ICSID Rev-Foreign Investment Law Journal* 1-25.

¹³⁷ Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 (1) *Harvard International Law Journal* 13.

¹³⁸ Bjorklund (n 7) 214.

therefore, political and as a rule every international dispute is of a political character.¹³⁹ This viewpoint notes that disputes between states might have a political character, and that this is not unusual. At the same time, it should be understood that declaring a ‘legal’ process does not abolish politics.¹⁴⁰ As already mentioned, the ICSID Convention attempts to keep political disputes out of the equation, and the main requirement of the Convention (Article 25) is that disputes must focus on the investment.

With these developments, it has been accepted that the ICSID has introduced important innovations.¹⁴¹ It should be noted that before the ICSID agreement, investor’s rights were protected by their national governments (diplomatic protection) or they were insecure. The ICSID Convention has converted diplomatic or political disputes into legal or judicial disputes.¹⁴² According to one scholar, one of the main goals motivating the ICSID Convention is the removal of investment disputes from the standard procedure of DP, by enabling direct access to international remedies.¹⁴³ Moreover, it is true that with the advent of investment arbitration in international affairs, much of the utility of DP has lost its appeal.¹⁴⁴ At the same time, DP and arbitration are two different institutions, and it would be wrong to combine them. Schreuer argues that, ‘the combination of two institutions would lead us to undesirable results.’¹⁴⁵ For this reason, these two terms should be examined separately.

The terms of DP are defined neither in the ICSID Convention nor in the ILC Draft Articles on DP. The definition of DP is given by one scholar as, ‘DP consists of resorting to DP or other means of peaceful settlement by a state adopting, in its own right, the cause of its nationals in respect of an injury to that national arising from an internationally wrongful act of another state.’¹⁴⁶ The ICSID does not allow DP or any home state involvement, and the ICSID does not accept DP if there is consent between parties (investor and state) for arbitration, and if the arbitration process has already started. This is one of the principal

¹³⁹ Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 153.

¹⁴⁰ Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalised Dispute Resolution: Interstate and Transnational’ (2000) 54 (3) *International Organization* 470.

¹⁴¹ Broches (n 51) 303.

¹⁴² Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 403.

¹⁴³ Nigel Blackaby, ‘Public Interest and Investment Treaty Arbitration’ in Albert Jan *International Commercial Arbitration: Important Contemporary Questions ICCA Congress Series 2002* (Kluwer Law International 2003) 357.

¹⁴⁴ Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 277.

¹⁴⁵ Schreuer (n 1) 416.

¹⁴⁶ Sir Frank Berman QC ‘The Relevance of the Law on Diplomatic Protection in Investment Arbitration’ in Federico Ortino, Lahra Liberti, Audley Sheppard (eds) *Investment Treaty Law: Nationality and Investment Treaty Claims Fair and Equitable Treatment in Investment Treaty Law* (British Institute of International and Comparative Law 2007) 68.

features of the Convention.¹⁴⁷ The Report of the Executive Directors reads as follows:

When a host state consents to the submission of a dispute with an investor to the centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his state to espouse his case and that state should not be permitted to do so.¹⁴⁸

Nevertheless, consent to ICSID arbitration by the investor cannot be construed as a valid waiver of diplomatic protection and this is why Article 27 is addressed to contracting states and not to investors.¹⁴⁹ At the same time, DP is an exercise of a state's own rights, but the majority of the international community denies that a private individual can waive a right that belongs to his state.¹⁵⁰ It is the state's right to espouse investors' claims or to not adopt them. Accordingly, an investor and host state might come to an agreement that the investor will not seek DP. However, the home state of the investor cannot be stopped from exercising DP.¹⁵¹ Under ICSID, DP is only allowed under some conditions. More broadly, in Article 27 it is clearly stated that DP revives only if the losing state does not comply with a final award. Specifically, Article 27 of the Convention states as follows:

- 1) No contracting state shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other contracting state shall have failed to abide by and comply with the award rendered in such dispute.
- 2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating the settlement of the dispute.¹⁵²

It seems that the mission of Article 27 is to comply with non-complying awards. However,

¹⁴⁷ Broches (n 51) 371; Schreuer (n 1).

¹⁴⁸ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of other States, International Bank for Reconstruction and Development (18 March 1965) para 33.

¹⁴⁹ Schreuer (n 1) 418.

¹⁵⁰ Broches (n 51) 373-374.

¹⁵¹ Roberts (n 137) 31; Christoph Schreuer, 'Investment Protection and International Relations' in A Reinisch and U Kriebaum (eds) *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 356-357.

¹⁵² ICSID Convention (1965) Article 27.

this is an alternative supplement to the judicial enforcement of awards.¹⁵³ Alexandrov notes that Article 27 repeats verbatim the text of Article 53, and, according to him, the text of Article 27 (1) runs in parallel to the language of Article 54.¹⁵⁴ The Enron Committee argued a similar view, as follows:

It is clear when these two provisions are examined together, that the failure of a state to abide by and comply with an award, as required by Article 53(1), is a breach of the ICSID Convention, entitling the national state of the award creditor to give diplomatic protection or bring an international claim. If a contracting state was entitled to require an award creditor to use enforcement mechanisms established under Article 54(1) as a precondition to compliance with the award, the Committee considers that the final words of Article 27(1) would have reflected the language of Article 54(1), rather than that of Article 53(1).¹⁵⁵

This provides that if the host state, as the losing party, breaches Articles 53 and 54 of the Convention and does not comply with the awards, then the home state of the investor can espouse the investor's claim and can commence a DP against the losing party. Under the ICSID, the main purpose of DP is to achieve the implementation of the award and obtain reparation for any additional damage caused by failure.¹⁵⁶ The main reason why DP is allowed in the ICSID Convention can be explained by the idea that coercive enforcement is not available on the international stage, and the winning party, therefore, has no other choice than to seek DP, or to bring 'an international claim'.¹⁵⁷ Nevertheless, it is critically important to mention that DP is useful only if the award has already been rendered and if it needs support exclusively for its implementation, but it does not support any other remedies.¹⁵⁸ In other words, if the arbitral tribunal has rejected an investor's claim, it cannot be pursued subsequently through DP.¹⁵⁹

Schreuer claims that allowance for DP in the ICSID Convention not only secures compliance

¹⁵³ Schreuer (n 151); Alexandrov (n 17) 325.

¹⁵⁴ Alexandrov (n 17) 325.

¹⁵⁵ *Enron Corporation Ponderosa Assets L.P v Argentine Republic*, ICSID Case Number ARB/01/3, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 7 October 2008 para 65 (Rule 54 of the ICSID Arbitration Rules) 32.

¹⁵⁶ Victorino J Tejera Perez, 'Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards' (2012) 3 (2) *Journal of International Dispute Settlement* 455.

¹⁵⁷ *Sempra Energy International v Argentine Republic* ICSID Case Number ARB/02/16, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) 5 March 2009, para 44.

¹⁵⁸ Schreuer (n 1) 427; Perez (n 156) 467.

¹⁵⁹ Schreuer (n 1) 427.

with an award but is designed to counter-balance any state immunity that is preserved by Article of 55 of the Convention.¹⁶⁰ In these circumstances, it is appropriate to argue that DP might be used to promote international relations between member states of the ICSID Convention. One example can be cited from Italy. In 2007, the Italian Government warned that a new South African law (regarding the development of natural resources) might breach a bilateral investment treaty between Italy and South Africa.¹⁶¹ This rule was used by the home state against the host country for the purposes of avoiding future disputes. Moreover, the Italian government's actions show that DP can be exercised to enhance international relations between states.

Article 27 (2) of the Convention allows informal exchanges between the host and the home states of the parties, and according to this article it does not constitute DP. In practice, there are cases where information exchange, consultation and diplomatic protection are confused. For instance, in the *Pac Rim Cayman v El Salvador* case, the Tribunal referred to CAFTA¹⁶², used Article 18.3 information requests, and Article 20.4 inter-state consultations, and DP.¹⁶³ As mentioned earlier, due to the existence of BITs and the ICSID Conventions, the institution of DP has taken a new turn, where new conditions or new rules are now applied. Crawford explains, 'One might argue that bilateral investment treaties in some sense institutionalise and reinforce (rather than replace) the system of diplomatic protection.'¹⁶⁴

The interesting point here is when the first BIT (Pakistan-Germany, 1959) was signed it was heavily tinted by the legacy of DP, and this, effectively, turned into a dispute between a host and home state of the investor.¹⁶⁵ In this case, there was no investor-state dispute clause, only a state-state dispute settlement clause (Article 11). However, in the new edition (2009) of the Pakistan-Germany BIT, the parties included an investor-state arbitration clause (Article 10). It can be seen that when the first BITs were signed, there was no ICSID Convention, and the only settlement available was a state-to-state dispute settlement mechanism or DP.

¹⁶⁰ *ibid*; Schreuer (n 151) 348.

¹⁶¹ R. Doak Bishop (n 5) 28.

¹⁶² The Dominican Republic - Central America - United States Free Trade Agreement, [https://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-DominicanRepublic\(CAFTA\).pdf](https://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-DominicanRepublic(CAFTA).pdf) (Last accessed June 2017).

¹⁶³ *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case Number ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 4.87- 4.89, 24-25.

¹⁶⁴ James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 (4) *The American Journal of International Law* 888.

¹⁶⁵ Maxmilian Clasmeier, *Arbitral Awards as Investments Treaty Interpretation and the Dynamics of International Investment Law* (Kluwer Law International 2017) 39.

Nevertheless, according to one researcher, the principles of Article 27 of the ICSID can be seen in BITs. From the 1950s to 1990s states signed 400 BITs, and, out of them, 32 had similar texts to Article 27 of the ICSID Convention.¹⁶⁶

Kokott claims that the rareness of DP in ICSID and BITs works as an advantage for both parties to avoid and exclude the uncertainties of DP.¹⁶⁷ Kokott talks about exercising DP under BITs and MAI; they have similarities in that DP is exercisable only when awards are not enforced, but the differences are that BITs leave open how the home state reacts to non-compliance, while MAI creates a framework and allows responsive steps only within the limits of that framework.¹⁶⁸ Lastly, if the award is not paid there is another option for the investor, namely to request that its national state (or a third party interested state) initiates an ICJ action according to Article 64 of ICSID.

It would be wrong to argue that the customary international law of DP has disappeared. Even under the terms of the ICSID Convention it continues to survive. Regarding this, Lillich notes the following:

Hence, pending the establishment of international machinery guaranteeing third-party determination of disputes between alien claimants and states, it is in the interest of all international lawyers not only to support the doctrine (diplomatic protection), but to oppose vigorously any effort to cripple or destroy it.¹⁶⁹

This idea can be supported by the suggestion that there is not a problem with DP itself. However, the powerful states that abuse DP put the Convention at risk. Also, it is understandable that if, according to ICSID arbitration rules 37(2), a home state, as a non-disputing party, applies DP and, ultimately, simplifies the dispute between the investor and the state, then no one should be against the principle of DP. Kaufmann-Kohler believes that the home state's intervention could be a useful contribution for a tribunal in the decision-making process, especially to facilitate better treaty interpretation, but there should not be

¹⁶⁶ Paul Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Yearbook of International Law* 145; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 (1) *British Yearbook of International Law* 284.

¹⁶⁷ Juliane Kokott, 'Interim Report on the Role of Diplomatic Protection in the Field of the Protection of Foreign Investment' in *Report of the Seventieth Conference held in New Delhi, 2 - 6 April 2002* (International Law Association 2002) 266.

¹⁶⁸ *ibid* 276.

¹⁶⁹ Richard B Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack' (1975) 69 (2) *The American Journal of International Law*, 359.

room for the investor's home state to exercise DP that might risk damaging the carefully balanced framework of the investor-state arbitration mechanism.¹⁷⁰ This argument is reasonable because Kaufmann-Kohler believes that allowing DP might damage the ICSID Convention. According to Paulsson, DP 'has proved itself unworkable as a way of protecting business interests in the context of contemporary international economic life.'¹⁷¹ Other scholars support this idea.¹⁷²

The ICJ Tribunal stated that BITs and the ICSID Convention protect all investor's rights, and in this context, the role of DP has somewhat faded as, in practise, recourse to it is only made in rare cases where treaty regimes do not exist or have proved in-operative.¹⁷³ In these cases, there were no BIT between two states, and, for this reason, the dispute settlement solution used was DP or the African Charter on Human Rights and Property Rights. In general, the view is that universal human rights declarations protect investors, and there is no need to use any other protection instrument. Acceptably, the institution of DP used as a procedural device has been influenced by these changes.¹⁷⁴ However, it is still questionable whether individuals are still subject to international law.¹⁷⁵

John Dugard claims that international human rights law does not consist of human rights conventions, but, instead, a whole body of conventions and customs, including DP, that together comprise international human rights law.¹⁷⁶ Dugard also claims that the European Convention on Human Rights (1950) may offer real remedies to millions of Europeans, but, in his opinion, it is difficult to argue that other conventions such as the American Convention on Human Rights (1969) or the African Charter on Human Rights (1998) have achieved the same degree of success.¹⁷⁷ The reasons for this was by explained in previous chapters.¹⁷⁸

¹⁷⁰ Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?' in Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge E. Vinuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 324.

¹⁷¹ Jan Paulsson, 'Arbitration without Privity' in R. Doak Bishop (n 5) 34.

¹⁷² Christoph Schreuer, 'Do We Need Investment Arbitration' in Kalicki and Bret (eds) (n 33) 879-890; Dolzer and Schreuer (n 107) 233; Bantekas (n 144) 277.

¹⁷³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections, Judgement (24 May 2007) para 88.

¹⁷⁴ Wilhelm Karl Geck, 'Diplomatic Protection' (1987), in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law Volume I* (published under the auspices of the Max Planck Institute for Comparative Public Law and International Law A A Lands Islands to Dumbarton Oaks Conference 1944) 1046.

¹⁷⁵ David Leys, 'Diplomatic Protection and Individual Rights: A Complementary Approach' (January 2016) 57 Harvard International Law Journal Online 2.

¹⁷⁶ John Dugard 'Diplomatic Protection' in James Crawford, Alain Pellet, and Simon Olleson (eds), Assistant Editor Kate Parlett, *Oxford Commentaries on International Law 'The Law of International Responsibility* (Oxford University Press 2010) 1070.

¹⁷⁷ *ibid* 1069.

Moreover, he believes that only a limited number of individuals have obtained, or will obtain, satisfactory remedies under these conventions, and that these remedies are weak.¹⁷⁹

For Dugard, diplomatic protection is only available to protect individuals against foreign governments, and this is a customary rule of international law, which applies universally, and, as such, it potentially offers a more effective remedy.¹⁸⁰ Also, it must be noted that human rights declarations do not prohibit DP to be used as a dispute settlement mechanism. This means that for individuals, DP might provide a similar protection system to human rights conventions against other states. Dugard rightly notes that the enlargement of the rights of individuals (human rights conventions) is not a substitution for diplomatic espousal.¹⁸¹ And, it must be noted that, nowadays, an individual's rights are better protected by modern international law. Nevertheless, states still 'own' international law. Because of this, Amerasinghe believes that DP will survive as an institution based on the theory that the state owns rights in international law, and not the individual.¹⁸² This opinion might be correct because, in general, an international institution's task is to *balance power, international law, diplomatic mechanisms and managerial systems of great powers and war*.¹⁸³ If DP is to survive as an institution, it must be exercisable and practicable.

It should be noted that the ICSID itself is one institution among other institutions that works to realise the common goals of states.¹⁸⁴ These same principles could be applicable under DP. However, the history of DP reveals that it has been abused by powerful states, and for this reason, it would not be misleading to argue that DP's deficiency is the 'fairness' or 'equality' of its institution. Franck notes that 'fairness' should satisfy the participants' expectations with the justifiable distribution of costs and benefits, and when rules are made and applied, the participants perceive a right process, and its fairness will encourage members (states) to comply with law.¹⁸⁵ Therefore, apparently, one of the main problems with DP is its 'fairness'.

The 'fairness' or 'unfairness' of DP is not limited to DP only; the 'fairness' of modern establishments, including the ICSID, has also been debated by different scholars. In light of

¹⁷⁸ See in Chapter 5 Daron Acemoglu and James A Robinson's arguments.

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*.

¹⁸¹ Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press 2014) 353.

¹⁸² Chittharanjan F Amerasinghe *Diplomatic Protection* (Oxford University Press 2012) 342.

¹⁸³ Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (2nd edn, Palgrave Macmillan Publishers 2002) 71.

¹⁸⁴ *ibid*.

¹⁸⁵ Thomas M Franck, *Fairness International Law and Institutions* (Clarendon Press 1997) 7-8.

this, some argue¹⁸⁶ that under investment treaties for arbitration, loosing investors and some states like Ecuador, Argentina are disadvantaged by ‘unfairness’, while others benefit from it. The ‘fairness’ of DP is only possible using the institutional mechanism as applied by states equally, without any mistreatment. It is necessary to mention that this research does not support the idea that DP should be the only dispute settlement mechanism used in investor-state arbitration, but it encourages states, where there is a demand for DP, to apply it on equal terms. This allows for states to espouse investor’s claims without any hesitation.

It is important to highlight that using DP is not always in the interests of investors. This is why there are different alternative dispute resolution mechanisms for investors in order to settle disputes, such as arbitration, mediation or negotiation. Moreover, with the onset of globalisation, investors’ plans have changed, and some prefer to do businesses without any home state intervention; this changes the traditional legal tasks undertaken by home states. August Reinisch claims that, ‘investors also contribute to the larger process of shaping international investment law.’¹⁸⁷ However, Reinisch does not provide cases or facts where this has happened.

In conclusion, it is worth asking whether ICSID has successfully avoided the process of DP. Interestingly, this question cannot be answered in one sentence. However, the ICSID Convention is not wrong when it asserts that the 21st century international legal environment is different from that of previous centuries, and it would be wrong to evaluate DP from a 19th and 20th century perspective. Developed states did not take as many risks in the past to harm their international image by exercising DP. Nowadays, it is expected that the outcome of DP will be different, but it is still the home state that decides how to exercise DP, whether through diplomatic pressure, economic or political sanctions or, as in bygone times, by the use of force or an adjudicatory dispute settlement.¹⁸⁸ This is because one or more investor states do not willingly exercise DP.¹⁸⁹ Reasons for this include the following:

1) In the 19th and 20th centuries the nationals of developed states were usually investors in

¹⁸⁶See, M. Sornarajah, ‘Developing Countries in the Investment Treaty System: A Law for Need or a Law for Greed?’ in Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and Development Bridging the Gap* (Edward Elgar Publishing 2015); Gus Van Harten, ‘Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 636.

¹⁸⁷ August Reinisch, ‘Investors’ in Noortmann et al. (eds) (n 135) 262.

¹⁸⁸ *ibid* 254.

¹⁸⁹ *Mr Franz Sedelamyer v Russian Federation SCC*, Stockholm, (Arbitration Award, 7th July, 1998)

developing countries. The situation now is different because citizens of developing countries are investing abroad. Previously DP was one-sided, but now it can be exercised by both developing and developed states.

- 2) In the past, developed states were not looking for an investment but nowadays they are. They are aware that international investment is a competitive sector and they want to attract more investors to their market. They can do this by promoting good international relations with other countries.
- 3) The economic relationships between states were different in the 19th and 20th centuries. Now, states are different NGOs or institutions trying to keep their investments and trade in from a suitable position. (The EU market is one example.)
- 4) It is believed that DP is a remedy of last resort, and experience demonstrates that it provides results that rarely satisfy the investor.¹⁹⁰

The above are arguments against exercising DP in investor-state arbitration. Nevertheless, in international law, historically, a state has had the power to settle claims on behalf of its nationals.¹⁹¹ However, it might be too costly for home states to espouse each investor's claims and try to settle themselves. Ben Juratovich argues that, 'Investment treaty actions and diplomatic protection will both continue to have a role, even if unequal in magnitude and it is therefore necessary to continue to grapple with their interface.'¹⁹² Juratovich is right because investment arbitration and DP are not the same. In legal terms, they do not cover the same subject matter and states do not treat them in the same manner.¹⁹³

6.5. The Different Opportunities Investors have to Enforce Investment Awards against States

As stated previously, enforcement mechanisms work successfully under the ICSID Convention. However, this does not mean that all awards are executed positively. In practice, there are some cases where ordinary enforcement mechanisms have proved to be

¹⁹⁰ Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* (2nd revised and enlarged edition, Kluwer Law International 1995) 147.

¹⁹¹ Roberts (n 137) 50.

¹⁹² Ben Juratovich, 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 (1) ICSID Review 35.

¹⁹³ Martins Paporinkis (n 166) p.297

unsuccessful. In these cases, home states, debt collection funds, international organisations, and arbitral institutions have ‘non-judicially’ or ‘alternatively’ intervened to supplement the judicial framework for the enforcement of awards.¹⁹⁴ Here, it is understandable why winning parties would try to obtain compensation via other legal channels. However, theoretically, the use of investor-state arbitration (ICSID) itself should be enough to enable parties to settle and enforce disputes without the intervention of third parties. Indeed, Wälde talked about ‘equality of arms’ as the founding principle of investment arbitration procedures, and even if there is no ‘equality of arms’ it is a tribunal’s duty to pro-actively restore it.¹⁹⁵

6.5.1. Third Party Funding

When states do not respect their international obligations and refuse to satisfy awards, there are other opportunities investors can take to enforce an award. One of these opportunities is selling an award to a third party. On 29 June 2012, an online platform was launched where parties can sell their awards to third parties.¹⁹⁶ Award buyers are now well known as third party funders, and their main business is to execute awards and compensation for investors. These third party funders are usually law firms, banks, insurance companies, and other financial institutions, but not the formal parties involved in the investor-state dispute. For example, it was journalist Luke Eric Peterson who reported that CMS sold its arbitral award against Argentina, and that the subsidiary Bank of America was trying to collect assets based on the award.¹⁹⁷ In general, third party funders see their funding as an investment, and they are profit oriented. The primary goal of the funders or buyers of awards is to earn 15% to 50% of the total amount of the award (this amount can change depending on the costs and risks of the investment).¹⁹⁸

Here, it is noteworthy to highlight that in the process of investment arbitration, the funders’ motives are not always based on making a profit. Sometimes, these bodies are fighting

¹⁹⁴ Jorge Viñuales and Dolores Bentolila, ‘The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States’, in Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge Viñuales, *Diplomatic and Judicial Means of Dispute Settlement Mechanism* (Martinus Nijhoff Publishers 2013) 247-248.

¹⁹⁵ Thomas Wälde, ‘Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State - Asymmetries and Tribunals’ Duty to Ensure, Pro-actively, the Equality of Arms’ (2010) 26 (1) *Arbitration International* 39.

¹⁹⁶ The ClaimTrading Ltd founded, (2011), www.claimtrading.com/.

¹⁹⁷ Luke Eric Peterson, ‘Clock runs out on Argentina; Vivendi likely to begin award enforcement proceedings even as annulment proceeding continues’ *IA Reporter*, 28 February 2009.

¹⁹⁸ S Khouri, K Hurford and C Bowman, ‘Third Party Funding in International Commercial and Treaty Arbitration: A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Funding’ (2011) 8 (4) *Transnational Dispute Management* 3.

against industries about health and safety issues, and they endeavour to support states against certain dominant companies. An example of this scenario is the *Philip Morris v Uruguay* case.¹⁹⁹ In this case, an Anti-Tobacco Trade Litigation Fund was created by a group of Bloomberg Philanthropists and the Bill and Melinda Gates Foundation as a third party, and it was funded to help support a developing country (Uruguay) against tobacco companies such as Phillip Morris.²⁰⁰

Third parties are not obliged to disclose their involvement in disputes, and this can help them prevent conflicts of interest arising in the proceedings.²⁰¹ At the same time, funders and investors/states operate using a bilateral contract, and are not under the jurisdiction of the tribunal. In general, for the funders, investment arbitration is more attractive than litigation, for the following reasons:

- 1) Investment arbitration is high value, and the proceedings are often speedier.
- 2) There is potential for greatly reduced evidentiary costs.
- 3) There is greater predictability of outcome in comparison to litigation.
- 4) There is a high enforceability of awards.²⁰²

Lastly, it should be noted that, in general, enforcement mechanisms in investment arbitration work successfully when third parties support the execution of awards. Of course, with the intervention of third parties, winning parties usually lose a percentage of their award amount. However, as Lord Justice Jackson states, ‘...it is better for him to recover a substantial part of his damages than to recover nothing at all.’²⁰³

6.5.2. Political Risk Insurance (PRI)

In some circumstances, third parties and PRIs can be confused. In investment arbitration they are completely different entities. The key feature of difference is that PRI is a *before the*

¹⁹⁹ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Republic of Uruguay*, ICSID Case Number ARB/10/7, Decision on Rectification (26 September 2016).

²⁰⁰ Victoria Shannon Sahani, ‘Revealing Not-for-Profit Third-Party Funders in Investment Arbitration’ 1 March 2017 <http://oxia.ouplaw.com/page/third-party-funders>; Bloomberg Philanthropies, *Annual Report* May 2017 www.bbhub.io/dotorg/sites/26/2017/05/May_2017_Annual_Report.pdf (Both Last accessed January 2018).

²⁰¹ Gary J Shaw, ‘Third-party funding in investment arbitration: How non-disclosure can cause harm for the sake of profit’ (2017) 33 (1) *Arbitration International* 110.

²⁰² Lisa Bench Nieuwveld and Victoria Shannon, *Third Party Funding in International Arbitration* (Wolters Kluwer Law & Business, 2012) 12.

²⁰³ Lord Justice Jackson, ‘Review of Civil Litigation Costs’ (2009) 1 *Preliminary Report*, Published in the UK (The Stationary Office) 160.

event (BTE) action, and third party funding is an *after the event* (ATE) action.²⁰⁴ ATE insurance is a type of third party funding, which covers almost all expenses including the arbitrators' fees. In cases where the dispute is lost, it also pays the respondents' legal costs. BTE is another type of insurance that is auctioned before any dispute arises. This PRI is similar to business insurance in that it is purchased by the investors themselves. However, taking out a separate insurance policy might create the question of *why do investors need additional protection whilst they are under the protection of customary international law, such as BITs and IIAs?* The answer to this question is that PRI compensates for certain actions taken by the host state, whilst BITs guarantee the investment climate in the host country.²⁰⁵ Also, it should be noted that when investors obtain PRI, they are trying to add in elements not stated in BITs.

Different governmental, non-governmental and financial institutions can offer PRI insurance. MIGA is an institution of the World Bank Group, which provides PRI and credits to investors in order to facilitate foreign direct investment in developing countries. Insurance companies provide different types of insurance protections, but in general these fall mainly within PRI categories relating to:

- 1) Political violence (war, terrorism, and civil disturbance).
- 2) Governmental expropriation or the illegal confiscation of investment.
- 3) Currency risk (currency inconvertibility and transfer restriction).
- 4) Breach of contract (governmental frustration of contracts).
- 5) Arbitration Award Default Coverage (AAD) (when the award is not collected).²⁰⁶

It should be noted that AAD cover must be purchased in advance. In other words, investors are not allowed to acquire AAD insurance when a claim against a host state has already been launched.²⁰⁷ In investor-state disputes this coverage provides compensation if an award is not executed by the state. There are some basic requirements that an investor must meet in order to make a claim for an arbitral award payment, as follows:

²⁰⁴ William H van Boom, *Third-Party Financing in International Investment Arbitration* (The Erasmus School of Law, 2011) 29.

²⁰⁵ Robert Ginsburg, 'Political Risk Insurance and Bilateral Investment Treaties: Making the Connection' (2013) 14 *The Journal of World Investment & Trade* 946.

²⁰⁶ Merli Margaret Baroudi, 'Innovation in Political Risk Insurance: Experience from the Multilateral Investment Guarantee Agency' (2017) 8 (3) *Global Policy* 407; Ginsburg (n 204) 947.

²⁰⁷ Ginsburg (n 204) 969.

- 1) The dispute between the investor and host state must be submitted to the correct international arbitration board in relation to the insured contract.
- 2) The arbitral award must be a final and binding monetary award.
- 3) At the first stage, the investor must take action to execute the award.
- 4) The host state must pay the amount of the arbitral award within 60 to 90 working days after the enforcement stage has begun.²⁰⁸

Lastly, it is worth mentioning that in 2013, MIGA made significant changes to its requirements. According to these new changes, projects must meet all of MIGA's requirements, and if a sovereign financial obligation is not honoured by a state or by a state enterprise, a PRI does not require any final arbitral award or court decision to cover or compensate investors.²⁰⁹ These new changes further support the collection of awards and reward investors.

6.5.3. The Use of 'Alternative' or 'Non-Judicial' Means to Enforce Investment Awards against States

On the international stage, there have been cases where powerful states like the USA (as the home state of the investor) have used other methods to enforce awards, such as sanctions, prohibiting financial aid or credits, or diplomatically pressuring other states to comply with awards. These methods or policies are used almost exclusively by economically and politically powerful states. Not all states can use these methods to achieve their goals. Usually, weaker and poorer states are not able to exert this kind of pressure. Therefore, using these methods shows that different states use different policies and demonstrate different behaviours relating to investment arbitration.

It is important to understand the expectations of states when they sign investment treaties. Sometimes, the home state perspective will decide future policies relating to investment disputes. Poulsen and Aisbett explain that in 'most Western states' treaties are designed and negotiated primarily to protect their investors abroad, whereas for most states in Africa, Latin America, Asia, and Eastern Europe, treaties are entered into primarily to help attract foreign

²⁰⁸ Fredrick E Jenney, 'Political Risk Insurance for Collection of Arbitral Awards' in R Doak Bishop (eds.) *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet Publishing 2009) 226.

²⁰⁹ World Bank Group, *Annual Report 2013 MIGA* (World Bank Group 2013) 60.

investment.²¹⁰ Moreover, the same scholars argue that BITs are used to strengthen diplomatic ties between states.²¹¹ Similar views are espoused by Chilton who states that, ‘the reason why foreign states sign a BIT with the U.S. is only to produce mutual political benefits.’²¹² These arguments demonstrate that states have different expectations and aims on investment treaties, when they use BITs.

Brazil, which is not member of the ICSID, and does not ratify BITs, holds the status as the country into which the most foreign direct investment flows.²¹³ This shows that investment treaties do not always play a crucial role when investors are investing in foreign countries, and it is not wrong to argue that their investments are based on their interests. Nevertheless, when an investor-state dispute appears, BITs and the ratification of ICSID can play a conclusive role for all parties.

As mentioned earlier, home states might intervene in investor-state disputes, and this action can work to politicise the dispute. It should be noted that a political intervention by a home state can prove to be a defining situation or problem in a particular way.²¹⁴ For instance, in *Autopista Concesionada v. Venezuela*,²¹⁵ a dispute arose between Venezuela and Aucoven, a Venezuelan company, controlled by main Mexican shareholders. In this case, Koskenniemi noted that, after the commencement of ICSID arbitration, the Mexican Government tried to settle the dispute, and, several times, tried to contact their Venezuelan colleagues. However, the Mexican Government was not successful, and their attempt to settle the dispute was misunderstood by Venezuelan Government who claimed violation of Article 27 of the ICSID Convention.²¹⁶ However, the arbitral Tribunal rejected the comments of Venezuela and clarified diplomatic protection and an amicable settlement. The Tribunal stated the following:

Article 27 of the ICSID Convention makes a clear distinction between diplomatic protection and efforts to settle a dispute. The ICSID Convention provides a forum for

²¹⁰ Lauge Poulsen and Emma Aisbett, ‘Diplomats want treaties: Diplomatic agendas and perks in the investment regime’ (2016) 7 *Journal of International Dispute Settlement* 73.

²¹¹ *ibid.*

²¹² Adam S Chilton, ‘The Politics of the United States’ Bilateral Investment Treaty Program’ in *Working Paper No. 722* (Coase-Sandor Institute for Law and Economics 2015) 12.

²¹³ *World Investment Report 2016: Investor Nationality Challenges* (United Nations Publications 2016) 9 http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (Last accessed September 2018).

²¹⁴ Martti Koskenniemi, ‘The Politics of International Law - 20 Years Later’ (2009) 20 (1) *The European Journal of International Law* 11.

²¹⁵ *Autopista Concesionada De Venezuela, C.A v. Bolivarian Republic of Venezuela*, ICSID Case Number ARB/00/5, (Decision on Jurisdiction, 2001).

²¹⁶ *ibid* para 53.

resolving disputes. However, its purpose is not to commit parties to arbitration, when there is a possibility to reach an amicable solution. Hence, attempts to settle a dispute do not constitute prohibited diplomatic protection in the sense of Article 27. The record shows that the purpose of Mexico's efforts has been to facilitate the settlement of the dispute between Aucoven and Venezuela and there is no indication that Mexico has espoused Aucoven's claim.²¹⁷

Moreover, Argentinean officials have met with foreign government officials and some ICSID claimants in an attempt to amicably resolve their investor-state disputes.²¹⁸

A similar situation occurred in *Santa Elena v. Costa Rica*.²¹⁹ In this case, the home state (the USA) diplomatically pressured the host state Costa Rica to consent to ICSID Arbitration.²²⁰ The reason why consent was required in this case was because there was no agreement or BITs between the USA and Costa Rica. For that reason, according to Article 42 (1) of the ICSID Convention, Costa Rica's consent was crucial. Here, the USA diplomatically evoked the Helms Amendment. This amendment is named after the USA Senator Jesse Helms and it prohibits USA foreign aid to a country that has expropriated the property of USA investors. As a result, the USA Government, via an Inter-American Development Bank delayed a \$175,000,000 loan to Costa Rica until the host state consented to ICSID arbitration.²²¹ This diplomatic intervention worked successfully, and Costa Rica then consented to arbitration. In this case, diplomatic intervention played a crucial role in persuading Costa Rica to settle a dispute for investor-state arbitration. However, at the same time, the DP did not note this award, which shows that home states can intervene to assist their investors without DP.

The USA can use different methods, such as GSP (the Generalized System of Preferences), and these methods are referred to as, 'trade remedies used to enforce arbitral awards.'²²² In practise, the GSP method has been applied in two separate cases: *CMS Gas Transmission*

²¹⁷ Ibid para 138-139.

²¹⁸ Maria Laura Avignolo, 'Argentina: Kirchner Asks to Meet French, German, Spanish Leaders in New York, World News Connection on 23 August 2005' in Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards Limits to Enforcement of ICSID Awards' (2006) Journal of International Arbitration 16.

²¹⁹ *Compania Del Desarrollo De Santa Elena, S.A. v The Republic of Costa Rica*, ICSID Case Number ARB/96/1, Final Award (17 February 2000).

²²⁰ Ibid para 25.

²²¹ Ibid.

²²² Roger P Alford, 'The Convergence of International Trade and Investment Arbitration' (2014) 12 (1) Santa Clara Journal of International Law 50.

*Company v. Argentina*²²³ and *Azurix Corp. v. Argentina*²²⁴ where awards were enforced against Argentina. The main reason why the GSP method was applied in these cases was that Argentina was the Respondent and lost its case, and subsequently it declined to pay an award voluntarily. The amounts to be paid in both cases were \$133 million and \$165 million USD dollars respectively. The Argentine Government's action against American investors was not welcomed by the USA and President Barack Obama announced that they had, 'not acted in good faith in enforcing arbitral awards in favour of USA owned companies and it is appropriate to suspend Argentina's designation as a beneficiary country under the GSP program.'²²⁵ This decision was made by presidential authority, and, at the same time, the national law of the USA (the Trade Act of 1974, Section 502 (f) (2)) was amended (19 U.S.C. 2462 (f) (2) to allow for this decision. Argentina was a beneficiary country under GSP, and if a receiver country fails to act in good faith to enforce arbitral awards in favour of USA owned companies, then USA aid is terminated.²²⁶

This was the first time in the thirty-five year history of GSP that the USA suspended Argentina's duty free allowance under this programme.²²⁷ At the time, in 2011, Argentina was the ninth largest GSP beneficiary, with \$477 million in exports of duty-free products to the USA²²⁸ In addition, the American Government began to vote against all credits for Argentina, beginning with a \$230 million loan from the Inter-American Development Bank, until it paid to *Azurix* and *Blue Ridge Investments*.²²⁹

Alternatively, in cases of the non-enforcement of awards, states might take economic sanctions against other states. This is not a popular method to use, but action of this nature has been taken. The tribunal in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea case* confirmed that, 'Non-compliance by a State constitutes a violation

²²³ *GMS Gas Transmission Company v. Argentina*, ICSID Case Number ARB/01/8, Award (12 May 2005). The original award in this case was purchased by Blue Ridge Investments, a Bank of America subsidiary.

²²⁴ *Azurix v. Argentina* ICSID Case Number ARB/01/12, Award (14 July 2006).

²²⁵ Message to the Congress Suspending Generalized System of Preferences Benefits to Argentina, 26 March, 2012 in *Public Papers of the Presidents of the U.S., Barack Obama, Book I - January 1 to June 30 2012* (United States Government Publishing Office 2016) 368.

²²⁶ *ibid.*

²²⁷ U.S. Suspends Special Tariffs for Argentina, BBC News (26 March 2012, 13:23 ET)

<http://www.bbc.co.uk/news/business-17517838/> (Last accessed September 2018).

²²⁸ U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences

<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti/> (Last accessed September 2018).

²²⁹ US will vote against loans to Argentina in World Bank and IDB, *MercoPress South Atlantic News Agency*, 29th September, 2011 <http://en.mercopress.com/2011/09/29/us-will-vote-against-loans-to-argentina-in-world-bank-and-idb/> (Last accessed September 2018).

by that State of its international obligations and will attract its own sanctions.’²³⁰ In 2012 the Argentine Government expropriated 51% of the YPF Oil Company from Repsol, a Spanish company. In response, the European Union launched a call to all member states to impose sanctions against Argentina.²³¹ The EU Trade Commissioner, Karel De Gucht, emphasises the importance of protection for investors with these words:

It will grant legal security to existing bilateral investment treaties concluded between our Member States and non-EU countries, as the EU is moving to replace them over time by EU-wide investment deals. This will protect EU investments abroad and allow investors legal channels to defend themselves when needed. The current dispute between Repsol and Argentina is a case in point...[...]. It’s my ambition that, with time, every European investor has an equal protection of his interests abroad which, for the moment, is only sometimes assured to investors from a limited number of member states.²³²

Accordingly, the Spanish Government restricted imports of bio-fuels from Argentina at a time they were importing three-quarters of all bio-fuels from Argentina.²³³ Interestingly, after the EU and Spain took this action, the Argentine Government began a WTO dispute settlement against the EU and Spain.²³⁴ As of 1 January 2018, the Argentine Government began to execute the award and has started to compensate foreign investors, and, thus, Argentina is being reinstated to the GSP program.²³⁵ Anna Joubnin Bret, an expert in international investment arbitration claims that, ‘sanctions do not work in investment arbitration and this system must be based on fairness and investors must be compensated.’²³⁶

²³⁰ *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case Number ARB/84/4, Interim Order No.1 on Guinea’s Application for Stay of Enforcement of the Award (12 August 1988) para 25.

²³¹ Fiona Govan and Emily Gosden, ‘European Parliament Calls for Sanctions against Argentina’, *The Telegraph*, 20th April, 2012, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/9216541/European-Parliament-calls-for-sanctions-against-Argentina.html/> (Last accessed September 2018).

²³² European Commission, ‘EU takes key step to provide legal certainty for investors outside Europe’, 12th December, 2012, http://europa.eu/rapid/press-release_IP-12-1362_en.htm/ (Last accessed September 2018).

²³³ Raphael Minder, ‘Spain Stings Argentina Over Oil Company Nationalization’, *The New York Times*, 20th April 2012, <http://www.nytimes.com/2012/04/21/business/global/spain-stings-argentina-over-nationalization-of-repsol-ypf.html/> Last accessed September 2018).

²³⁴ WTO, *European Union and a Member State: Certain Measures Concerning the Importation of Biodiesels*, WT/DS443/5, 7 December 2012.

²³⁵ Office of the United States Trade Representative, Executive Office of the President, ‘Trump Administration Enforces Trade Preference Program Eligibility’, *Press Releases*, December, 2017 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/trump-administration-enforces/> Last accessed September 2018).

²³⁶ Anna Joubin-Bret ‘Is There a Need for Sanctions in International Investment Arbitration (2012) 106 *American Society of International Law* 130-133.

Lastly, it should be noted that countries such as Argentina, who do not comply with awards, are in a minority, and/or information about countries that fail to comply is generally not in the public domain. Therefore, to enforce an award and compensate the investor, diplomatic, economic and trade actions can be taken. However, if more countries follow the lead of Argentina, then the ICSID system could collapse, and this would weaken the international system that has been built up since 1965.²³⁷ Maurer argues that it is very difficult for democratic states to ignore calls to protect their citizens' investments abroad.²³⁸ Maurer also argues that the domestic political cost of refusing to intervene is often higher than the cost of intervening.²³⁹ Additionally, the cost of these interventions on behalf of private investors costs less when we compare the same costs to those of the Cold War period.²⁴⁰ Nevertheless, this kind of intervention is not the best solution for investor-state arbitration. In practise, if the majority of states did not obey international rules, it might be assumed that international society might change the ICSID Convention or renew it with any added necessary articles. In 1965 the ICSID Convention was founded to demonstrate that the international community could create new conventions or change old ones, and replace them with efficient ones.

The action taken by the USA and the European Union against Argentina, for example, is only possible for economically and politically powerful countries. Using these mechanisms is not feasible for politically and economically weak states, and only a few states are able to use the above discussed mechanisms to enforce awards. Therefore, it is very important to limit the use of such mechanisms in investor-state disputes. However, trying to ban or limit the use of these mechanisms would be difficult, and it raises new questions, but if this option is not considered, then the ICSID's future might be in danger. Finally, it is worth mentioning that if disputes between the investor-state, or the state-state arise, then the use of diplomatic channels would be the most likely method for solution, and might be welcomed in this kind of dispute.²⁴¹

6.6. State to State Arbitration

The ICSID Convention and the BIT system embody two distinct spheres of rights and

²³⁷ Noel Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas 1893-2013* (Princeton University Press 2013) 444.

²³⁸ *ibid* 446.

²³⁹ *ibid* 433.

²⁴⁰ *ibid* 446.

²⁴¹ Lars Markert and Stephan Wilske, 'The Use of Diplomatic Channels' in Günther J Horvath and Stephan Wilske (eds), *Guerilla Tactics in International Arbitration* (Wolters Kluwer & Business 2013) 298.

obligations: the ones applicable between contracting parties (state-to-state arbitration) and others between one contracting state and the host state of the investment (investor-state arbitration).²⁴² The first modern BITs were signed in 1959 between Germany and Pakistan, during a time when the only dispute settlement mechanism available was state-to-state arbitration. In the first inter-state arbitrations, the clauses were influenced by previous friendships, and commerce and navigation (FCN) treaties.²⁴³ These BITs continued until 1968, and it was only after this time that BITs were designed to settle not only state-to-state arbitration, via submission of the dispute to the ICJ, but also investor-state arbitration. With the introduction of modern BITs, foreign investors obtained the right to bring claims directly against a host state in investor-state arbitration. Nevertheless, this does not mean that party states cannot settle their disputes using state-to-state arbitration; almost all BITs allow for state-to-state arbitration, where contracting parties can settle their conflicts on ‘treaty interpretation or treaty application’. For some scholars, interstate arbitration mechanisms are important for two reasons: firstly they help parties re-engage with the investment treaty system, and they serve to re-politicise investor-state arbitration.²⁴⁴

In general, state-to-state arbitration is different from investor-state arbitration or DP, but neither closes access to state-to-state arbitration. It is believed that state-to-state arbitration has a much broader scope than DP, and this is more useful to both host and home states.²⁴⁵ It also means that investor-state arbitration is not prioritised over, or insulated from, state-to-state arbitration.²⁴⁶ These foundations of DP: investor-state arbitration and state-to-state arbitration can be applied separately or alternatively using different processing times for the disputes. For instance, in the *Italy-Cuba case*²⁴⁷ the Tribunal’s view was that the Investor had a choice whether to bring its DP claim according to Article 10 of the Italy-Cuba BIT, using inter-state arbitration or investor-state arbitration provisions, but not both.²⁴⁸ DP is applicable if the losing party does not comply with the award, and the same rules apply for state-to-state arbitration. In other words, state-to-state arbitration is appropriate for the enforcement of

²⁴² Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 3-4; Zachary Douglas ‘Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID’ in James Crawford, Alain Pellet and Simon Olleson (eds) *The Law of International Responsibility*, (Oxford University Press 2010) 816.

²⁴³ Roberts (n 137) 3.

²⁴⁴ *ibid* 2-4.

²⁴⁵ Murilo Lubambo, ‘Is State-State Investment Arbitration an Old Option for Latin America?’ (2016) 34 (2) *Conflict Resolution Quarterly* 230.

²⁴⁶ Roberts (n 137) 11.

²⁴⁷ *Republic of Italy v. Republic of Cuba*, Ad hoc Arbitration, Final Award (15 January 2008).

²⁴⁸ Clovis J. Trevino, ‘State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the Same Treaty’ (2014) 5(1) *Journal of International Dispute Settlement* 218.

awards, but not for investor-state arbitration and/or if the state party terminates the BIT earlier to the detriment of prospective investors.²⁴⁹ One example of this is the BIT between Japan and Colombia 2011 Article 40 (2), which reads as follows:

If the disputing party fails to abide by or comply with an award, upon a request of the Contracting Party other than the disputing Party, an arbitration board in conformity with Article 24 [state-state arbitration] may be established. The requesting Party may seek in such proceedings:

- a. A determination that the failure to abide by or comply with the final award is inconsistent with the obligation of this Agreement; and
- b. A recommendation to the disputing Party to abide by or comply with the award.²⁵⁰

Moreover, Reisman explains that state-to-state arbitration is relevant when there is a non-enforcement of an award, and where the treaty is invalid, terminated or suspended.²⁵¹ It confirms that none of the procedures (investor-state, DP or state-state arbitration) are, on their own, sufficient enough to protect foreign investments, and each of them might be accepted as alternative options for foreign investors in order to protect their investment in a foreign country.²⁵² Probably for that reason, ICSID or BITs allow for the settlement of inter-state disputes according to these treaties. In general, a state-to-state dispute settlement clause could read as follows:

...Any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels shall be submitted on the request of either Party to arbitration, for a binding decision or award by a tribunal in accordance with applicable rules of international law.²⁵³

²⁴⁹ Jarrod Wong, 'The Supervision of State-to-State Investment Treaty Arbitration' (2014) 53 (1) *Columbian Journal of Transnational Law* 38.

²⁵⁰ An Agreement between Japan and the Republic of Colombia for the Liberalisation, Promotion and Protection of Investment (BIT) (2011) Art 40 (2).

²⁵¹ *The Republic of Ecuador v. the United States of America*, (Expert Opinion with Respect to Jurisdiction of Professor W Michael Reisman, PCA Case No. 2012-5) 24 April 2012, para 41, 23.

²⁵² Peter Malanczuk, 'State-State and Investor-State Dispute Settlement in the OECD Draft Multilateral Investment Agreement' (2000) 3 (3) *Journal of International Economic Law* 438; Roberts (n 137) 69; Murilo Lubambo, 'Is State-State Investment Arbitration an Old Option for Latin America?' (2016) 34 (2) *Conflict Resolution Quarterly* 241.

²⁵³ The United States Model Bilateral Investment Treaty (2012) Art 37(1).

The ICSID allows for the settling of disputes between member parties of the Convention. Specifically, if there is any dispute relating to the interpretation or application of the ICSID Convention, in accordance with Article 64 of the Treaty, then the parties are permitted to bring a claim before the ICJ. However, this is not for the protection of the investment, but for ‘interpretation’ and ‘application’ of the Treaty. As Douglas explains, the purpose of Article 64 is to ‘protect the integrity of ICSID system rather than to achieve compensation on the behalf of its investors.’²⁵⁴

To date, 3,321 IIAs have been concluded²⁵⁵ but only four state-state arbitrations are publicly known about.²⁵⁶ These cases are: *Mexico v. United States (NAFTA, 2000)*, *Italy v. Cuba (2003)*, *Peru v. Chile (2003)*, and *Ecuador v. United States (2011)*. The disputes between *Mexico v. United States* were on the matter of cross-border trucking services.²⁵⁷ The first case of state-state arbitration was the *Italy v. Cuba* case, where investor-state arbitration was used as an alternative option for dispute settlement.²⁵⁸ In this case, Italy espoused sixteen investors’ claims (DPs) and initiated inter-state arbitration against Cuba. The Italian Government relied on Article 10 of the BIT (1993) between Italy and Cuba to argue that the Cuban Government was not complying with its treaty responsibilities and obligations.²⁵⁹ However, Cuba objected and asserted that according to Article 10 of the BIT, Italy had no right to espouse national claims, and Italy was only able to bring a dispute on its own regarding the interpretation and application of the Treaty.²⁶⁰ In the final decision, the Ad Hoc Tribunal dismissed all of Italy’s claims on the basis of either jurisdiction or merits, and rejected the counter-claims of the Cuban Government, and the costs of arbitration were borne by the parties.²⁶¹

²⁵⁴ Douglas (n 241) 817.

²⁵⁵ United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Navigator <http://investmentpolicyhub.unctad.org/IIA> (Last accessed November 2017).

²⁵⁶ Nathalie Bernasconi-Osterwalder ‘State-State Dispute Settlement in Investment Treaties’ in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both End Publications 2016) 254.

²⁵⁷ *ibid* 15.

²⁵⁸ Michele Potestà, ‘State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?’ in Nerina Boschiero et al. (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (T.M.C. Asser Press 2013) 754.

²⁵⁹ Orlando F Cabrera, *The Republic of Italy v. The Republic of Cuba (Ad Hoc Arbitration), Final Award, International Arbitration Case Law* (School of International Arbitration, Queen Mary University of Law, 8 October 2011) 3.

²⁶⁰ Larisa Babiy, ‘Decisions published in rare state-to-state dispute between Italy and Cuba (Ad hoc)’ (19 July 2012) *Investment Treaty News* <https://www.iisd.org/itn/2012/07/19/awards-and-decisions-8/> (Last accessed September 2018).

²⁶¹ Cabrera (n 258) 13.

Here, it is worth mentioning that in cases such as *Italy v. Cuba* (2003) if DP is applied as a dispute settlement mechanism, then DP is not only subject to customary international law but also to the new codified basis of the treaties.²⁶² In a nutshell, Amerasinghe explains that in *Italy v. Cuba* (2003), DP is available to the treaty parties as an alternative to settlement procedures.²⁶³ Amerasinghe's view is supported by Roberts, who believes that treaty party states should be permitted to bring DP in state-to-state arbitration clauses on the basis that this will help develop party investment treaty rights; today's investor-state arbitration practices have proved there is a need for DP in most cases.²⁶⁴ However, to put it bluntly, scholars have not given any specific examples of where the investor-state is indispensable for DP. In other words, to the researcher's knowledge, no practical examples have been given where investor-arbitration disputes have not been solved because of the absence of DP.

Amerasinghe explains that if investor-state arbitration has already been commenced, then treaties (usually) do not allow the involvement of the home state in the arbitration process, because it would not simplify the dispute settlement but rather duplicate it, and the result would not be logically acceptable.²⁶⁵ A similar situation occurred in *Peru v. Chile*. In this case, the Chilean investor *Luchetti* launched ICSID arbitration against Peru in 2003.²⁶⁶ The Chile-Peru BIT was signed in 2000 and entered into force in 2001. However, the Peruvian Government declared that, according to Article 2 of the Treaty, this dispute lacked jurisdiction (*ratione materiae*). In other words, according to Article 2, the dispute was outside the scope of the Treaty.²⁶⁷ However, the Government of Peru tried to resolve the disagreement diplomatically, but it was not successful. When the Peruvian Government learned it had not been successful, it commenced state-to-state arbitration against Chile, and requested for the suspension of the *Luchetti v Peru* case.²⁶⁸ The investor-state arbitration *Luchetti v. Peru* Tribunal declined the request for suspension, claiming that the conditions for a suspension of the proceedings had not been met.²⁶⁹ At the same time the *Luchetti v. Peru*

²⁶² Greg Lourie, 'Diplomatic Protection under the State-to-State Arbitration Clauses of Investment Treaties', in Christian Klausegger et al. (eds) *Austrian Yearbook on International Arbitration 2015* (Beck C.H. 2015) 515.

²⁶³ Amerasinghe (n 181) 341.

²⁶⁴ Roberts (n 137) 29.

²⁶⁵ Amerasinghe (n 181) 341.

²⁶⁶ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. the Republic of Peru (Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. the Republic of Peru)*, ICSID Case Number ARB/03/4, Award (7 February 2005).

²⁶⁷ *ibid* para 25 (3) (iv).

²⁶⁸ *ibid*, para 7.

²⁶⁹ *ibid*, para 9.

case was decided in favor of Peru²⁷⁰ and, thereafter, the winning party abandoned its state-to-state arbitral proceedings.²⁷¹

One other well known state-to-state arbitration case is *Ecuador v. U.S.* As in the previous case *Luchetti v. Peru*, this case also began as an investor-state arbitration case. Between 1991 and 1993 Texaco Petroleum (TexPet) filed seven breaches of contract cases against Ecuador in the national courts of the Ecuadorian Government.²⁷² One of the arguments of the claimants Chevron Corporation and Texpet was that Ecuador violated treaty obligations specifically under Article II (7) of the U.S.- Ecuador BIT, where under that paragraph, ‘Each party must provide effective means of asserting rights and claims with respect to investment, investment agreements and any investment authorizations.’²⁷³ On 30 March 2010 the Tribunal agreed that the Ecuadorian Government had violated Article II (7) of the BIT.²⁷⁴

After this, the Ecuadorian Government tried to settle the dispute using diplomatic channels. However its efforts were not successful, and this was why inter-state arbitration was commenced. According to Article VII of the BIT between the USA and Ecuador, the Ecuadorian Government initiated state-to-state arbitration. The interesting point in this arbitration case is that the USA Government claimed that Ecuador’s claim fell outside of the scope of Article VII, and so there was no dispute between the parties concerning the interpretation or application of the Treaty.²⁷⁵ More importantly, the USA claimed that, as a respondent, they were not obliged to respond to or to confirm Ecuador’s unilateral interpretation of the Treaty.²⁷⁶ In practice, the silence of the USA or a failure to confirm Ecuador’s interpretation meant there was no basis for a dispute concerning interpretation.²⁷⁷ Finally, the Tribunal dismissed the case on the grounds of the absence of the existence of a

²⁷⁰ Nathalie Bernasconi-Osterwalder, ‘State-State Dispute Settlement in Investment Treaties’ 2014 (October) in International Institute for Sustainable Development 11.

²⁷¹ Rudolf Dolzer and Christopher Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 234.

²⁷² *Chevron Corporation (U.S.) and Texaco Petroleum Company (U.S.) v. the Republic of Ecuador*, Partial Award on the Merits (30 March 2010) para 134.

²⁷³ The U.S. - Ecuador BIT, (signed on 27 August 1993 and entered into force 11 May 1997) Art II (7).

²⁷⁴ *Chevron Corporation (U.S.) and Texaco Petroleum Company (U.S.) v. the Republic of Ecuador*, Partial Award on the Merits (30 March 2010) para 270.

²⁷⁵ *The Republic of Ecuador v The United State of America*, Memorial of Respondent United States of America on Objections to Jurisdiction, PCA Case No. 2012-5 (25 April 2012) 15.

²⁷⁶ *ibid* 36.

²⁷⁷ Margie-Lys Jaime, ‘Relying Upon Parties’ Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements’ (2014) 46 *Georgetown Journal of International Law* 301.

dispute that fell within the ambit of Article VII of the Treaty.²⁷⁸

Occurrences of the above described kind of inter-state arbitration are rare. For this reason, it is important to gauge expert views on this subject. In relation to the *Ecuador v. U.S.* case, Reisman claims that if the Tribunal had accepted Ecuador's claims, then this would have worked to, 'frustrate the investor's right under the substantive provision of the Treaty and replace the investor's right to a finally binding arbitration.'²⁷⁹ Moreover, Reisman argues that state-state arbitration should not replace investor-state arbitration, and the former should only be applied in certain circumstances, such as the failure of the host state to comply with awards, and then investors must push their governments to initiate arbitration between state parties.²⁸⁰ In other words, state-state arbitration should be the 'last resort' for the protection of investors if there is a problem with investor-state arbitration.²⁸¹

Here, it is worth mentioning that there is no template for how investor-state and state-to-state arbitration should interact; it is still an open issue.²⁸² Lastly, it should be noted that inter-state arbitration should not be used as an appellate mechanism for investor-state arbitration, or used instead of a trial for dispute settlement. In general, the state-to-state arbitration mechanism is a useful tool for settling investors' problems, even in specific territories such as the Crimea. In his article 'Sovereignty over Crimea: A Case for State-to-State Investment Arbitration', Tzeng explains that the terms of the Russian-Ukraine BIT state that the Ukraine Government can initiate state-to-state arbitration, and that Ukraine has a seat at the table.²⁸³ These examples show that state-to-state arbitration is an essential instrument, even in investor-state dispute settlements.

6.7. The Recognition and Enforcement of Awards under the New York Convention of 1958

The New York Convention (1958) is one of the most recognised and ratified conventions in the world. Its full name is *The Convention on the Recognition and Enforcement of Foreign*

²⁷⁸ *The Republic of Ecuador v The United States of America*, Award of 29 September 2012, Part VII (1).

²⁷⁹ *The Republic of Ecuador v The United States of America*, Expert Opinion by W. Michael Reisman with Respect to Jurisdiction in the Interstate Arbitration Initiated by Ecuador against the United States (24 April 2012) para 32.

²⁸⁰ *ibid* para 29.

²⁸¹ Giorgio Sacerdoti, 'Interstate Dispute Settlement in BITs' (1997) in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law, Tome 269 de la Collection* (Martinus Nijhoff 1998) 436.

²⁸² Roberts (n 137) 55.

²⁸³ Peter Tzeng, 'Sovereignty Over Crimea: A Case for State-to-State Investment Arbitration' (2016) 41 *The Yale Journal of International Law* 460.

Awards. Until today, the Convention was signed by 157 states, and is accepted as a key instrument in international arbitration. It has allowed arbitration to become the primary method for solving disputes in international trade and commerce.²⁸⁴ The Convention is remarkably short, and it does not seek to specify where foreign awards should and should not be enforced, or where awards should be annulled. The main principle of the Convention is that unless an award is faulty, then awards must be enforced and executed by the contracting states of the Convention without any complications.²⁸⁵ In addition, as indicated in its name, the Convention requires ‘recognition’ of awards in another country other than the seat of arbitration.²⁸⁶

If awards are not ICSID awards, then the only option that remains for the parties, when they are seeking to enforce and execute their award, is the New York Convention. In other words, non-ICSID awards cannot be enforced without the existence of the New York Convention, which makes this international treaty valued in international society. Here, it is important to note that awards rendered by the ICSID Additional Facility Rules are not ICSID awards, and are out of jurisdiction of the ICSID Convention. For this reason these awards can only be enforced under the New York Convention (not under the ICSID Convention). Schreuer states that, ‘the question of the applicability of the New York Convention to ICSID awards is not likely to arise. But this issue may become relevant in exceptional circumstances, like the enforcement of an ICSID award in a state that is a party to the New York Convention but not to the ICSID Convention.’²⁸⁷

In general it is accepted that, in comparison to the New York Convention, ICSID awards are enforced automatically and easily. The ICSID Convention does not allow municipal courts to review awards, but the New York Convention does.²⁸⁸ Moreover, Article V of the New York Convention allows for the national courts of states to resist the recognition and enforcement of foreign awards if one or more of the following five conditions are met:

- 1) The incapacity and invalidity of the arbitration agreement.

²⁸⁴ Christoph Liebscher, ‘The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Preliminary Remarks’ in Dr. Reinmar Wolff, with a contribution by Christian Borris et al., *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Commentary* (Verlag C H Beck oHG, Munchen 2012) 2.

²⁸⁵ Marike Paulsson, *The 1958 New York Convention in Action* (Wolters Kluwer 2016) 1-2.

²⁸⁶ The New York Convention (1958), Article I (1).

²⁸⁷ Schreuer (n 1) 1118.

²⁸⁸ Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn, Kluwer Law International 2011) 180; Bjorklund (n 7) 215-216.

- 2) A lack of due process.
- 3) When arbitrators have acted beyond their jurisdiction.
- 4) There is an improper constitution of the tribunal.
- 5) The award is not binding or has not been set aside or suspended by the courts of the seat.²⁸⁹

These grounds must be proven by the parties. According to Article V (2) of the New York Convention, courts may take into account *sua sponte* on two grounds, as follows:

- 1) A violation of procedural or substantive policy/non-arbitrability.
- 2) The public policy of the enforcing state.

Here, it should be noted that in the earlier case of *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier*, the Second Circuit of the United States Court of Appeals emphasised that the Convention's public policy defence, '...should be construed narrowly. The enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.'²⁹⁰ This shows that Convention's main aim is to recognise and enforce awards internationally, but also to preserve the national values and morals of the member states. Lastly, it is worth noting that, under the ICSID Convention, if the award has been annulled, this means that the case is over, and the only remaining option for parties is to re-submit the dispute to another arbitral tribunal. However, the system of the New York Convention is different, in that it allows for the recognition and enforcement of suspended or annulled awards in different member states. For instance, the Svea Court of Appeals allowed the recognition and enforcement of a treaty award in Sweden, even though it was still under annulment review in Denmark. The Court found that a violation of the principles of *lis pendens* does not qualify as 'public policy' circumstances, and it does not form valid grounds to refuse enforcement.²⁹¹

Therefore, as shown, both the ICSID and New York Conventions are different in some respects, and this makes their operation successful and practical in the field of international

²⁸⁹ The New York Convention (1958) Article V(1); Ilias Bantekas, *An Introduction to International Arbitration*, (Cambridge University Press, 2015) 223-247; Julian D. M. Lew, Loukas A Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration*, (Wolters Kluwer Law & Business 2003) 706-732.

²⁹⁰ *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier* (1974) RAKTA, Court of Appeals, Second Circuit, 508 F.2d 969, United States of America 974.

²⁹¹ *Swembalt Aktiebolag v. The Republic Of Latvia*, Svea Court of Appeal Judgment Case No Ö 7192-01, Stockholm, 29 October 2002 https://www.italaw.com/sites/default/files/case-documents/italaw7717_0.pdf (Last accessed October 2018).

arbitration. It would not be wrong to argue that the main reason why these Conventions are accepted and applied by members relates to the self-interest of all member states, not just the disputing parties, as in DP. Secondly, it is now accepted that if compliance is not working properly, then ‘punishment’ is not a perfect mechanism for encouraging compliance with international law.²⁹² It is wiser to find other solutions (by devising ICSID or New York type conventions, for example) where the majority of states agree to comply with awards voluntarily.

6.8. Conclusion

This chapter has examined the judicial and non-judicial resolution systems available to resolve international investment disputes arising between investors and states. International investment arbitration is one of the most effective methods for the resolution of international investments disputes, but some legal challenges still arise in relation to the enforcement of arbitral awards. This chapter has focused on analysing practical solutions that can provide effective enforcement, and which can increase an investor’s access to justice. In most cases, investors face some legal problems, especially in relation to state immunity from execution in some cases, where the losing party does not intend to comply with an arbitral award. The solutions discussed in this chapter can be used differently in order to offer more effective enforcement mechanisms for the winning party.

²⁹² Eric A Posner and Alan O Sykes, ‘Efficient Breach of International Law: Optimal Remedies, Legalized Non-Compliance and Related Issues’ (2011) 110 (243) Michigan Law Review 256.

Chapter Seven: Conclusion and Recommendations

7.1. Conclusion

Historically, the protection of investors has been one of the main goals of DP. However, over the years, this changing process has been described using different terms by different people. Many have referred to the kind of protection practised in centuries past as ‘gunboat diplomacy’ while in modern times it has been called ‘home state intervention’. Nowadays, investors are protected by ‘special bilateral or multilateral investment agreements’ and various treaties outline the processes investors can use to settle investment disputes, including ICSID Arbitration, Additional Facility Arbitration, or using an ad-hoc tribunal (UNCITRAL). However, after the commencement of investment arbitration, the ICSID Convention does not welcome any further home state involvement in a dispute.

The main aim of this thesis was to explore and explain the role of DP in investment disputes. Before investors begin an arbitration process, home state countries might be able to diplomatically protect investors by negotiating with host states. Usually, the home state sends a notice letter and a warning that outlines how pursuing a case might harm specific investors (as in the Italy-Cuba case). If arbitration has already commenced between an investor and a state, home state involvement is only permitted under ICSID Article 27, which is during the enforcement process of administering ICSID awards. This thesis recognises that the enforcement mechanism of the Convention works efficiently, and that this has helped to minimise state-state conflicts when dealing with investor disputes.

Nowadays, parties often have different alternative legal enforcement mechanisms available to them, such as third party funding schemes. These have become more popular in recent years, because they serve to reduce the involvement of the home state, especially during the enforcement stage of the award. Under this mechanism, parties can sell their award in exchange for compensation. This process has several advantages, but one of the main benefits is that it prevents state-state interaction on the behalf of investors. Furthermore, awards can be executed more easily. For now, it seems that the process of DP has largely collapsed; it is no longer an attractive dispute settlement mechanism for states and investors.

After explaining the main conditions under which DP has been exercised in the past, the thesis attempted to clarify the main reasons why the institution has failed. The main reason is

because DP has been mainly used as an instrument, and not used by states equally. Historically, DP has often been used as a tool to protect investors from powerful states, and this bodes badly for the future of the ICSID Convention. Indeed, the history of DP should serve as a lesson to member countries of the ICSID. As discussed in this thesis, DP became very popular in Latin American countries, and was mostly used by, but also, subsequently, denounced by these countries. The history of the ICSID Convention shows also that Latin American countries were among the first to reject the Convention. However, to date, only a few countries have actually officially withdrawn from the ICSID Convention, but this crisis might be a prequel to a trend that points to the beginning of the end for the ICSID Convention.

This thesis has highlighted that, in investment arbitration, weak or developing countries often lose out when they come up against developed states. In other words, the ICSID Convention costs more for economically weak states. However, this is not the fault of the ICSID Convention per se, which is not biased, but is because developed states are economically and legally stronger in comparison to weaker states from the outset, and this status helps them to win cases against weaker states. Furthermore, if this winning streak increases each year, this could damage the relationship between treaty parties, hasten more withdrawals, and, ultimately, speed-up the demise of the ICSID Convention. This thesis argues in favour of promoting dialogue between states, and the importance of developed countries listening to weaker states, to try to find solutions to their problems, rather than have them move to automatic withdrawal from the ICSID Convention. This is important for future co-operation between countries, especially in investment, trade and economic sectors.

Lastly, this thesis does not support the idea that DP should automatically be used to solve investor-state disputes, nor does it argue that DP should be completely avoided. This thesis contends that DP should be used when it offers the best framework for a solution for investor-state conflicts.

7.2. Recommendations

This thesis proposes the following recommendations:

7.2.1. Recognising the Changing Role of DP

Diplomacy or DP should not be used as the primary dispute settlement mechanism available in investor-state disputes. However, there should be opportunity for parties to use it as an additional instrument to aid interpretation or to evaluate investors' personal requests. When parties exercise diplomacy or DP in a fair and appropriate way, it does not damage ISA, and can work to support investment arbitration. It would be wrong to claim that the ICSID Convention or any other investor-state dispute settlement mechanism has 'one size fits all' capabilities to find a solution for all types of investment disputes.

In the case of *Occidental Exploration v The Republic of Ecuador*¹ the arbitral Tribunal ordered Ecuador to pay almost 2 billion USD for discriminatory treatment of the investor. This amount is equal to Ecuador's annual health or education budget. In such cases 'diplomacy' could play a key role in settling disputes between parties. For instance, in this case it is clear that 'diplomacy' would have been more efficient and beneficial for the parties. This is because the home state of the investor could have contacted the host state and especially requested the state not to discriminate against the investors. This would have helped both parties. Firstly, the investors would have been able to work in their field and improve their business with the host state. Secondly, Ecuador would not have been responsible for paying its annual education or health budget to a foreign company as compensation, and they could reinvest this money in their developing country, in health and/or education.

7.2.2. Recognising the Nationality of Investors

The ICSID Convention has been in operation for more than fifty years. In the beginning it was advantageous for it not to provide specific definitions for some terminologies. At the outset, the Convention was a new, and states were limited in the choice of investors they could do business with. However, the situation has changed, and now ICSID has many years experience in resolving investor-state disputes, and in investment arbitration, and it has become clear that an investor's nationality is extremely important. For this reason, the ICSID Convention needs reform in terms of how it defines 'nationality'. This will help to prevent the phenomenon of 'treaty shopping' and abuse of the ICSID Convention. The way the law stands now is that 'treaty shopping' investors can sue host countries even if they are not

¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Co. v. The Republic of Ecuador*, ICSID Case Number ARB/06/11, Award (2012).

genuine investors in those countries. As Schreuer notes, from a human rights perspective individuals are enjoying their rights regardless of their nationality, and this situation might take a long time to resolve.²

7.2.3. Preventing Withdrawal from the ICSID Convention

After some decades, a small number of Latin American came to the conclusion that the ICSID Convention did not work for them and, so, they decided to withdraw from the Agreement. The thesis has explored some of the main reasons why these states came to denounce the ICSID Convention. Indeed, this situation might happen again, and other states might decide to join those who have withdrawn. However, if a substantial number of countries decide to withdraw from the ICSID Convention, this would destroy a system that has taken fifty years to develop and establish. For this reason, states that express concerns should be listened to by other member countries of the ICSID Convention. Also, the complaining countries should receive support to solve their problems, in order to keep them within the institution. The Latin American states who withdrew created their own regional Investment Arbitration Centre, and there is a danger that more small centres like this one might emerge. Therefore, collaboration between ICSID member states is required.

7.2.4 Arbitrators v. Diplomats

This thesis has explained how the role of investment arbitrator has supplanted that of the diplomat in investor-state disputes. This has freed-up diplomats to work on political issues to protect their own citizens' interests and rights in foreign countries. At the same time, this trend has minimised the involvement of diplomats in investor-state disputes. However, some diplomats still work on investment matters, in specialised areas, such as inviting investors to visit their countries and organising events. The foundation of ICSID meant that member state arbitrators could settle investment disputes. However, research finds that only fifteen arbitrators have succeeded in solving more than 55% of well-known investment dispute cases, and all of these arbitrators are from developed countries.³ The substitution of diplomats with arbitrators seems to have been advantageous for investment arbitration, but if more than

² Christoph Schreuer, 'Nationality of Investors: Legitimate Restrictions vs. Business Interests' (2009) 24 (2) ICSID Review: Foreign Investment Law Journal 521-527.

³ Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and Transnational Institute, 2012) 8.

half of disputes are resolved only by small number of arbitrators, this might work to undermine the ICSID Convention. This is because these kinds of facts can be used as grounds for party opposition against the settlement process of investment arbitration. One solution to this problem is that arbitrators should not be drawn only from developed countries; candidates from developing countries should be offered equal opportunity to work as arbitrators in investment disputes. If the ICSID Centre cannot recruit enough quality arbitrators or lawyers, then it should set up its own school for arbitrators, in order to train lawyers and experts to work on future investor-state disputes. The Centre could also train arbitrators from different countries, so that disputing parties can make choices between arbitrators from all over the world. In addition, there should be limit on arbitrators recruited to work on investment arbitration, and the ICSID Secretariat could put a cap in place.

7.2.5. Balancing the Interests of Developing and Developed States

This research has acknowledged that developed countries have abused the DP process, and this has worked to reduce the popularity of DP in the field of investment disputes. This is important in relation to the survival of the ICSID Convention too. If the ICSID system is abused or used unfairly against developing countries, it will lose its prestige in the international arena. For this reason, ICSID should work towards creating a harmonised arbitration centre where developing and developed countries can protect their own interests according to international law. It has been shown that developing countries lose more disputes in investment arbitration, because they lack adequate legal skills and financial resources. Therefore, the Centre could give legal aid to developing countries. This will help the Centre better understand and practise investment arbitration, which will, in turn, minimise investment disputes in the future. In this case, from legal point of view, both developing and developed states will be in more of an equal position from the outset, and both parties' interests will be protected. In short, investor-state dispute settlement mechanisms should not work just for the benefits of developed countries, and law firms, consultants, and arbitrators in powerful states.

7.3. The Future of the ICSID Convention

There are critics of the ICSID Convention. Criticisms put forward mainly concern the lack of independence and impartiality of arbitrators, the lack of confidentiality in investor-state

disputes, and the limited accessible appellate mechanism of the ICSID Convention. Some commentators have called for the creation of a standing International Investment Court.⁴ However, this is a long term goal, which will need to be supported by other new international organisations. For this reason, a better solution would be to reform the ICSID Convention under control of the World Bank. If necessary, member countries should also participate in and help to finance the reforming process. Nevertheless, in conclusion it should be noted that the purpose of the BITs or FTAs between are to stimulate foreign direct investment and 'depoliticize' investment disputes between contracting parties. After this research it would not be wrong to claim that investment treaties between states successfully achieved their purpose and investment disputes are not a political and sensitive issue between countries anymore.

⁴ *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* UNCTAD (2013) No.2.

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