

The Competence of an Arbitral Tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of other States. An Analysis of Bilateral Investment Treaties Provisions and a Question of Admissibility

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1. Introduction

The International Centre for Settlement of Investment Disputes (hereinafter ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention or Washington Convention). The Convention came into force the 14th of October of 1966. ICSID's role, according to the Washington Convention, is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of Other Contracting States.¹ In the present article, we will focus on arbitration under the convention and particularly on the jurisdiction of an arbitral tribunal constituted under the mentioned international instrument.

The topic is relevant due to the increasing use of ICSID arbitration over the last years. According to the ICSID's website,² since the establishment of the Centre there have been 233 registered cases.³ Of these 233 cases only 5 are conciliation cases, the rest are arbitration cases.⁴ The increasing importance of ICSID arbitration can be

¹ Article 1 of the ICSID Convention.

² <<http://www.worldbank.org/icsid/index.html>> (accessed 18 April 2007).

³ There are 110 pending cases and 123 concluded cases in total, this includes conciliation cases and cases seen under ICSID's Additional Facility.

⁴ This includes cases arbitrated under ICSID's Additional Facility. ICSID Additional Facility includes, *inter*

understood easily with the use of statistics. There were 9 ICSID arbitration cases registered in the 1970's, and 15 in the 1980's. The number of arbitration cases registered since 1995 is of 196. Namely, more than 85% of ICSID's arbitration cases were registered after the first 5 years of the 1990's.

In most of the cases that had been brought to arbitral tribunal, under the provisions of the ICSID Convention and Rules, the respondent had argued that the dispute was not within the jurisdiction of ICSID either entirely or partially. «It is becoming increasingly common for the issue of jurisdiction to be raised as the first line of defence in a reference to arbitration».⁵ Schreuer identifies jurisdictional objections as a «standard feature» in ICSID arbitration.⁶ Jurisdictional objections can be then identified as a common place in ICSID arbitration and they are usually related to the consent or the lack of consent given by States to arbitrate certain disputes. In the first and second part of this article we will analyze the ICSID Convention provisions related to an arbitral tribunal capacity to determine the jurisdiction of the Centre and its own competition; and the jurisdiction of the Centre *per se*. These topics will be focused on articles 41, 25, and other provisions related to the topic in the ICSID Convention or Rules of Procedure for Arbitration Proceedings (hereinafter Arbitration Rules). The mentioned articles are directly related to the competence of an ICSID tribunal and give us a general understanding of the jurisdiction of the Centre.

The above mentioned articles and rules answer questions that will be approached in the first two parts of this work. The main questions that we would like to approach related to jurisdiction and competence in an ICSID arbitration are the following: (i) In what capacity does an arbitral tribunal constituted under the ICSID Convention determines the jurisdiction of the Centre and its own competence? (ii) What requirements does a tribunal have to analyse in order to determinate the jurisdiction of the Centre over a particular dispute? (iii) Are those elements restricted to those mentioned in article 25 of the ICSID Convention? (iv) Can the tribunal go further in order to determine the jurisdiction of the Centre or not? We need to answer these questions in order to pass to our third topic: State consent provided in Bilateral Investment Treaties (hereinafter BITs).

State consent, as we will see in the present article, has a fundamental role in jurisdictional issues. There are various forms that can be used by a State to express its consent

alia, conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State of the ICSID Convention.

⁵ REDFERN, Alan and Martin HUNTER. *Law and Practice of International Commercial Arbitration*. Fourth Edition Student Version. London: Thomson, Sweet & Maxwell, 2004, p. 534.

⁶ SCHREUER, Christoph. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2001, p. 531.

to ICSID jurisdiction. The third part of this article will focus in State consent provided in BITs. Our concern is how these bilateral instruments frame State consent to arbitrate. The UNCTAD website provides us with the following definition for this class of international instrument:

Bilateral investment treaties (BITs) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and *dispute settlement mechanisms, both state-state and investor-state* (emphasis added).⁷

We have identified in BIT's provisions a very important and increasing source of State consent for ICSID arbitration. They have become one of the most important legal instruments affecting private investment.⁸ The first modern BIT is the one between the Federal Republic of Germany and Pakistan, signed the 25th of November of 1959.⁹ In September 1994 over 700 BITs were already concluded.¹⁰ The worldwide increasing development of BITs has made it difficult to keep track of their number; however the UNCTAD website has an online BIT collection updated to the 26th of February of 2007.¹¹

The thesis of the present study in this part is that the terms in which consent is provided by States through BITs frame the jurisdiction of the Centre in each particular case. To prove the above-mentioned thesis, we would analyse typical BIT provisions that are normally used by States in order to base their jurisdictional objections. The provisions that we are going to analyse are: (i) «Fork in the Road» Provisions; (ii) Amicable Settlement provisions; (iii) Provisions that provide a definition for the term «investment»; and (iv) *Ratione temporis* Provisions. We believe that these typical provisions can give us a good example of how State consent can be expressed and constrained in BITs. This part will deal with the importance of the terms by which State consent is given.

Finally, we will like to deal with a current issue in ICSID arbitration. This part of the article will be related to questions of admissibility. A question that has been raised

⁷ <http://www.unctadxi.org/templates/Page____1006.aspx> (accessed 16 August 2005).

⁸ DOLZER, Rudolf and Margrete STEVENS. *Bilateral Investment Treaties*. The Hague: Kluwer Law International, 1995, p. 1.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ <http://www.unctadxi.org/templates/DocSearch____779.aspx> (accessed 18 April 2007).

on ICSID arbitration and in which there seems not to be a consensus. The distinction between jurisdiction and admissibility had been proved to be a very tricky one, particularly in ICSID arbitration. We would analyse the distinction and its particular consequences to ICSID arbitration.

2. Jurisdiction and Competence of an Arbitral Tribunal under the ICSID Convention

Jurisdiction can be understood as the power of a particular forum to hear a case. The *Oxford Dictionary of Law* defines jurisdiction as «[t]he power of a court to hear and decide a case or make certain order».¹² While *Black's Law Dictionary* gives, *inter alia*, the following meaning to the concept: «[a] court's power to decide a case or issue a decree».¹³ At this point we will like to address the question related to the capacity of an arbitral tribunal constituted under the ICSID Convention to determine the jurisdiction of the Centre and its own competence.

The power of an arbitral tribunal, constituted under the ICSID Convention, to determine its own jurisdiction over a case comes from treaty law. According to Schreuer the «[...] power of a judicial body to determine its own competence is an accepted principle of international adjudication and *is a common feature in instruments governing international judicial procedure*» (emphasis added).¹⁴ In that sense, article 41 of the Washington Convention gives the arbitral tribunal the power to determine its own competence:

- (1) The Tribunal shall be the judge of its own competence.

Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal shall be considered by the Tribunal which shall determinate whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 41 is the first article of Section 3 of the Arbitration Chapter of the Convention (Chapter IV). Section 3 deals with the powers and functions of an ICSID arbitral tribunal. As we can notice, paragraph (1) of article 41 deals with the general principle of the tribunal's power to determine its own competence while paragraph (2) deals with procedural matters related to such a power. This article is further developed by Rule 41 of the Arbitration Rules.

¹² *Oxford Dictionary of Law*. Fifth Edition. Oxford: Oxford University Press, 2002.

¹³ *Black's Law Dictionary*. Second Edition. St. Paul: West Publishing Company, 2001.

¹⁴ SCHREUER, Christoph. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2001, p 521.

2.1. Competence doctrine

According to Redfern and Hunter «[...] the usual practice under modern international and institutional rules of arbitration is to spell out in express terms the power of an arbitral tribunal to decide upon its own jurisdiction or, as it is often put, its competence to decide upon its own competence».¹⁵ This is sometimes addressed using the shorthand «competence/competence».¹⁶ We can see this clearly in article 41 of the ICSID Convention and in the Arbitration Rules.

2.2. Purpose of Article 41

Professor Schreuer argues that the primary purpose of article 41 «[...] is to prevent a frustration of the arbitration proceedings through a unilateral denial of the tribunal's competence by one of the parties».¹⁷ This article excludes the possibility for example of one State resorting to its domestic courts or to an *Ad Hoc* tribunal in order to deny an ICSID tribunal's jurisdiction. Mainly because the article «[...] includes the tribunal power to interpret a party's consent in the face of that party's attempt to interpret it restrictively».¹⁸

Another important point brought by Schreuer is that article 41 «[...] implies that a tribunal constituted pursuant to the Convention's procedure is validly constituted even if the validity of the consent to arbitration is disputed and may turn out to be defective».¹⁹ Namely, the fact that an ICSID tribunal determines its lack of competence because the arbitration agreement was not valid doesn't alter the validity of the constitution and actions taken by such tribunal. The same applies if the decision is annulled under article 52 of the ICSID Convention. We have to agree with Schreuer in the fact that article 41 gives the tribunal an «independent legal basis».²⁰

The importance of the power given to the tribunal to determine the jurisdiction of the Centre and its own competence is then threefold: (i) Parties cannot claim unilaterally that the ICSID tribunal lacks competence in order to hear a particular dispute; (ii) The fact that the tribunal determines that it has no competence over a particular dispute does not invalidate its constitution neither their decisions; and, (iii) The fact that its decision can be annulled, under article 52 of the Convention, doesn't invalidate the constitution of the tribunal.

¹⁵ REDFERN, Alan and Martin HUNTER, *op. cit.*, p. 300.

¹⁶ *Ibid.*

¹⁷ SCHREUER, Christoph, *op. cit.*, p. 522.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

An ICSID tribunal decision on jurisdiction should be binding on the parties and the only remedies available are the ones specified in the Washington Convention,²¹ namely, supplementation, rectification, interpretation, revision and annulment. Redfern and Hunter refer to the ICSID regime as an exceptional one «[...] where no application to local courts to review a jurisdictional decision is possible and where the internal annulment process only applies in respect to internal awards [...]».²² This is perhaps one of the most important features of ICSID arbitration.

3. Conditions of a Dispute in order to be in the ICSID Convention Jurisdiction

Chapter II of the Washington Convention deals with the jurisdiction of the Centre. As we have explained in the preceding point an ICSID arbitration tribunal has the power to deal with any objection related to the jurisdiction of the Centre. For these means article 25 of the ICSID Convention is crucial. Article 25 refers to the conditions a dispute needs in order to be available for ICSID arbitration. These conditions are the following: (i) The parties must have consent expressed in writing to submit the dispute to the Centre; (ii) The dispute must be between a contracting State (or one of its subdivisions or agencies designated to the Centre by that State) and a national of another contracting State; (iii) It must be a legal dispute; and, (iv) It must arise directly out of an investment.

These conditions involve the analysis that arbitral tribunals, acting in the scope of the ICSID Convention, have to perform in order to determine their own jurisdiction. Nevertheless, an analysis on a case-by-case basis can lead to other elements or arguments for a tribunal to find a particular dispute within or without the jurisdiction of the Centre.²³ These elements often derive from the conditions established in article 25 (1), and are particularly linked to the first condition, namely the consent expressed in writing between the parties or to the characterization of an investment.

We have to consider at this point that article 25 encompasses the jurisdiction of ICSID in arbitration and conciliation proceedings, although this work is focus only in arbitration. In this point we shall consider the jurisdictional conditions established in article 25, namely the jurisdictional requirements of a case in order to be heard by an ICSID tribunal. We will deal with other considerations that may arise in particular cases, such as some BIT provisions and admissibility later in this article.

²¹ Article 53 of the ICSID Convention.

²² REDFERN, Alan and Martin HUNTER, *op. cit.*, p. 305.

²³ As we will see in point 3 of the present article, this includes BIT provisions.

3.1. The parties must have consent expressed in writing to submit the dispute to the Centre

«The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice».²⁴ In order for a dispute to be within the jurisdiction of the Centre, written²⁵ consent given by both parties, namely the host State and the investor, is required. As Redfern and Hunter have pointed this is an usual feature of arbitration: «The arbitration can only proceed validly on the basis that the State concerned has agreed to arbitrate; and such an agreement is generally held to be a waiver of immunity».²⁶

Article 25 was drafted in a sense that consent in writing was required in order to assure the parties to the Washington Convention that ratifying that instrument wasn't by its own a consent to arbitrate. By these means they could overcome the concern expressed by «[...] some developing countries' representatives who feared that the Convention's mere existence might lead to pressure on host States to give consent [...]».²⁷

It is generally accepted that consent to ICSID jurisdiction may be given in any of the following ways: (i) By a direct agreement between the host State and the investor (e.g. provision in a legal stabilization agreement); (ii) By a provision in the host State's investment legislation which is accepted by a foreign investor; (iii) By an offer made by the State in a treaty which is thereafter accepted by an investor of the other contracting State (including multilateral treaties and BITs).²⁸ In the first case the consent of the parties is direct and clear. The second and third described cases consent is understood to be given as a «[...] result of a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted by the investor [...]».²⁹ Paulsson refers to this phenomena as arbitration without privity,³⁰ namely «[t]he possibility of direct action —international arbitration without privity— allows the true complainant to face the true defendant».³¹ Alejandro Escobar describes the phenomena of arbitration without privity as «[...] consent to arbitration formulated not in relation to a specific party but rather to a category of investors defined in general and

²⁴ SCHREUER, Christoph, *op. cit.*, p. 191.

²⁵ As we have noticed, the only formal requirement expressed in the Convention for the consent of the parties is that it has to be in writing.

²⁶ REDFERN, Alan and Martin HUNTER, *op. cit.*, p. 550.

²⁷ Schreuer, Christoph, *op. cit.*, p. 192.

²⁸ *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, at <<http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>>, para. 45.

²⁹ SCHREUER, Christoph, *op. cit.*, p. 192.

³⁰ PAULSSON, Jan. «*Arbitration without Privity*», in 10 ICSID Review – Foreign Investment Law Journal, 2005, p. 232.

³¹ *Ibid.*, p. 256.

sometimes open-ended terms».³² This distinction is paramount if we consider that the parties of a BIT (States) are not the parties of an investment dispute (State/Investor). We will continue dealing with State consent expressed in BITs in the third part of this article. At this point it is our intention to point out that State consent to arbitrate under the Washington Convention can be given in treaties and in municipal law.

It is important to notice at this point that parties can choose the scope of their consent to arbitrate, whether the consent is given in a direct way or by means of legislation or treaties. It is a very important task for an arbitral tribunal constituted under the Washington Convention to determine in which sense consent has been given, since not all disputes between parties that have consented for ICSID arbitration fall within that consent. In that sense Schreuer notices that «[t]he Convention leaves the parties a large measure of freedom in expressing their consent».³³ Again, this point will be treated more deeply when we refer to the States' consent provided in BITs in the present article.

In addition to that, article 25 (4) of the ICSID Convention gives the possibility to the parties to notify the Centre «[...] of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre».³⁴ The time frame provided for this notification is very broad. It can be done «[...] at the time of ratification, acceptance or approval [...]» of the Convention «[...] or at any time thereafter [...]».³⁵

3.2. The dispute must be between a Contracting State (or one of its subdivisions or agencies) and a national of another Contracting State

3.2.1. Contracting State

The term Contracting State is determined by article 68 of the Washington Convention. That article establishes that a State becomes a party of the Convention 30 days after depositing its instrument of ratification, acceptance or approval. According to the ICSID website there are 143 Contracting States and 155 States that have signed the Convention; this information is updated until the 15th of December 2006, day in which Canada signed the Convention.³⁶ The only means to lose the capacity of a Contracting State is through denunciation. Article 71 provides that: «Any Contracting State may

³² ESCOBAR, Alejandro. (2005) *The Use of ICSID precedents by ICSID and ICSID tribunals*, (British Institute of International and Comparative Law) at <<http://www.biiicl.org/admin/files/Alejandro%20Escobar.pdf>>, p. 1.

³³ SCHREUER, Christoph, *op. cit.*, p. 194.

³⁴ Article 25 (4) of the ICSID Convention.

³⁵ *Ibid.*

³⁶ <<http://www.worldbank.org/icsid/constate/c-states-en.htm>> (accessed 18 April 2007).

denounce this Convention by written notice to the depositary of this Convention [...] denunciation shall take effect six months after receipt of such notice».³⁷ However the denunciation of the Washington Convention is subject to limitations, in first place as article 71 provides it only becomes effective after six months and in the second place, as stipulated in article 72, it doesn't affect the consent given to the jurisdiction of the Centre before the denunciation.³⁸

3.2.2. *Constituent subdivisions or agencies designated to the Centre by a Contracting State*

The ICSID Convention gives Contracting States the possibility to designate constituent subdivisions or agencies. By constituent subdivisions the Convention refers to territorial entities, for example, according to the ICSID's website, Great Britain has designated, *inter alia*, Turks and Caicos Islands.³⁹ On the other hand, Peru has designated Perupetro S.A. a private law State company responsible for promoting the investment of hydrocarbon exploration and exploitation activities in the country,⁴⁰ namely an agency. Schreuer categorizes agencies as entities of a non-territorial nature.⁴¹

The purpose of such a designation is clearly that these territorial or non-territorial entities of a Contracting State can directly be part of an ICSID proceeding. It is our belief that in cases where investors have disputes with a constituent subdivision or an agency they can choose between presenting the request of arbitration directly against them or against the State. We have to consider at this point that is commonplace in Public International Law that «[a] State cannot plead the principles of municipal law, including its constitution, in answer to an international claim».⁴² In other words, the fact that an investment claim was raised because of the actions of a constituent subdivision or agency doesn't exclude States' responsibility in international law, regardless of its internal structure and the municipal laws regulating that structure. In that sense we believe that the provision has to be read taking into account the concept of indivisibility or unity of the State and the norms regarding State responsibility, in the light of customary international law. From that perspective, we consider that the fact that a State has designated a constituent subdivision or an agency doesn't preclude a claimant from presenting a request for arbitration

³⁷ Article 71 of the ICSID Convention.

³⁸ SCHREUER, Christoph, *op. cit.*, p. 141.

³⁹ At: <<http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-c.htm>> (accessed 16 August 2005).

⁴⁰ Peruvian Organic Law for Hydrocarbons, Law N° 26221.

⁴¹ SCHREUER, Christoph, *op. cit.*, p 154.

⁴² BROWNLIE, Ian. *Principles of Public International Law*. 4th ed. Oxford: Clarendon Press, 2003, p. 449.

against the State's central authorities. The reason of being of this particular provision is, in our understanding, to let a potential claimant decide if he is presenting a claim against the designated constituent subdivision or agency; or against the State. Sometimes the claimant would find more convenient to file a claim against a constituent subdivision or an agency and other times it would be more convenient to file the request for arbitration against the State's central authority. It really depends on the claimants' assessment before they present the request for arbitration.

3.2.3. *National of another Contracting State*

Article 25 of the ICSID Convention refers to the other party of the dispute as the national of «another Contracting State». From the Convention requirement for the investor to have the nationality of a Contracting State, we can establish *a contrario sensu* that an investor that only has the nationality of a non-contracting state to the Washington Convention is excluded.⁴³ It is useful at this point to refer to the basic purpose of the Convention, which is «[...] as expressed in its title [...] to provide for dispute settlement between States and foreign investors».⁴⁴ In that sense, we believe that the aim of this article is to provide for dispute settlement in an area where there wasn't usually a direct and specific mechanism. This is the case of disputes between States and private nationals of other States. This excludes State owned investors, because the Convention refers to private investors for the purposes of ICSID jurisdiction. Article 25 (2) provides that such nationals can be either a natural or a juridical persons (e.g. a corporation).

3.2.3.1. *Nationality of a Natural Person*

Hirsch identifies two conditions, in article 25(2)(a) of the Convention, that a natural person must satisfy in order to participate in arbitration proceedings before the Centre. The first condition is a positive one, namely the natural person must be a national of a State which is part of the Washington Convention. The second condition —a negative one— refers to the fact that the natural person is not a national of the Contracting State that is part of the dispute.⁴⁵

It is not the purpose of the present study to assess the different relationships that can exist between nationality and ICSID arbitration? Although it is a very interesting area of investigation, its extension would be beyond the scope of the present piece

⁴³ SCHREUER, Christoph, *op. cit.*, p. 270.

⁴⁴ *Ibid.*, p. 158.

⁴⁵ HIRSCH, Moshe. *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*. AD Dordrecht: Martinus Nijhoff, 1993 p. 75.

of writing. For the purposes of the present article we will only refer to the basic rule that says that nationality depends on municipal law.⁴⁶

3.2.3.2. Nationality of Juridical Persons

In the case of juridical persons the conditions related to their nationality provided by article 25 (2) (b) are the same ones established for natural persons, namely: (i) They must be a national of a Contracting State; and, (ii) Their nationality must not be that of the Contracting State which is a party of the dispute.⁴⁷ However in the case of legal persons that have the nationality of the Contracting State party of the dispute the article «[...] grants equal standing [...] but only upon fulfillment of two cumulative conditions: a) the corporations must be subject to “foreign control”: b) the parties have agreed to treat the corporation as a national of another Contracting State».⁴⁸

As in the case of natural persons we will only refer to the criteria used to determine nationality. In that sense we can say that although the Convention doesn't provide with specific criteria to use in order to determine the nationality of legal persons, international law as Hirsch comments, gives us three principal criteria⁴⁹ in order to identify corporate nationality. The three criteria usually used by international law are the following (i) The place of incorporation; (ii) The location of the seat; and, (iii) The criterion of control.

3.3. It must be a legal dispute

The ICSID Convention does not provide a definition of «legal dispute». Article 42 (1) of the Convention provides that an ICSID tribunal may apply rules of international law in the absence of any other applicable laws agreed by the parties. In order to find a definition of the term dispute we will have to look within the sources of international law. Article 38 of the Statute of the International Court of Justice identifies, *inter alia*, judicial decisions as a source of international law. We have found some international judicial decisions that provide us with definitions of the term «dispute».

The Permanent Court of International Justice defined a dispute in the *Mavrommatis Case* as «[...] a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons».⁵⁰ This definition has been used again by the

⁴⁶ BROWNLEE, Ian. *Principles of Public International Law*. 6th ed. Oxford: Clarendon Press, 2003, p. 395.

⁴⁷ Article 25 (2) (b) of the ICSID Convention.

⁴⁸ HIRSCH, Moshe, *op. cit.*, p. 81.

⁴⁹ *Ibid.*

⁵⁰ *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (Ser. A) No. 2, at 6, p. 11.

International Court of Justice in 1995 in the *Case Concerning East Timor*.⁵¹ Likewise, the International Court of Justice in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* defined a dispute to be «[...] a situation in which the two sides hold clearly opposite views concerning the question of the performance or non performance of certain treaty obligations».⁵² That Advisory Opinion provides us with two more interesting propositions that characterize a dispute: (i) «Whether there exists an international dispute is a matter for objective determination»; and, (ii) «The mere denial of the existence of a dispute does not prove its non existence».⁵³ Similarly in *South West Africa* the court established the view that in order to ascertain the existence of a dispute «[I]t must be shown that the claim of one party is positively opposed by the other».⁵⁴

Schreuer states clearly that the disagreement between the parties has to have practical relevance in the parties' relationship, namely it can not be purely theoretical.⁵⁵ He continues saying that «[i]t is not a task of the Centre to clarify legal questions *in abstracto*».⁵⁶ Going to an ICSID case, in *Emilio Agustín Maffezini v. Kingdom of Spain*⁵⁷ (hereinafter *Maffezini v. Spain*) Decision on Jurisdiction, the tribunal described how a dispute typically arises:

The tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.⁵⁸

Schreuer comments that «[t]he existence of a dispute presupposes a minimum of communication between the parties».⁵⁹ In that sense, one party has to take the matter with the other, which can oppose the claimant's position by direct or indirect means, failure to respond within a reasonable period of time is sufficient.⁶⁰

⁵¹ *Case Concerning East Timor* (Portugal v. Australia), Judgment of 30 June 1995, 1995 I.C.J. Rep. 89, p. 99.

⁵² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of March 1950, 1950 I.C.J. Rep. 65, p. 74.

⁵³ *Ibid.*

⁵⁴ *South West Africa Case* (Ethiopia v. South Africa; Liberia v. South Africa), Judgment on Preliminary Objections of 21 December 1962, 1962 I.C.J. Rep. 318, p. 328.

⁵⁵ SCHREUER, Christoph, *op. cit.*, p. 102.

⁵⁶ *Ibid.*

⁵⁷ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7). Decision on Jurisdiction, 25 January 2000, at: <http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf>.

⁵⁸ *Maffezini v. Spain*, Decision on Jurisdiction, para. 96.

⁵⁹ SCHREUER, Christoph, *op. cit.*, p. 102.

⁶⁰ *Ibid.*

The ICSID Convention adds another characteristic. We have to be in front of a «legal dispute», excluding by these means moral, political or commercial claims that don't have a legal ingredient. Schreuer states that a dispute will only qualify as «legal» «[...] if [...] legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed».⁶¹ Legal rights in that sense can have many sources including international law, domestic legislation or contracts.

As a conclusion to this point we can say that ICSID tribunals can use, and in fact they have, the criteria used in judicial decisions to determinate the existence and meaning of a dispute. In some cases the existence or non-existence of a dispute will be clearer than in other cases, this will determine the criteria and the use of international judicial decisions by the ICSID tribunal.

3.4. Investment

As we have explained at the beginning of part 2) of the present work, article 25 provides that the jurisdiction of the Centre extends to legal disputes «[...] arising directly out of an investment [...]».⁶² According to Broches during the preparatory work on the Convention «[...] numerous definitions of investment were proposed and ultimately rejected».⁶³ The absence of such a definition give the parties a «[...] large measure of discretion in deciding what constitutes an investment in a particular context».⁶⁴ We will deal again with this topic when we refer to BITs. The majority of these bilateral treaties tend to provide in some sense a definition of investment.

We have to mention again at this point, as we did in point 2.1, that article 25 (4) of the Convention allows Contracting States to «[...] notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre».⁶⁵ The possibility of delimiting the type of dispute has lead to the exclusion of disputes that are connected to certain types of investments. Schreuer provides us with the following examples: (i) The exclusion of legal disputes by Jamaica that come from investments related to minerals or other natural resources; and, (ii) The exclusion of disputes by Turkey related to property and real rights upon real estates.⁶⁶ Also, Turkey only admits disputes related to investment activities that have

⁶¹ *Ibid.*, p. 105.

⁶² Article 25 (1) of the ICSID Convention

⁶³ BROCHES, Aron. *Arbitration under the ICSID Convention*. Washington: International Centre for Settlement of Investment Disputes, p. 5

⁶⁴ *Ibid.*

⁶⁵ Article 25 (4) of the ICSID Convention.

⁶⁶ SCHREUER, Christoph, *op. cit.*, p. 134.

the necessary permission according to its foreign capital legislation.⁶⁷ As we can note article 25 (4) allows States to limit the jurisdiction of the Centre, when they are the host countries, by excluding disputes referred to certain kind of investments or by limiting the jurisdiction of the Centre to disputes referred to investments conducted in a certain way.

4. State Consent as provided by BITs

We have previously seen that one of the forms in which State consent can be given in order to access ICSID arbitration is through treaties, and that this is commonly done through BITs. The main aim of those treaties is to protect the investments made by the nationals of one State in the territory of another. Most modern BITs often provide means in order to access ICSID arbitration. Sornarajah emphasizes the importance of this kind of provisions in BITs:

At the highest, they entitle the foreign investor to initiate proceedings by himself before an ICSID tribunal. The existence of such provisions in bilateral investment treaties is a major step that has been taken to ensure the protection of the foreign investor by enabling him to have a direct access to a neutral forum for the settlement of disputes that could arise between him and the host state. It has been suggested that this technique of permitting the foreign investor to take up his own dispute «depoliticises» the process as the dispute does not become a dispute between the home state and the host state. The two states could continue their relations as if the dispute did not affect their mutual relations (footnote omitted).⁶⁸

The key question at this point is the following: How can a BIT provide access to ICSID arbitration if the BIT is a treaty between two States and ICSID arbitration requires consent between a State and a national of another State? This question had been answered in part 2 of the present article; however we would like to analyse it more deeply at this stage. Dolzer and Stevens have an interesting approach to the question that is widely accepted. According to them BITs can include ICSID arbitration provisions which constitute an offer «[...] by the host State to submit investment disputes to ICSID arbitration [...]» which investors can accept.⁶⁹ The acceptance of the investor can be given by initiating the arbitration proceedings with the presentation of the request for arbitration to the Secretary-General of the Centre.⁷⁰ We have to be clear at this point that not all ICSID provisions included in BITs constitute

⁶⁷ *Ibid.*

⁶⁸ SORNARAJAH, M. *The International Law of Foreign Investment*. Cambridge: Cambridge University Press, 1994, pp. 265-266.

⁶⁹ DOLZER, Rudolf and Margrete STEVENS, *op. cit.*, pp. 131-132.

⁷⁰ Article 36 of the Washington Convention.

consent or an offer by the host State to arbitrate. Some of them for example provide for further agreement between the parties of the dispute (host State and national of the other contracting party of the BIT). As Dolzer and Stevens comment:

It must however be emphasized that not every reference in a BIT to arbitration under the ICSID Convention will qualify as an advance consent by the States parties to resort to such arbitration. A handful of BITs provide (in terms the mandatory phrasing of which is somewhat illusory) that investment disputes «shall» be submitted to ICSID arbitration but only if there is a subsequent agreement to that effect between the disputing parties.⁷¹

However, most BIT provisions referring to ICSID do appear to represent consent on behalf of the host State in despite of BITs that refer «[...] to ICSID arbitration in terms that do not themselves constitute consents to such arbitration [...]».⁷² In this part of this article we will focus on the provisions included in BITs that represent State's consent to submit investment disputes to ICSID arbitration.

A point that we have to consider is that contracting parties of a BIT have to be themselves contracting parties of the ICSID Convention in order to include a provision in the bilateral agreement that can lead to ICSID arbitration. As we have seen before article 25 of the Washington Convention establishes that «[...] the jurisdiction of the Centre shall extend to any legal dispute [...] *between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State [...]*» (emphasis added). No proceedings, then, can be followed in ICSID if either the State or the State of the investor is not a party of the ICSID Convention.⁷³ Dolzer and Stevens have identified some cases in which «[...] States that are not ICSID contracting States nevertheless include unqualified consents to submit investments disputes to ICSID arbitration».⁷⁴ They have identified the case, *inter alia*, of the 1989 treaty between France and Laos. Although the ICSID Convention entered into force in France in 1967, Laos still isn't a contracting party of the Convention.⁷⁵ In that sense the BIT provision that refers investment disputes to ICSID arbitration «[...] are incapable of being put into effect: that is, despite the terms of those provisions, affected investors are unable to take advantage of the consents to arbitration until the States concerned become parties to the ICSID Convention».⁷⁶

⁷¹ DOLZER and STEVENS, *op. cit.*, p. 132.

⁷² *Ibid.*, p. 134.

⁷³ A list of countries in which the ICSID Convention has entered in to force can be found at <<http://www.worldbank.org/icsid/constate/c-states-en.htm>> (accessed 16 August 2005).

⁷⁴ DOLZER and STEVENS, *op. cit.*, p. 137.

⁷⁵ According to ICSID List of Contracting States at <<http://www.worldbank.org/icsid/constate/c-states-en.htm>> (accessed 19 August 2005).

⁷⁶ DOLZER and STEVENS, *op. cit.*, p. 138.

Probably the most complex issue we would like to refer in this part of the article is related to the scope of the arbitrable disputes as can be provided in different BITs. In that sense we have to say that the submission of a dispute to an ICSID arbitration has to be done according to the terms of the BIT. The increasing amount of BITs makes this a very complex area because of the different kind of provisions that they contain. A case-by-case approach is necessary to evaluate the State's consent.

It is beyond the scope of the present work to review all the different provisions that can be included in a BIT and that can affect jurisdictional issues or that can be presented as an argument by the respondent State to object the competition of the arbitral tribunal. This would be impossible to achieve because of the impressive amount of concluded BITs and the larger amount of provisions that they contain.⁷⁷ However as BITs can imply State consent to ICSID arbitration we will like to analyse some typical provisions that are included in those instruments. We have identified, *inter alia*, the following BIT provisions that are normally used by States in their jurisdictional defence: (i) «Fork in the Road» Provisions; (ii) Amicable Settlement provisions; (iii) Provisions that provide a definition for the term «investment»; and (iv) *Ratione Temporis* Provisions. This kind of provisions can constrain the State's consent to submit disputes to ICSID arbitration.

4.1. The «Fork in the Road» Provision

Some BITs provide different methods for dispute settlement between the State and the investors of the other party. They often refer to the local courts and to international arbitration—usually under the terms of the Washington Convention. In most cases it is provided that using one of the methods provided in the BIT excludes the claimant from using the other method. These provisions are known as «fork in the road» provisions. According to Escobar «[...] the application of so-called “fork-in-the-road” provisions in investment treaties [...] require investors to choose once and for all between submitting investment disputes to arbitration and submitting them to local courts».⁷⁸ The inclusion of such a provision in a BIT represents a fundamental condition of the signatory governments' agreement to be bound by the BIT. The «fork in the road» provisions have a foundational importance and constrain the States' consent to arbitrate.

As we can appreciate, these kinds of provisions shape the States' consent to arbitrate. They are animated by policy concerns. BITs adopt this approach in order to avoid

⁷⁷ For an online collection of BITs go to: <http://www.unctadxi.org/templates/DocSearch____779.aspx> (accessed 18 April 2007).

⁷⁸ ESCOBAR, Alejandro, *op. cit.*, p. 5.

inconsistent judgments by domestic courts and international tribunals.⁷⁹ This kind of provisions also prevents forum shopping, the waste of time and resources, and promotes judicial economy and «orderliness». It can be said that by analogy, the policy reasons used to support the application of those principles to solve multiplicity of forum problems⁸⁰ also support and shape the application of «fork in the road» provisions in the contest of investment arbitration, and international arbitration in general.

The policy concern expressed in «fork in the road» provisions importance is explained in *Maffezini v. Spain*. Although that case did not deal with a «fork in the road» provision, the tribunal wanted to analyse the effects of this kind of provision *vis-à-vis* a «most favoured nation» clause (hereinafter «MFN» clause). The tribunal explained that among the BIT provisions that cannot be overridden by operation of the «MFN» clauses we can found «fork in the road» provisions because they are based in public policy concerns:

[...] if the parties have agreed to a dispute settlement arrangement which includes the so called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and when the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy.⁸¹

We have to conclude at this point that the policy concerns expressed in «fork in the road» provisions limit the scope of States' consent to ICSID arbitration in the cases were the investors choose to submit the dispute to local courts.

4.2. Amicable settlement Provisions

BIT's articles that provide submission to arbitration commonly establish a period of time for the conflicts or disputes to be settled amicably before the dispute can be brought to an arbitral tribunal. Parra comments that the «[...] provisions of most BITs on the settlement of investment disputes urge that such disputes be resolve amicably».⁸² According to him «[m]any of the treaties make it clear that a negotiated settlement must be sought before there is recourse to other dispute-resolution

⁷⁹ PARRA, ANTONIO R. «Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments of Investment». In: 12 *ICSID Review – Foreign Investment Law Journal* 287, 1997, pp. 334-335, 351.

⁸⁰ Principles such as *forum non conveniens* and the case of *lis alibi pendens*, which are explained in point 4 of the present article.

⁸¹ *Maffezini v. Spain*, Decision on Jurisdiction, para. 63.

⁸² PARRA, ANTONIO R., *op. cit.*, p. 322.

mechanisms».⁸³ We can find examples of this typical BIT provision in the Great Britain Model BIT,⁸⁴ the German Model BIT,⁸⁵ the Swiss Confederation Model BIT⁸⁶ and in the old⁸⁷ and the new⁸⁸ US BIT Models. The compliance with this kind of provision is fundamental because they represent the form in which a State consents to arbitrate a particular dispute. The investors' non-compliance with the proceeding provided in a BIT for an amicable settlement before the dispute is brought to arbitration can and has been used by States to object ICSID jurisdiction over a particular claim. An example of this objection can be seen on *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*⁸⁹ (hereinafter *Salini v. Morocco*) Decision on Jurisdiction.

In the above mentioned case two Italian companies submitted to arbitration a dispute related to a construction contract on the basis of a Bilateral Agreement between the Kingdom of Morocco and the Italian Government for the reciprocal promotion and protection of investments. Article 8.2 of the mentioned agreement provides, *inter alia*, a period of six months for amicable resolution before the claim can be brought to: (i) ICSID, (ii) the court of the contracting party that has jurisdiction or (iii) an *ad hoc* tribunal. In this case the Kingdom of Morocco objected ICSID's jurisdiction. One of the arguments for the objection was that the Italian companies request for arbitration was premature in the light of the agreement because they didn't comply with article 8.2. In other words, the dispute brought by the investors hasn't been the object of a claim for amicable settlement in the terms of article 8.2.

The arbitral tribunal in *Salini v. Morocco*, in view of the documents and the oral arguments presented by the parties, adopted the following criteria in order to decide if the Italian companies complied with the amicable resolution provision contain in the Moroccan-Italian BIT: (i) Was the Kingdom of Morocco properly furnished with the request for amicable resolution of the dispute?; (ii) Did the request for amicable resolution involve the same subject-matter as the arbitration claim?; and, (iii) Did the period provided in the BIT (six months) concluded before the arbitration claim was presented? After analysing those issues the arbitral tribunal determined

⁸³ *Ibid.*

⁸⁴ Article 8 of the Great Britain Model Agreement.

⁸⁵ Article 11 of the German Model Agreement.

⁸⁶ Article 9 of the Swiss Confederation Model Agreement.

⁸⁷ Article IV of the United States of America Old Model Agreement

⁸⁸ Article 23 of the United States of America 2004 Model Agreement

⁸⁹ *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case N° ARB/00/4, Jurisdictional Decision, 23 July 2001, in 42 ILM 609 (2003).

that «[...] *the defect of prematurity of claim has not being established* [...]»⁹⁰ namely, that the Italian companies complied with the amicable resolution provision.

We consider that the preconditions established by the arbitral tribunal in *Salini v. Morocco* for deciding the issue treated in the present paragraphs normally would apply in order to determine if a claimant has complied with an amicable settlement provision. This could vary from BIT to BIT, but as a general rule the analysis will consist on determining: (i) If the claimant has presented a request for amicable settlement to the appropriate authority of the State; (ii) If the request involves the same subject matter of the arbitration claim;⁹¹ and, (iii) If the period of time established in the particular BIT is over before the claimant presents its request for arbitration.

Alleging the breach of an «amicable settlement» provision in an ICSID arbitration is difficult because generally it will be easy for an investor to comply with this kind of provision. Nevertheless, this depends of the specific provision to be applied, normally an investor would only need to present a request for an «amicable settlement» to the appropriate institution within the State and wait for the period establish on the BIT. Not complying with this kind of provision can be considered a negligent act on behalf of the investor's representatives.

There is however an important exception to the compliance of «amicable settlement» provisions established in BITs. When a BIT contains a «MFN» clause this can be used by the claimant to override the «amicable settlement» proceeding of the BIT, if the case is that the other party to the BIT have granted another State direct access to ICSID arbitration or a more favourable «amicable settlement» provision. *Maffezini v. Spain*, as we have seen previously, is a case that deals with the application of the «MFN» clause. The BIT invoked by the claimant,⁹² in that case, to refer to ICSID arbitration contains a «settlement of dispute» article⁹³ which provides for the dispute to be submitted to the competent tribunal of the contracting party, for at least eighteen months after a six months «amicable settlement period», before the claimant could refer a case to ICSID arbitration. Spain used that article to object the jurisdiction of the Centre. The tribunal considered that the «MFN» clause of the BIT in combination with the Spain-Chile BIT⁹⁴ made ineffective the proceeding establish

⁹⁰ *Salini v. Morocco*, Jurisdictional Decision, para. 23.

⁹¹ It is not necessary in the request for «amicable resolution» to give a detailed and comprehensive review of the dispute, however it is necessary that it deals with the essence of the dispute and states the willingness of the investors to find a non-contentious solution to the dispute.

⁹² Acuerdo para la Promoción y Protección Recíproca de Inversiones entre el Reino de España y la República Argentina (hereinafter Spain-Argentina BIT).

⁹³ Article X of the Spain-Argentina BIT.

⁹⁴ *Acuerdo entre la República de Chile y el Reino de España para la Protección y Fomento Recíproco de Inversiones*

in the «settlement of dispute» article of the Spain-Argentina BIT. Although, Spain's objection was based in the non-compliance with the eighteen months of local court proceedings the same principle could be applied to the compliance of a «amicable settlement» proceeding *vis-à-vis* a «MFN» Clause.

«Amicable settlement» provisions usually require the claimants to comply with a proceeding before they present a request for arbitration, in order to bring a dispute to ICSID arbitration. These provisions have to be followed in order to get the States' consent to arbitrate whenever they are included in a BIT. An exception to this rule can be, as we have mentioned in the preceding paragraph, the inclusion of a «MFN» clause in the BIT.

4.3. «Investment» Definitions agreed on BITs

As we have notice in point 2.4 of the present article the Washington Convention does not provide a definition for the term «investment». Most investment treaties and particularly BITs provide us with a definition of Investment. According to Sornarajah most treaties that deal with foreign investment contain definitions of investments and this definition is usually broad.⁹⁵ Bilateral Investment treaties include a wide range of assets in the term investment, including tangible and intangible assets. Article 1 of the U.S. 2004 Model BIT,⁹⁶ for example, provides the following definition for the term investment:

[...] 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;

(hereinafter Spain-Chile BIT). Article 10 (2) of the Spain-Chile BIT provided that the investor can opt for arbitration after a period of six months for «amicable settlement».

⁹⁵ SORNARAJAH, M., *op. cit.*, p. 240. According to the *Nationality Decrees in Tunis and Morocco Case* «[...] it is well accepted in that any matter that falls within the domestic sphere can be brought within the sphere of international law by making it the subject of a treaty [...]» (SORNARAJAH, M., *op. cit.*, p. 242).

⁹⁶ United States of America 2004 Model BIT at: <<http://ita.law.uvic.ca/documents/USmodelbitnov04.pdf>> (accessed 23 August 2005).

- (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 pledge.⁹⁷

As we can notice the US BIT model gives us a very wide definition of the term «investment» and it provides an open list —*numerus apertus*— of the forms an investment can take.⁹⁸ As in the US Model, most recent BITs «[...] have adopted a more elaborate formula, illustrated by a list of five groups of specific rights which usually include traditional property rights, rights in companies, monetary claims⁹⁹ and titles to performance, copyrights and industrial property rights as well as concessions and similar rights». ¹⁰⁰ Also, as in the American model, these lists are not exhaustive.

The BIT between the Republic of Peru and the United Kingdom,¹⁰¹ which entered in to force the 21st of April of 1994, provides in his first article another very broad definition of the term.¹⁰² However in this particular treaty there is a *renvoi* to the law of the contracting party in which the investment is made in order to provide a definition of the assets. The Peruvian-United Kingdom BIT, once again, provide us a non-exclusive list of assets. Other BITs require that in order to qualify as an investment, the investor has to comply with the laws and regulations of the host country. This is the case, for example, of the BIT between Peru and Chile.¹⁰³ The first article of the Peru-Chile BIT defines investment as any class of assets, as long as the investment is made in compliance with the laws and regulations of the Contracting Party in whose territory the investment is made. Such provisions delimiting

⁹⁷ Article 1 of the United States of America 2004 Model BIT.

⁹⁸ The US 2004 BIT Model expressly excludes from the term investment orders or judgments entered in a judicial or administrative action.

⁹⁹ As we have seen in the previous footnote this type of right is limited in the US 2004 BIT Model.

¹⁰⁰ DOLZER and STEVENS, *op. cit.*, p. 26

¹⁰¹ Agreement between the Government of the Republic of Peru and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments. This Agreement is based in the Great Britain Model Agreement.

¹⁰² «[...] *investment* means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares, stock or debentures and other forms of participation in companies or joint ventures;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual and industrial property rights such as copyright, patents, utility models, industrial models and designs, marks, trade names, goodwill and know-how;
- (v) Concessions conferred by law or under contract for the performance of an economic activity, including concessions for prospecting, exploration and exploitation of natural resources [...]

(emphasis added).

¹⁰³ Convenio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile para la Promoción y Protección Recíproca de Inversiones (hereinafter Peru-Chile BIT)

the scope of a BIT have a sound policy foundation. As the arbitral tribunal explains in *Salini v. Morocco*, such a limitation «[...] aims in particular to assure that the bilateral Agreement does not protect investments which it should not, generally because they are illegal».¹⁰⁴ These kind of provisions try to assure that investors do not obtain international protection of a host country's BIT for investment activities that are unlawful in that country.

We had looked at some of the definitions BITs provide for the term «investment» and how these definitions can send us back to the host country's legislation, sometimes in order to provide a definition for an asset and sometimes to specify how the investment must be conducted. The thesis proposed in this point is that the definition of an investment provided by a BIT though which consent to ICSID arbitration is sought can determine the jurisdiction of the Centre in a particular case. In that sense the focus in BITs is essential when they can constitute the consent of the State to ICSID arbitration. The reason for this is the lack of a definition of investment in the Washington Convention. If we add to this the fact that the BIT constitutes, in its terms, the State's consent to arbitrate, the conclusion would be that in those cases the BITs definition of an investment would limit the scope of the tribunal's jurisdiction. For that reason a tribunal has to be very careful in assessing if a particular dispute is related to an investment in the terms agreed in the BIT.

Schreuer sets some examples of the evaluation of investment definitions in BITs in order to determine the jurisdiction of the Centre:

In *AAPL v. Sri Lanka*, the dispute arose directly out of an officially approved investment. Its nature as an investment under the Convention and under the BIT between the United Kingdom and Sri Lanka was never cast into doubt. In *AMT v. Zaire*, the Respondent argued that its dispute was really with a Zairian company in which the Claimant was merely a majority stockholder. Therefore, AMT had not made a direct investment in its name. The Tribunal rejected this argument and pointed out that under the terms of the Zaire-United States BIT the term 'investment' included 'shares of stock or other interests in a company'. Therefore, AMT's investment consisted of a participation in the Zairian company. In *Fedax v. Venezuela*, the Tribunal held that promissory notes being credit instruments were covered by the terms 'every kind of asset' and more specifically 'titles of money' as used in the Netherlands-Venezuela BIT to define the concept of investment.¹⁰⁵

In all the above mentioned cases we can clearly see how tribunals refer to specific BITs in order to provide an «investment» definition. In that sense the jurisdiction of the Centre is constrained by the «investment» definition provided on a particular

¹⁰⁴ *Salini v. Morocco*, Jurisdictional Decision, para. 46.

¹⁰⁵ SCHREUER, Christoph, *op. cit.*, pp 130-131.

BIT. From the «investment point of view» a case-by-case approach will be required then in order to assess the jurisdiction of the Centre in each case that is brought by means of a BIT. This is because the investment definition provided in a BIT covers the lack of definition of the ICSID Convention and sets up the terms of the State's consent to arbitrate.

4.4. *Ratione Temporis* Provisions

The general rule in international law, as embodied in article 28 of the United Nations Vienna Convention of 1969 on the Law of Treaties (hereinafter the Vienna Convention), «[...] is that unless there is a different interpretation of the treaty or unless it is otherwise established in its provisions, such provisions are not binding in connection with an act or event which took place or a situation that ceased to exist before its entry into force».¹⁰⁶ Most BITs contain provisions with respect of the time in which they become effective and their *ratione temporis* scope. Sometimes these provisions follow the general rule we have described above and sometimes they provide for the application of the BIT to acts that took place before the entry into force of the BIT. States' consent, as we have mentioned before, is under the scope of the BIT. The scope of the BIT can be constraint by provisions referring to its temporal application. These provisions usually refer to: (i) Its entry in to force; (ii) If it covers investments made before or after its entry in to force; and, (iii) If it covers disputes originated before or after its entry in to force. As we will analyse in the next paragraphs the issues concerning this type of provisions are twofold.

Redfern and Hunter identify two possible situations that may arise before an ICSID tribunal in order to analyse the jurisdiction of the Centre. The first issue is related to the protection of investments realized prior to the day in which the BIT entered in to force, according to them «[e]arlier practice inclined towards granting protection only to investments made *after* the BIT come into effect»,¹⁰⁷ the reason being that the purpose of the BIT was to promote new investment.¹⁰⁸ However certain BITs protect investments made prior to the entry into force of the instrument, providing for their application to investments that already existed at the time of their entry into force and to investments made after its entry into force. This is the case of article 2 of the Peru-Chile BIT —we will deal later in this point with that particular article,

¹⁰⁶ *Técnicas Medioambientales Temed, S.A. v. United Mexican States*. (ICSID Case N° ARB (AF)/00/2) Award, 29 May 2002, (unofficial English translation) at: <<http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>> para. 63.

¹⁰⁷ REDFERN, Alan and Martin HUNTER, *op. cit.*, pp. 566-567.

¹⁰⁸ *Ibid.*

as we refer to a case— and of article XIV of the Argentina-US BIT,¹⁰⁹ which provides the following:

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. *It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter* (emphasis added).¹¹⁰

The second issue is related to the investment dispute, and the time when it comes into existence in order to determine if the dispute is covered by the BIT's dispute settlement provisions. This situation appears when a BIT only covers disputes that arise after its entry in to force either expressly or by an interpretation realized pursuant to article 28 of the Vienna Convention. Disputes occur during a particular time or period of time. In some cases this is easier to identify than in others. In the above-mentioned situation it is paramount to identify when the dispute originates. We can find a good example of this circumstance in *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru* (hereinafter *Lucchetti v. Peru*).¹¹¹

In *Lucchetti v. Peru* the tribunal held that it had no jurisdiction to hear the merits of a claim presented by a Chilean company and a Peruvian company.¹¹² The dispute concerned a pasta factory operating in Lima, owned by the second claimant. The companies based their request in the Peru-Chile BIT which provided for ICSID arbitration under certain conditions. This decision was made because according to the tribunal the dispute in which the request for arbitration was based fell outside Peru's consent to arbitrate under the Peru-Chile BIT. The tribunal considers in order to give the award¹¹³ the *ratione temporis* provision included in article 2 of the mentioned BIT, which provides as follows:

This Treaty shall apply to investments made before or after its entry in to force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. *It shall not, however, apply to differences or disputes that arose prior to its entry into force* (emphasis added).¹¹⁴

¹⁰⁹ Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (hereinafter Argentina-US BIT).

¹¹⁰ Article XIV (1) of the Argentina-US BIT.

¹¹¹ *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru* (ICSID Case N° ARB/03/4) Award, 7 February 2005, at <<http://www.worldbank.org/icsid/cases/lucchetti-award.pdf>>.

¹¹² 98% of the shares of this company were owned by Empresas Lucchetti S.A., the first claimant. This is important in order to consider the second claimant as a Chilean investor for the purposes of the dispute resolution provisions of the Peru-Chile BIT.

¹¹³ This award is currently being object of an annulment proceeding in ICSID under article 52 of the ICSID Convention.

¹¹⁴ Unofficial translation of article 2 of the Peru-Chile BIT.

The Peru-Chile BIT entered into force the 3rd of August 2001. The claimants argued that the dispute was first raised with a letter they addressed to the President of the Republic of Peru dated 3rd of October 2001, and related to two Decrees of the Municipality of Lima which *inter alia* revoked Lucchetti Peru S.A. operating license and ordered the permanent closure of the industrial establishment. The Decrees were promulgated on the 16th of August 2001 and published the 22nd of August 2001. By that means claimants sustain that «[...] the dispute began after the BIT came into force, and that, therefore, the Tribunal has jurisdiction *ratione temporis*». ¹¹⁵

On the other hand, the respondent objected the jurisdiction *ratione temporis* of the tribunal with the following argument: (i) The BIT's provisions do not apply to disputes and controversies that arose before the BIT entered into force; (ii) The BIT entered into force the 3rd of August 2001; (iii) The dispute between Lucchetti companies and the Peruvian authorities began in 1997-1998; Therefore, (iv) The tribunal lacked of jurisdiction *ratione temporis* to hear the case. ¹¹⁶

According to the respondent the dispute began in 1997-1998 because the Claimants commenced the construction of the factory, around August 1997, «[...] without obtaining the necessary urban habilitation and environmental approvals and that their approach throughout the construction process was to build their plant quickly, without regard for Peruvian laws and regulations, in the expectation that they could then present a *fait accompli* to the municipal authorities [...]». ¹¹⁷

In support of its contention that there was only one dispute and that it arose before the BIT entered into force and continued beyond that date, Respondent submits that the subject matter of the dispute was the same in 1997/98 as in 2001 when Decrees 258 and 259 were adopted, and the conflict between Claimants and the municipal authorities during that entire period of time amounted to an interrelated series of events which together make up a single dispute. ¹¹⁸

The tribunal found that the dispute arose before the BIT entered into force, as the respondent stressed and for that means it hold as we have mentioned previously that it had no *ratione temporis* jurisdiction over Lucchetti's claim. This case constitutes a good example of how States can constrain their consent to ICSID arbitration only to disputes that arise after the entry in to force of the BIT.

¹¹⁵ *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru* (ICSID Case N° ARB/03/4) Award, 7 February 2005, at <<http://www.worldbank.org/icsid/cases/lucchetti-award.pdf>>, para. 25.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, para. 28.

¹¹⁸ *Ibid.*, para. 41.

As we have seen States' consent to ICSID arbitration can be limited by temporal means. Circumstances that may develop from the application of *ratione temporis* provisions have to be analysed in a case-by-case approach. This kind of provisions often leads to situations in which the entry into force of a BIT has to be analysed *vis-à-vis* the time the investment was made or to the time when the dispute arises.

5. Admissibility

In some cases arbitral tribunals will have to deal with questions of admissibility as a preliminary issue. Although none of the provisions of the Washington Convention refer to admissibility, the question has been considered by ICSID tribunals. Jurisdiction and admissibility are two different preliminary issues that can be brought to a tribunal for their consideration. The former refers to the power of a tribunal to hear a case; while the latter considers whether it is appropriate for the tribunal to hear the case («whether the case itself is defective»)¹¹⁹ In other words, admissibility refers to the discretion that can be exercised by a tribunal to dismiss or suspend claims without addressing the merits for the time being. Hight draws an interesting distinction in his dissenting opinion to the *Waste Management v. Mexico* Award: «If the Claimant's case is inadmissible, the Tribunal has jurisdiction to hear it, but should decline it on grounds relating to the case itself—not relating to the roles or powers of the Tribunal»¹²⁰. Brownlie describes the distinction between objections to jurisdiction and admissibility in the following way:

Objections to the jurisdiction, if successful, stop all proceedings in the case, since they strike at the competence of the tribunal to give rulings as to the merits or admissibility of the claim. An objection to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits [...] *In normal cases the question of admissibility can only be approached when jurisdiction has been assumed* (emphasis added)¹²¹

The arbitral tribunal in *Société Générale de Surveillance v. Republic of the Philippines* (hereinafter *SGS v. Philippines*) concluded that there is a «degree of flexibility in the way» a matter of admissibility is applied.¹²² In *SGS v. Philippines* a request for arbitration was presented, by Société Générale de Surveillance (hereinafter SGS),

¹¹⁹ *Waste Management, Inc. v. United Mexican States* (hereinafter *Waste Management v. Mexico*) ICSID Case N° ARB(AF)/98/2, Arbitral Award, Dissenting Opinion of Keith Hight, 8 May 2000 at <http://www.worldbank.org/icsid/cases/waste_diss.pdf>, para. 58.

¹²⁰ *Ibid.*, at n. 45.

¹²¹ BROWNIE, Ian. *Principles of Public International Law*. 6th ed. Oxford: Clarendon Press, 2003, p. 457.

¹²² *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Decision on Jurisdiction, 29 January 2004, at <<http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>>, at para. 170.

based on alleged breaches to an agreement for the provision of comprehensive import supervision services (hereinafter CISS agreement). SGS invoked the provisions of the bilateral agreement of 1997 between the Swiss Confederation and the Republic of Philippines on the Promotion and Reciprocal Protection of Investments, which provided, *inter alia*, for ICSID arbitration. However, the Philippines objected to the jurisdiction of the ICSID tribunal. One of the arguments used by the Philippines was that SGS's request for arbitration was based in a purely contractual claim (non payment under a contract) and the CISS agreement had a jurisdictional clause according to which «[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila».¹²³ In other words, the CISS agreement referred disputes concerning the agreement to domestic courts and on that basis Philippines presented one of its arguments for lack of jurisdiction.

For the tribunal the fact that the CISS agreement referred to another forum wasn't a matter of jurisdiction but one of admissibility, and on that basis it concluded, *inter alia*, that «[...] such a contractual claim, brought in breach of the exclusive jurisdiction clause embodied in Article 12 of the CISS Agreement, is inadmissible, since Article 12 is not waived or over-ridden by [...] the BIT or by Article 26 of the ICSID Convention».¹²⁴ The tribunal held its jurisdiction over the dispute and stayed the proceedings until the parties resolved in the domestic courts the exact amount owed by the Philippines to SGS under the contract at issue in that dispute—decision that show us to a certain extent the difference between jurisdiction and admissibility. The tribunal decided that it had «[...] the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision».¹²⁵

In a recent publication Emmanuel Gaillard¹²⁶ criticizes this decision. He argues that «[...] when a BIT tribunal asserts jurisdiction, it should effectively exercise such jurisdiction, be it over claims relating to more traditional provisions of the treaty or over claims alleging the violation of an observance of undertakings clause».¹²⁷ We believe that the «discretionary measure» taken by the *SGS v. Philippines* tribunal was made in accordance with the ICSID Convention and the Arbitration Rules, as we will explain in the following paragraph.

¹²³ *SGS v. Philippines*, Decision on Jurisdiction, para. 22.

¹²⁴ *Ibid.*, para. 169.

¹²⁵ *Ibid.*, para. 173.

¹²⁶ Mr. Emmanuel Gaillard acted as a counsel for SGS in *SGS v. Pakistan* as well as in *SGS v. Philippines*.

¹²⁷ GAILLARD, Emmanuel. «*Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered*». In Todd Weiler (Ed.). *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA Bilateral Treaties and Customary International Law*. London: Cameron May, 2005, p. 346.

According to the mentioned award the power to stay proceedings derived from article 44 of the ICSID Convention, which provides that « [i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question».¹²⁸ Article 44 provides ICSID arbitral tribunals with a «degree of discretion and flexibility» in cases where there is no applicable provision in Section 3 of Chapter IV of the ICSID Convention or the Arbitration Rules or rules agreed between the parties.¹²⁹ There is then a certain amount of discretion in order to admit the competition over a case. Rule 19 of the Arbitration Rules go in the same sense giving the tribunal the power to «make the orders required for the conduct of the proceeding».¹³⁰ We can say then that the discretion applicable in a particular decision by an ICSID tribunal derives from the Washington Convention and from the Arbitration Rules.

The Decision on Jurisdiction in *SGS v. Philippines* suggests us that the «degree of discretion»¹³¹ to address matters of admissibility, that can be applied by ICSID tribunals, is analogous, in some cases, to the practice of national courts faced with non-jurisdictional claims such as *forum non conveniens* and *lis alibi pendens*.¹³² We will develop both doctrines in the next paragraphs.

The doctrine of *forum non conveniens* has its origins in the nineteenth century. The principle of *forum non conveniens* refers to the most appropriate forum in order to hear a case, and gives other forums the power to stay proceedings on a discretionary basis, although both forums have jurisdiction over the case. According to Dicey and Morris:

The doctrine of *forum non conveniens*, i.e. that some other forum is more «appropriate» in the sense of more suitable for the ends of justice, was developed by the Scottish courts in the nineteenth century, and was adopted (with some modifications) in the United States. The Scots rule is that the court may decline to exercise jurisdiction, after giving consideration to the interests of the parties and the requirements of justice, on the grounds that the case cannot be suitably tried in the Scottish court nor full justice be done there, but only in another court (footnotes omitted).¹³³

This principle wasn't fully accepted in English courts in order to stay actions against defendants sued in England until 1984.¹³⁴ A few years latter, in *Spiliada Marime Corp.*

¹²⁸ Article 44 of the ICSID Convention.

¹²⁹ *Ibid.*

¹³⁰ Rule 19 of the Arbitration Rules.

¹³¹ *SGS v. Philippines*, Decision on Jurisdiction, at para 170.

¹³² *Ibid.*, at n 95.

¹³³ DICEY, Albert Venn and John Humphrey MORRIS. *Dicey and Morris on Conflict of Law*. 13th ed. London: Sweet & Maxwell, 2000, p. 389.

¹³⁴ *Ibid.* See also: *Owners of the Las Mercedes v. Owners of the Abidin Daver*. [1984] A.C. 398.

v. Cansulex Ltd. (hereinafter *Spiliada case*), a leading case for the application of *forum non conveniens* in order to stay proceedings, Lord Goff of Chieveley stated that:

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.¹³⁵

Next we consider the case of *Lis alibi pendens*. *Lis alibi pendens* is the case of continuing simultaneous litigation in two different countries involving the same parties and the same issues.¹³⁶ The case of *Lis alibi pendens* is closely linked with the principle of *forum non conveniens*. Although Lord Goff of Chieveley didn't explain how the principle operates in cases involving multiplicity of proceedings in the *Spiliada case*, he did so in *De Dampierre v. De Dampierre*.¹³⁷ In the last referred case he stated that:

Under the principle of *forum non conveniens* now applicable in England as well as in Scotland, the court may exercise its discretion under its inherent jurisdiction to grant a stay where «it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of justice» [...] The effect is that the court in this country looks first to see what factors there are which connect the case with another forum. If, on the basis of that inquiry, the court concludes that there is another available forum which, *prima facie*, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay [...] *The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum.* (footnote omitted and emphasis added).¹³⁸

It can be suggested that these principles could be applied by analogy in ICSID proceedings in order to answer admissibility questions and to stay proceedings. However we have to remember at this point that although the analogy could be viable, part of the decision in *SGS v. Philippines* was based on the jurisdictional clause of the CISS Agreement, namely, the contract had an exclusive forum selection in favour of local courts. A cautious approach has to be taken in this respect. Although at the end we can conclude that the CISS Agreement gives jurisdiction to the local courts in Philippines, we have to consider a case-by-case approach to address questions of admissibility.

As mentioned at the beginning of this section, the ICSID Convention does not provide any express grounds to dismiss a case for inadmissibility. In that sense another

¹³⁵ *Spiliada Maritime Corp v Cansulex Ltd.* [1987] A.C. 460.

¹³⁶ CHESHIRE, Geoffrey Chevalier and Peter Machin NORTH. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths, 1999, p. 347.

¹³⁷ *Ibid.*, p. 348. See also: *De Dampierre v. De Dampierre*. [1988] AC 92.

¹³⁸ *Ibid.*

approach to the distinction between jurisdiction and admissibility in investment arbitration has been mentioned by Laird, referring to the case where preliminary requirements are placed in the text of an instrument, mentioning, *inter alia*, article 25 of the ICSID Convention.¹³⁹ In those cases «[...] it is simpler to term them as being broadly jurisdictional rather than to identify any particular requirement more specifically as a question of admissibility».¹⁴⁰ He mentions that a requirement concerning the nationality of the claimant or the existence of a legal dispute could be considered questions of admissibility.¹⁴¹ However, as we have seen, article 25 of the ICSID Convention deals with the nationality of the claimant and the existence of a legal dispute as issues of jurisdiction. In that perspective, issues that would normally be considered admissibility questions can be identified as jurisdictional issues by a formalistic or literal application of the ICSID Convention.

In that sense we believe that the requirements establish in article 25 of the ICSID Convention should be considered as jurisdictional issues, despite that sometimes some of those requirements are considered as questions of admissibility. An interpretation of article 25 made in compliance with article 31 (1)¹⁴² of the Vienna Convention will lead us to that conclusion.

We have to say at this point that the distinction between jurisdiction and admissibility in the «ICSID *fora*» is not a very clear one. Although the ICSID Convention provides which are the jurisdictional requirements of a case, it doesn't refer to questions of admissibility. Laird has observed that «[t]he distinction between an objection to the substantive admissibility of a claim and an objection to the jurisdiction of a Tribunal in international investment law is one area that is the subject of divergent analysis and treatment in the developing jurisprudence» (footnote omitted).¹⁴³

In *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*¹⁴⁴ (hereinafter *SGS v. Pakistan*) Decision of Jurisdiction, a decision taken some months before the decision in *SGS v. Philippines*, another ICSID tribunal didn't refer to the distinction

¹³⁹ LAIRD, Ian A. «A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*». In: Todd Weiler (Ed.). *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA Bilateral Treaties and Customary International Law*. London: Cameron May, 2005, p. 216.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² «Article 31 General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose [...]».

¹⁴³ *Ibid.*, p. 202.

¹⁴⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*. (ICSID Case N° ARB/01/13), Decision on Jurisdiction, 6 August 2003, at: <<http://www.worldbank.org/icsid/cases/SGS-decision.pdf>>.

between jurisdiction and admissibility in a similar case. We mention this case because the similarities are quite obvious.¹⁴⁵ Both cases refer to contractual claims that could be covered by dispute settlements clauses in agreements and at the same time by BITs with provisions referring disputes to ICSID arbitration. In the case of *SGS v. Pakistan* there was an ongoing arbitration in accordance with the Pre-Shipment Inspection Agreement (hereinafter PSI Agreement) which submitted disputes arising out of such agreement to arbitration under Pakistan's arbitration act. The tribunal in *SGS v. Pakistan* decided, *inter alia*: (i) That it had jurisdiction over SGS's claims that Pakistan breached the BIT (ii) That it had no jurisdiction over SGS's claims that Pakistan breached the PSI Agreement or over Pakistan's claims that SGS breached the PSI Agreement; and, (iii) Not to stay proceedings pending a resolution of the arbitration under the PSI Agreement.¹⁴⁶

The difference between the two Decisions on Jurisdiction as explained by the *SGS v. Philippines* tribunal is that the tribunal in *SGS v. Pakistan* declined to stay proceedings because «[...] it held that there was no sufficient overlap between the BIT claims before it and the contractual claims before the Pakistan arbitrator».¹⁴⁷ This can be corroborated by looking at the *SGS v. Pakistan* Decision on Jurisdiction where it is held that: «The Claimant can proceed with the BIT claims that are within the subject-matter jurisdiction of this Tribunal without having the factual predicate of a determination by the PSI Arbitrator that either party breached that Agreement».¹⁴⁸ It is also clear from the case that the tribunal in *SGS v. Pakistan* decided that the BIT didn't cover claims over PSI's Agreement breaches,¹⁴⁹ we believe that this is the biggest difference between both decisions regarding the admissibility question.

The tribunal in *SGS v. Philippines* argued that «implicit in the discussion in *SGS v. Pakistan* is the view that an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision».¹⁵⁰ From our point of view it is not clear that the *SGS v. Pakistan* tribunal had made such an assertion either expressly or implicitly. In that sense it is only clear to us that the tribunal analysed Pakistan's request to stay the proceedings.¹⁵¹ However, as we mentioned before we agree, with the fact that article 44 of the ICSID Convention and Rule 19 of the Rules of Arbitration give tribunals some

¹⁴⁵ This case is referred to as «the sister case» in the *SGS v. Philippines* Decision on Jurisdiction (*SGS v. Philippines*, Decision on Jurisdiction, para 10).

¹⁴⁶ *SGS v. Pakistan*, Decision on Jurisdiction, para. 190.

¹⁴⁷ *SGS v. Philippines*, Decision on Jurisdiction, para. 172.

¹⁴⁸ *SGS v. Pakistan*, Decision on Jurisdiction, para. 188.

¹⁴⁹ *Ibid.*, para. 173.

¹⁵⁰ *SGS v. Philippines*, Decision on Jurisdiction, para. 173.

¹⁵¹ *SGS v. Pakistan*, Decision on Jurisdiction, paras. 185-188.

discretion in order to stay proceedings. Discretion that was clearly used in *SGS v. Philippines* and not used in *SGS v. Pakistan*. This discretion has to be applied on a case-by-case basis.

The fact that each case is unique and that ICSID decisions do not constitute obligatory precedents makes determining questions of admissibility a difficult task. However, for «a tribunal to decide an issue without demonstrating awareness of other cases that deal with the same or cognate issues would be highly unusual». ¹⁵² In that sense, *SGS v. Philippines* can be considered an important benchmark in order to establish the distinction between jurisdiction and admissibility.

6. Conclusions

1. An ICSID tribunal has the power to determine the jurisdiction of the Centre and its own competence in a particular dispute. This power is expressly provided by article 41 of the ICSID Convention. In that regard, we can say that it is a usual practice in institutional arbitration to provide a tribunal with the competence to decide upon its own competence in express terms.
2. The most important consequences of this provision are the following: (i) The fact that it prevents a unilateral denial of the Centre's jurisdiction or the tribunal's competence by one of the parties to the proceedings; (ii) The constituted tribunal proceedings are valid even if they found that the consent to arbitration is defective; and, (iii) The fact that a decision can be annulled doesn't invalidate the constitution of the tribunal. This leads us to the conclusion that ICSID tribunals have an independent legal basis provided by article 41 of the ICSID Convention.
3. We would like to stress here one of the most important features of ICSID arbitration regarding jurisdiction and that is the fact that an ICSID tribunal decision on jurisdiction shall be binding on the parties and the only remedies available are those specified in the Washington Convention. There is no room here to the application to local courts or any other fora.
4. Article 25 of the ICSID Convention establishes the requirements a dispute has to have for ICSID arbitration. Those requirements are: (i) The parties must have consent expressed in writing to submit the dispute to the Centre; (ii) The dispute must be between a contracting State (or one of its subdivisions or agencies designated to the Centre by that State) and a national of another contracting

¹⁵² ESCOBAR, Alejandro, *op. cit.*, p. 2.

State; (iii) It must be a legal dispute; and, (iv) It must arise directly out of an investment. We are going to describe briefly the conclusions reached for those requirements:

For a dispute to be within the jurisdiction of the Centre, written consent given by both parties —host State and investor— is required. It is not sufficient that the host State and the investor's State of nationality have ratified the Convention. Written consent to ICSID arbitration can be given in the following ways: a) By a direct agreement between the host State and the investor (e.g. legal stabilization agreement); b) By a provision in the host State's legislation which is accepted by the foreign investor; and, c) By an offer made by the host State in a treaty —including multilateral investment treaties and BITs. It has to be regarded that States can frame their consent to arbitrate and this has an impact on the jurisdiction of the Centre in every particular case.

Contracting States are those that have complied with the requirements of article 68 of the ICSID Convention. These States can designate constituent subdivisions and agencies. Constituent subdivisions refer to territorial entities and agencies to entities of a non-territorial nature. The fact that an investor has a dispute with one of this constituent subdivisions or agencies doesn't enable him to present a request for arbitration against the State's central authorities, this is a matter for his discretion and he would normally deal with it according to its convenience. This is based on the international law principle of State unity and indivisibility and norms regarding State responsibility.

The national of the other contracting State —the other party in the dispute— has to be a private investor to the exclusion of State owned investments; and can either be a natural or a juridical person.

Although the Convention doesn't provide us with a definition of «legal dispute» we can refer to the sources of international law. Judicial decisions such as those of the Permanent Court of International Justice in *Mavrommatis* or by the International Court of Justice in *South West Africa* and *Case Concerning East Timor* or in their advisory opinion in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* shed ICSID tribunals with some light in order to approach the term.

We have to bear in mind at this point that the job of an ICSID tribunal isn't to deal with purely theoretical questions and that the Convention refers to legal claims to the exclusion of purely moral, political or commercial claims.

As in the case of the term «legal dispute» there is an absence in the ICSID Convention for the definition of the term «investment» which gives the parties plenty of discretion in order to decide what «investment» means in a particular context.

In accordance with article 25 (4) of the Convention contracting States can limit the jurisdiction of the Centre, when they act as host countries, by excluding disputes referred to certain kind of investments or by referring to its jurisdiction only disputes linked to investments conducted in a certain way (e.g. according to the law of the host State).

5. BITs are a major source of State consent for ICSID arbitration. BITs that provide direct State consent for ICSID arbitration constitute an offer by the host State to submit investment disputes to ICSID arbitration. This offer can be accepted by investors (e.g. by presenting a request for arbitration).
6. This consent is framed by the provisions of each particular bilateral instrument, namely the submission of a dispute to an ICSID arbitration has to be done according to the terms of the BIT. Provisions incorporated in BITs such as «fork in the road» provisions, amicable settlement provisions, provisions that define the term «investment» and *ratione temporis* provisions frame the scope of States' consent to ICSID arbitration.
7. In some cases like in the «fork in the road» provisions there are policy concerns behind them—in order to avoid inconsistent judgments by domestic courts and international tribunals. In other cases BITs establish negotiation proceedings— using amicable settlement provisions – that must be followed in order to get the States' consent for ICSID arbitration. Amicable settlement provisions can sometimes be override by «MFN» clauses.
8. The inclusion of a definition of the term «investment» in BITs not only shapes States' consent regarding which type of investment disputes can be submitted to ICSID arbitration but also characterizes the term. This is very important if we keep in mind that the ICSID Convention doesn't provide us with a definition. Provisions in BITs that only consider investments made in compliance with the laws and regulations of the host State have a sound policy foundation.
9. States' consent to ICSID arbitration can also be limited by temporal means with the use of *ratione temporis* provisions. This kind of provisions lead ICSID tribunals to analyse the time the bilateral instrument entered in to force *vis-à-vis* the time the investment was made or the time the dispute arises.

10. ICSID tribunals can deal with questions of admissibility as a preliminary issue. Jurisdiction and admissibility are different preliminary issues that can be brought before a tribunal for their consideration. Jurisdiction is the power of a tribunal to hear a case, while admissibility questions consider if it is appropriate for the tribunal to hear the case. In order to declare a case inadmissible a tribunal would need to have jurisdiction. An admissibility question was raised by the *SGS v. Philippines* tribunal. In that case the tribunal stayed the arbitral proceedings because the majority of them considered that bringing a contractual claim that was in breach of an exclusive jurisdiction clause—which referred those types of disputes to domestic courts—was inadmissible.
11. The power to stay proceedings derives implicitly from article 44 of the ICSID Convention and from Rule 19 of the Arbitration Rules. Those norms provide ICSID tribunals with a «degree of discretion and flexibility» to address matters of admissibility.
12. The Decision on Jurisdiction in *SGS v. Philippines* suggests us that this «degree of discretion» is analogous to the practice of national courts faced with non-jurisdictional claims such as *forum non conveniens* or *lis alibi pendens*. However we have to be cautious with this analogy and base it on a case-by-case approach. We have to remember that the decision in *SGS v. Philippines* was based on the jurisdictional clause of a contract.
13. Some requirements established in article 25 of the ICSID Convention are normally considered as questions of admissibility. However, a formalistic application of the ICSID Convention, based on an interpretation made in compliance with article 31 (1) of the Vienna Convention, will cast them as jurisdictional requirements. On the other hand, we have to point out that the Washington Convention doesn't provide any express grounds in order to declare a case inadmissible.
14. Nevertheless, the distinction between jurisdiction and admissibility in the «ICSID *fora*» cannot be qualified as a clear one—it is an area of divergent analysis and treatment by ICSID jurisprudence. The reason being that each case is unique and ICSID's tribunal's decisions on jurisdiction and awards don't constitute obligatory precedents. Yet, ICSID tribunals look at past decisions in order to make their conclusions, for that reason *SGS v. Philippines* can be considered as an important precedent in order to recognize the distinction.