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Problems related to jurisdiction in ICSID arbitration

Abstract: Problems related to ICSID jurisdiction are extremely relevant, and the mistakes made during the drafting of an arbitration clause may exclude the competence of the Centre. When drafting a document that designates ICSID as a forum for resolving emerging disputes, it is necessary to carefully check the compliance of the document with the requirements of the Convention and international law. Deviation from the ICSID jurisdiction criteria may result in the State hosting the investment pleading that the Centre lacks jurisdiction. This article will examine in detail issues related to ICSID jurisdiction when considering investment disputes, as well as how non-compliance with the conditions of jurisdiction may affect the exercise of the right to investment protection under ICSID.

Keywords: ICSID, jurisdiction, investment, arbitration

1. Introduction

In accordance with the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention of 1965), the International Centre for the Settlement of Investment Disputes (ICSID) was established in 1966. ICSID is the dispute resolution arm of the World Bank Group that provides "*facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention*".[1] ICSID arbitration is regularly used to resolve

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[1] ICSID Convention (1966) art. 1 para. 2.

investment disputes and is administered by the International Centre for the Settlement of Investment Disputes, which has become a household name in the past few decades. Unlike other arbitral institutions, ICSID plays a role only in investment arbitration disputes. The ICSID system is the only institutional system of international arbitration specifically designed to resolve investment disputes.

Although ICSID has become the main forum for settling investment disputes, it is not the only institution for investment arbitration and not all States have become party to the ICSID Convention.[2] In accordance with arts. 53 and 54 of the Convention, the decision of the ICSID Tribunal is binding on all parties to the proceedings, and each party must comply with it in accordance with its terms. The Convention limits the role of national courts to the recognition and enforcement of these awards. National courts of each State Party to the ICSID Convention are required to enforce the pecuniary obligations imposed by the ICSID decision as if it were the State Party's final judgment. ICSID decisions are a type of public law decisions. In fact, ICSID decisions awarded by tribunals acting under an international treaty are not subject to any domestic law. This distinguishes ICSID proceedings (and decisions) from other investment dispute proceedings, whether *ad hoc*, under the UNCITRAL Rules or the rules of arbitration institutions.[3]

In order to refer a dispute to ICSID for consideration, it is necessary to fulfill certain conditions that ensure the emergence of the Centre's jurisdiction. Firstly, an agreement of the parties is necessary on the submission of the dispute that has arisen for consideration by the ICSID. This can be an individual investment agreement, a bilateral or multilateral investment agreement (however, domestic legislation of the host State, in

[2] Billiet (2016) 250.
[3] Krajewski (2019) 225.

which the State accepts ICSID's jurisdiction is also accepted instead of such agreement). Such an agreement may be concluded not only in relation to disputes that may arise in the future, but also in relation to a dispute that has already arisen. At the same time, the parties to the agreement must be a contracting State and a natural or legal person of another contracting State. The final criterion for submitting a dispute to ICSID is the fact that the dispute must be of a legal nature and arise from investment relations with a foreign element.[4]

Paragraph 1 of art. 25 of the Washington Convention establishes the jurisdiction of ICSID:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Thus, before including in the text of an international agreement an arbitration clause on the submission of a dispute to ICSID, the parties must verify not only the validity of the arbitration clause itself, but also that the agreement and the potential dispute meet all the criteria for the emergence of the jurisdiction of the Centre. At the same time, the parties must understand that these criteria cannot be changed or excluded by adding a certain clause to the contract, since the criteria specified in the convention are mandatory. It should be noted that in the absence of one or more of the conditions specified in the Convention, the ICSID Secretariat is obliged to refuse to consider the dispute between the parties, even if the parties have identified ICSID as

[4] Абашидзе (2012) 180.

the institution to which they submit disputes arising between them for consideration. According to art. 41 of the Washington Convention:

> The Tribunal shall be the judge of its own competence. Any objection by a party to the dispute that that 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 determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

2. Subject jurisdiction (*ratione materiae*)

Ratione materiae of ICSID are disputes that are, firstly, of a legal nature and, secondly, are directly related to investments. It should be noted that fixing the legal nature of the dispute aims to exclude political and moral disagreements, while requiring that the dispute is related to investments, excludes disputes of a commercial nature from the competence of the Centre. At the same time, the 1965 Washington Convention itself does not contain a definition of the "legal nature" of a dispute, and the practice of interpreting the legal nature of a dispute by ICSID arbitration mainly refers to the existence and limits of certain rights and obligations of the parties or the possibility of compensation if the parties violate certain legal obligations.[5] Due to the fact that it is not possible to foresee all potential disputes that may arise during an investment relationship, the criterion of the "legal nature" of the dispute is an extremely important condition. This element should be taken into account when drafting the arbitration clause, in which it is necessary to formulate the conditions for applying to ICSID as broadly as possible.

[5] Schreuer (2001) 103–104.

It should be noted that, despite the absence of a definition of "legal dispute" in the final version of the Convention, the text of the original draft qualified this term as: "*any dispute concerning a legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation*".[6] At the same time, most of the doctrinaires and practitioners who commented on the convention defined the concept of a legal dispute based on a list of actual situations and issues that they may entail. The most common include expropriation, violation or termination of an agreement, application of tax or customs rules. According to the opinion of Schreuer, despite its practical value, such an approach to the definition of a "legal dispute" does not provide a clear explanation of the very essence of this term. According to Schreuer, a dispute can be qualified as legal when one of the parties resorts to such legal remedies as damages or restitution, and the legal rights and obligations of the parties are based on the rules of law applicable to the dispute.[7] Despite certain difficulties arising from the absence of this concept in the text of the Convention, the text provides for another mechanism to determine the nature of legal relations from which a dispute may arise. According to art. 25 para. 4 of the Convention, any Contracting State may, at the time of ratification, acceptance or approval of Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre.[8]

The second element of the subject matter jurisdiction of ICSID is the direct connection with investments, that is, relations arising from investment agreements ("*any legal dispute arising directly out of investment*"). It should be noted that in the text of the Convention there is no definition of the concept of

[6] ICSID (1970) 116.
[7] Schreuer (2001) 105.
[8] ICSID Convention (1965) art. 25 para. 4.

"investment", which leads to certain difficulties in interpreting and identifying the nature of legal relations from which a dispute may arise.[9] According to the preliminary text of the Convention, "investment" was understood as "*any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years*".[10] However, in the final version of the Convention, the drafters did not include this definition in the text, due to the fact that the inclusion of a provision defining the concept of "investment" could affect the role assigned to the concept of mutual consent and could raise controversies.[11] In this regard, the final version of the text of the Convention focuses on the mutual agreement of the parties to refer the dispute to ICSID.

Although the final text of the convention abandoned the qualification of the term "investment", States are free to determine which categories of disputes are not subject to the jurisdiction of the Centre. According to para. 4 of art. 25 of the Washington Convention, any Contracting State may, at the time of ratification, accession or approval of the Convention, and at any time thereafter, notify ICSID of the category or categories of disputes that fall or do not fall under the jurisdiction of ICSID. At the same time, it should be taken into account that it only allows States to determine the categories of disputes related to investment activities for which they (at their discretion) are willing to give their consent to submit to ICSID. It should be noted that the burden of proving the fact of the presence of investments and the fact that the dispute arose as a result of investment activities lies with the party applying to ICSID. This is due to the fact that the parties themselves have the right to designate the criteria that, in their opinion, determine the concept of investment, and if the arbitral tribunal finds these

[9] ICSID (1970) 123.
[10] ICSID (1970) 116.
[11] ICSID (1968) 564.

criteria convincing, it will establish its jurisdiction to consider the dispute.

Over the years of the Centre's activity, through arbitration practice, a certain number of criteria have been established to distinguish investments from the circle of foreign economic operations and transactions taking place in the international community. In most cases, for a project or transaction to be recognized as an investment, it must: "1) be of significant duration; 2) to give the investor a guarantee of a commensurate return on invested funds; 3) include an element of risk for both parties; 4) constitute a significant involvement of an investor in a project or transaction; 5) be of great importance for the development of the host state".[12]

Despite the extensive practice of the Centre, the problem of the lack of consolidation of the concept of investment and the lack of a unified approach in the consideration of cases remains relevant. An analysis of ICSID decisions made during this study shows that arbitrators tend to use the concept of "investment" in the sense of the definition enshrined in the national legislation of the host State or in bilateral (or multilateral) agreements on the protection of investments. At the same time, the position of Schreuer is of interest, who, in a commentary to the Convention, also proposed to qualify investments in accordance with such criteria as a certain period, regularity of profit, the presence of risk, the materiality of the obligation and the importance for the development of the State that hosts the investment.[13]

It should be noted that not all countries have taken advantage of the right granted by para. 4 of art. 25 of the Convention, which allows reservations to be made about the category or categories of disputes that fall or do not fall under the jurisdiction of

[12] *Salini Costruttori S. P. A.* (2001).
[13] Schreuer (2001) 140.

ICSID.[14]For example, Indonesia excluded from ICSID jurisdiction disputes related to administrative decisions of Indonesian government bodies; Saudi Arabia has ruled out disputes related to oil and acts of sovereignty. At the same time, China excluded disputes related to the payment of compensation for expropriation and nationalization; Jamaica disputes concerning mineral and other natural resources; Papua New Guinea limited the competence of the Centre to disputes material to the investment itself; Guatemala has excluded disputes arising from compensation for damages due to armed conflict or civil strife. Turkey also limited the jurisdiction of ICSID to disputes directly arising from investment activities carried out in accordance with permits under Turkish Foreign capital law, and excluded disputes related to ownership and other rights *in rem* to real estate, due to the reason that they are subject to the exclusive jurisdiction of Turkish courts.[15]

As noted earlier, initially the concept of "investment" in the doctrine of international law included a combination of such components as: a contribution, a certain period of execution of an investment agreement (or investment activity in another form) and the assumption of risks under an investment agreement. This interpretation excluded from the jurisdiction of ICSID disputes that may arise under a supply agreement or a bank guarantee, which was confirmed by the decision in the case of *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*.[16] At the same time, the importance of meeting the investment, duration and risk triad as the minimum requirement for holding an investment was further highlighted in *Nova Scotia Power Incorporated v. Bolivian Republic of Venezuela*[17]. In this case, the arbitral tribunal upheld the defendant's objections regarding

[14] ICSID Convention (1966) art. 25 para. 4.
[15] ICSID/8-D (2020).
[16] *Joy Mining Machinery Ltd.* (2004).
[17] *Nova Scotia Power Incorporated* (2014).

the competence of the ICSID to adjudicate a dispute that arose essentially from a coal sale and purchase relationship, despite its more complex nature and composition, due to the absence of the three minimum requirements.

It should be noted that the first arbitral award to apply these criteria was in the case of *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*[18], which was subsequently called the "Salini test".[19] In this case, the arbitral tribunal was faced with the question of whether the implementation of a socially important project - the construction of a highway - is considered an investment. Answering this question, the arbitration added to the list of investment criteria the case of contribution to the economic development of the recipient State. Despite the fact that the Salini test was widely used and was applied in many disputes, some arbitrators considered such use unjustified, since these criteria are doctrinal and not fixed at the level of international law. The absence of a normative consolidation of the criteria shows that they do not have the effect of an imperative prescription, which is necessary for the emergence of ICSID jurisdiction. One example of arbitrators refusing the Salini test would be the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.[20] The arbitral tribunal held that, given that the contracting parties have expressly abandoned the notion of "investment" in the Washington Convention, there is no justification for the mechanical application of the five criteria

[18] *Salini Costruttori S. P. A.* (2001).

[19] The Salini test is used to determine the existence of an investment and, accordingly, the investor's right to require the host state to fulfill obligations to protect such an investment. According to its criteria, the investment must represent the contribution of the investor, which is carried out over a significant period of time, with a balance of risks of the state and the investor, taking into account the presence of contributions to the economy of the host state.

[20] *Biwater Gauff (Tanzania) Ltd.* (2006).

of the Salini test in each particular case, since these criteria are not fixed or legally binding and may be subject to agreement between the contracting States. At the same time, it was concluded that this test cannot act as a strict criterion for investments, since there is no normative fixing of it, and careless use of the test may unreasonably exclude certain categories of transactions from the jurisdiction of ICSID. Based on these factors, the arbitration leaned towards a more balanced approach with regard to "investment", noting the need for an analysis of the actual circumstances of the case and the consent of the State to apply to ICSID. A more flexible approach to the Salini test was enshrined in the *Phoenix Action, Ltd. v. Czech Republic*[21] decision, where the tribunal added an additional criterion to the test in the form of the need to meet the *bona fide* criterion (assets are invested in good faith). In this case, ICSID argued that there was no *ratione materiae* jurisdiction because the investment did not meet the *bona fide* principle.

3. Personal jurisdiction (*ratione personae*)

As noted earlier, the State parties to the Washington Convention (or an authorized body about which the States informed the Centre) and a legal entity or individual of another State party to the Washington Convention can act as parties to an investment dispute. In accordance with paragraph 2 of Art. 25 of the Washington Convention, the term "National of another Contracting State" means:

> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does

[21] *Phoenix Action, Ltd.* (2009).

> not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

As a general rule, nationality is the determining factor in assessing the status of an individual. When analysing the text of the Convention, it can be concluded that an individual can act as a party to a dispute before ICSID in the case he has the nationality of a country party to the Convention when the dispute arises. For example, a Turkish national can file a claim with ICSID on the basis of a dispute that has arisen in relation to investments made in the territory of Moldova. At the same time, ICSID will not have jurisdiction if a Turkish national acquires Moldovan nationality before the commencement of the dispute. Therefore, the presence of dual nationality of the investor, if such nationality is obtained in the country of investment, deprives the Centre of jurisdiction, even if the country accepting the investment agrees to consider the person a foreign national.

At the same time, the determination of the nationality of a legal entity is a more complex procedure. When analysing the practice of ICSID, it can be concluded that arbitrators tend to be of the opinion that a legal entity, at the time of reaching a mutual agreement to submit a dispute to ICSID, must have the nationality of a contracting State that is different from the contracting State receiving the investment (host country). Where a legal entity does not have such a nationality, the parties

may agree that, by virtue of the control exercised by foreign persons over such legal entity, it may be considered as a person of another Contracting State for the purposes of the Convention. Subject to such an agreement, ICSID will have jurisdiction in the event of a dispute. An example would be a situation where a legal entity is established under the law of the host country, but the parties have agreed to treat it as a party to another contracting State under the Convention, provided there is a full control over such legal entity by persons of investors State.

It should be noted that the text of the Convention does not contain a definition of the "nationality" of a person and "foreign control", and the evaluation criteria were developed in the ICSID arbitration practice itself. One example of developing parameters for assessing "foreign control" is the decision of the Centre in the case of *Amco v. Indonesia*, where the plaintiff was an American corporation that established PT Amco in Indonesia for the purpose of making investments. Upon incorporation in Indonesia, Amco applied to the Indonesian Foreign Investment Authority to obtain permission to incorporate PT Amco as an Indonesian company to build and operate a hotel in Indonesia. At the time of the dispute, Indonesia referred to the fact that, despite the full control of the American corporation over PT Amco, the parties had not agreed to recognize PT Amco as a legal entity of another State within the meaning of the Convention. Despite the lack of express agreement, the arbitral tribunal ruled that:

> It thus appears obvious that when agreeing to the Application, the Indonesian Government knew perfectly that PT Amco would be under foreign control. Knowing this expressly stated fact, the Government has agreed to the Application and to the arbitration clause in it: therefore, it is crystal clear that it agreed to treat PT Amco as a national

> of another Contracting State, for the purpose of the Convention.[22]

At the same time, the requirement for a Contracting State to recognize the investor's foreign nationality as a condition for establishing ICSID jurisdiction was emphasized in *Tokios Tokeles v. Ukraine*[23] decision on jurisdiction dated April 2004. In this case, the arbitral tribunal emphasized that, in conditions where the Convention does not provide for a method for determining the nationality of an investor, the parties have the widest possible margin of appreciation regarding the criterion for determining the nationality of an investor and the form of such an expression of will.

The nationality of a legal entity can be determined based on the principle of incorporation, the principle of seat or the principle of the centre of exploitation, or through the application of the principle of control. It should be noted that when establishing a company based on the law of the host State, the mere consent of the recipient State to refer the dispute to ICSID might not be enough. Under the Convention, it is necessary to conclude a special agreement between the legal entity of the host State, controlled by a foreign investor, and the recipient State, which will indicate the recognition of foreign nationality.[24] Such an agreement was entered into by the parties in the case of *SOABI v. State of Senegal*[25], where the Centre accepted its jurisdiction. The dispute arose between Senegal and a Senegalese company owned by a Panamanian joint venture, which in turn was owned by Belgian investors, despite the fact that Panama was not a State party to the Washington Convention, unlike Belgium. The investment agreement on the basis of which the dispute arose

[22] *Amco Asia Corp.* (1983).
[23] *Tokios Tokeles* (2004).
[24] Бабкина (2016) 67.
[25] *Société Ouest Africaine des Bétons Industriels (SOABI)* (1988).

included a provision according to which, the parties expressly agreed that arbitration will be carried out in accordance with the rules established by the Convention for the Settlement of Disputes between States and Nationals of Other States, developed by the International Bank for Reconstruction and Development. In this regard, the Government of the host State agreed to recognize the nationality of the investor as being in conformity with art. 25 of the Convention, specifically:

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

At the same time, in the case of *LETKO v. Liberia*, an agreement was concluded between the Liberian government and the claimant, a Liberian company, under the full control of French persons, for the implementation of investment activities, but there was no express agreement between the parties regarding the criteria for determining the nationality of LETKO. However, ICSID noted that a Contracting State, by signing an investment agreement containing an arbitration clause with a person wholly controlled by foreign persons, has agreed to submit the case to ICSID for arbitration in accordance with the Convention containing a provision regarding the determination of the nationality of a company through persons exercising control over such company.[26] An additional factor in favor of the recognition of the foreign nationality of the investor was the provision of Liberian legislation, according to which foreign

[26] *Liberian Eastern Timber Corporation (LETCO)* (1986).

investors are required to establish local companies in order to carry out investment activities.

Also, ICSID case law shows that the agreement of the parties prevails over the principle of control used in the practice of private international law. For example, in the case of *Autopista Concesionaria de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, the main shareholder of a Venezuelan company, at the time of the signing of the contract, was a citizen of Mexico, which was not a party to the Convention. The arbitration clause in the concession agreement concluded between the parties provided for *ad hoc* arbitration in Venezuela, referring at the same time to the fact that if the main shareholder of the company acquires the nationality of a Contracting State, the dispute will be referred to the ICSID. After the signing of the agreement, 75% of the company's shares were transferred to an American company. When considering the case, Venezuela referred to the lack of ICSID jurisdiction, since after the transfer of shares to an USA person, effective control continued to be exercised by a Mexican person. In turn, ICSID rejected the arguments of Venezuela, and noted that:

> The Tribunal has found no element allowing it to find that, by the words the "majority shareholder(s) of THE CONCESSIONAIRE", the parties did not mean the person holding the majority shares, but rather the person exercising effective control over Aucoven. In other words, there is no indication on record that the parties intended to exclude share transfers among ICA Holding's subsidiaries and meant to condition their agreement upon a change of effective or ultimate control over Aucoven.[27]

At the same time, the criteria for the presence of foreign control include the size of the share, the degree of influence in decision-

[27] *Autopista Concesionaria de Venezuela, C.A.* (2001).

making and the management of the company's activities.[28] It should be noted that these criteria are considered in each individual case after assessing the actual circumstances of the case. For example, in *Vacuum Salt v. Ghana*[29], it was stated that the Centre did not have jurisdiction, despite the fact that the bilateral investment agreement contained an arbitration clause with the competence of ICSID. In this case, the arbitration did not recognize the investor as a foreign national, due to the fact that only 20% of the shares belonged to Greek persons, and the remaining 80% belonged to citizens of Ghana. An additional factor in the lack of competence, the Centre considered the lack of an agreement between the parties that would determine the nationality of Vacuum Salt. At the same time, the fact that Greek citizens held the positions of directors and technical adviser, which, according to ICSID, did not meet the objective criteria for control over the legal entity, and the role of a Greek shareholder in controlling a company is not so significant that the company could be considered a foreign entity. Accordingly, the dispute was not considered to be in accordance with the Convention in the framework of ICSID arbitration.[30]

The other party to an investment dispute may be a State that is a party to the Washington Convention. In most cases, authorized State bodies act on behalf of the State, however, the Convention does not indicate specific authorized bodies (divisions or institutions) of the State, which gives the State a wide margin of appreciation. In this matter, the main role is played not by the institutional aspect (organizational and legal form, form of ownership, State share in the authorized capital of a legal entity), but by the functional one - the organization

[28] Богуславский (2004) 148.
[29] *Vacuum Salt Products Ltd.* (1994).
[30] *Vacuum Salt Products Ltd.* (1994).

must perform public functions on behalf of the State party to the Washington Convention.[31]

An important issue is whether the constituent subdivision or agency of a Contracting State is considered a party to a treaty under the Washington Convention. In accordance with the Convention, a constituent subdivision or agency of a Contracting State may act as a party to an investment agreement subject to two conditions:
(1) the contracting State has authorized the constituent subdivision or agency to be a party to the investment agreement and to submit disputes for settlement to ICSID with the appropriate consent and in accordance with para. 1 of art. 25 of the Convention;
(2) the host State has agreed to refer the dispute to ICSID, where the party is constituent subdivision or agency of this State, (unless it notifies ICSID that such consent is not required in accordance with paragraph 3 of Art. 25 of the Convention).

Thus, on the basis of paragraph 1 of Art. 25 the host State may make a reservation for all disputes that involve a subdivision or body of that State in respect of certain investment projects or a certain dispute that has arisen. According to the provisions, paragraph 3 of Art. 25 of the Convention, the State can also notify ICSID of relinquishing its authority to approve certain categories of transactions, and territorial-administrative units and State bodies can on their own behalf enter into agreements with investors and refer emerging disputes to ICSID. In the event that a State has notified ICSID of its authorized body, its authority to participate in the dispute on behalf of the State is presumed. At the same time, the lack of notification of authorized bodies entails the lack of jurisdiction of the Centre. Given the absence in the text of the Convention of a clear time

[31] Schreuer (2001) 151.

at which a State must notify ICSID of its authorized bodies, as a general rule, such notification can be sent at any time before filing a dispute with ICSID.

A party to a dispute may also be an administrative-territorial unit of a State, as in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*[32], where a lawsuit was brought against Argentina in connection with the violation by officials of the concession agreement concluded between investors and the province of Tucuman of the Argentine Republic.

It should be noted that even when the host State delegates its powers regarding the jurisdiction of ICSID and approves both the investment agreement and the consent to arbitration, which is enshrined in the arbitration clause, the investor cannot initiate arbitration proceedings against this State before ICSID, even if the State itself has actively accepted participation in the negotiations on the investment project and its actions led to a controversial situation. The investor must enter into an ICSID referral agreement directly with the State itself in order to refer the case to the Centre and initiate arbitration proceedings against the State. For example, in *Cable Television v. Saint Kitts and Nevis*[33], an investor entered into an agreement with the administration of Nevis, which is an administrative-territorial unit of the federal State of Saint Kitts and Nevis. According to the agreement, the arbitration clause referred to ICSID as a mechanism for resolving possible disputes. However, Nevis has not been authorized by the government of Saint Kitts and Nevis as a body that can appear before ICSID in disputes. At the same time, the government did not approve the arbitration clause contained in the agreement, therefore the Centre did not recognize its jurisdiction.

[32] *Suez, Sociedad General de Aguas de Barcelona S.A.* (2006).
[33] *Cable Television of Nevis, Ltd.* (1996).

In this regard, when concluding an investment agreement with an administrative-territorial unit or body of a contracting State that contains a reference to ICSID, it is necessary to carefully analyse the arbitration clause for its validity under the jurisdiction of ICSID. Based on this, it is necessary to include in the arbitration clause with reference to ICSID: (1) the exact name of the relevant body or territorial-administrative unit; (2) details of the contracting State's vesting in that unit with the authority to refer disputes to ICSID; (3) an instrument by which a contracting State gives its consent to the conclusion of investment agreements by subdivisions that include an ICSID arbitration clause, or where the consent of the State to such actions of its subdivision, addressed directly to ICSID, would be indicated.

Despite the general difficulties in not meeting the criterion *ratione personae*, it does not necessarily entail the inability to apply to ICSID to resolve the dispute between the investor and the State. ICSID adopted the Additional Facility Rules in 1978, allowing in the case where one of the parties is a State not party to the Washington Convention, or the investor has the citizenship of such a State, to apply to the Centre. At the same time, thanks to these Rules, it became possible to resolve disputes that are not directly related to investments. When considering a dispute under the Additional Facility Rules[34], the direct enforceability rule of the Washington Convention does not apply; the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 shall apply to the enforcement of the award.

4. The presence of the written consent of the State

[34] ICSID Additional Facility Rules (April 2006).

One of the main requirements of having ICSID arbitration is the consent of the parties, which must be in writing. In the report on the adoption of the Convention, the Board of Directors of the World Bank noted that "*The most important feature was that the jurisdiction of the Centre was based on the consent of the parties*".[35]

While investors generally agree to refer to the Centre for all categories of disputes, States may consent to such referral for a specific dispute that has arisen or for specific categories of disputes. It should be noted that being party to the Convention is not the same as a consent, since consent must be further enshrined in an additional instrument. Such an additional tool can be either an arbitration clause in an investment agreement or contract, or a bilateral (or multilateral) investment treaty, or an indication of the acceptance of the jurisdiction of ICSID in the national legislation of the State.

At the same time, according to Art. 26 of the Convention, the consent of the parties is absolute: "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*".[36] Such consolidation in the Convention indicates that the parties are obliged to address the dispute to the Centre, unless otherwise provided by the agreement. This limitation in practice extends to the prohibition of applying to local or international bodies to resolve a dispute.

An additional issue regarding the jurisdiction of the Centre is the situation when, due to certain economic difficulties, the investor transfers part of his rights, for example, the right to apply to ICSID, to another person. Due to the fact that investment relations are distinguished by their long-term nature,

[35] ICSID (1968) 320.
[36] ICSID Convention (1966) art. 26.

at some point the investor may transfer all or part of his rights and obligations to another person. In the event of such a succession, the parties must provide in advance in their agreement a provision that will govern the relationship of the parties upon transfer. At the same time, the assignee must meet all the requirements of the Convention necessary to establish the jurisdiction of the Centre, in particular in matters of nationality. With that, the host State may challenge the jurisdiction of ICSID if the assignee is not a party to the arbitration agreement.[37]

In general, the consent of the State to the jurisdiction of the Centre can be expressed in various forms:

(1) Bilateral investment agreement (BIT) - for example, in accordance with paragraph 3 of Art. 10 of the Agreement concluded between the Government of the Republic of Moldova and the Government of the Republic of Turkey on the promotion and mutual protection of investments dated December 16, 2016 states:

> If disputes cannot be resolved within six (6) months, disputes may be referred, at the option of the investor, to:
> a) the competent commission of the Contracting Party in whose property the investment was made; or
> b) International Centre for the Settlement of Investment Disputes (ICSID), established by the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States", signed on March 18, 1965 in Washington;
> c) ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
> d) Council of the Arbitration Institute of the Stockholm Chamber of Commerce (CCI);

[37] Козменко (2011) 57.

e) any other arbitral institution or any other arbitration rules, if the parties to the dispute so agree.

According to the ICSID Annual Report for 2022, in cases registered this year, the competence of the Centre was determined by bilateral investment agreements in 56% of cases.[38]

(2) Multilateral investment agreements and free trade agreements - such international treaties are, as a rule, regional in nature, for example, the Energy Charter Treaty, the North American Free Trade Agreement (replaced by the U.S.-Mexico-Canada Agreement (USMCA)). According to the ICSID Annual Report for 2022, the competence of the Centre was determined by international investment agreements and free trade agreements in 27% of cases.

(3) Investment (concession) agreement. The second most commonly used for securing the jurisdiction of ICSID is a consent in the arbitration clause contained in the investment agreement concluded between the investor and the host State. According to the ICSID Annual Activity Report for 2022, the competence of the Centre was determined by investment agreements in 13% of cases. It should be noted that the inclusion of the jurisdiction of the Centre in the investment agreement allows minimizing the issue of determining the competence of the ICSID to consider the dispute and does not require the study of the problem of the umbrella clause.

(4) investment legislation of the host State - this form of expressing the consent of the State to refer the dispute to the Centre took place in only 4% of cases registered in 2022.[39]

[38] ICSID (2022) 23.
[39] ICSID (2022) 23.

Based on the latest ICSID annual report, it can be concluded that the inclusion of a provision on the jurisdiction of the Centre in a bilateral investment agreement is the most common form of expressing consent. At the same time, the issue of what to consider as reached agreement was considered by the Centre in *Tradex Hellas S. A. v. Republic of Albania*[40], in which the Albanian government referred to the absence of a written agreement between the parties to refer the dispute to ICSID. The panel of arbitrators came to the conclusion that the Convention does not require the consent of the parties to be expressed in a separate document, and the inclusion in the text a reference to an international treaty or an act of national legislation of a provision on the competence of ICSID indicates the consent of the State to refer possible disputes to the Centre for consideration. Despite this, the jurisdiction was rejected, due to the fact that the appeal to the Centre was received before the entry into force of the bilateral international treaty between Greece and Albania on the promotion and mutual protection of investments.[41]

Indeed, there are no specific requirements in the Convention for the form of consent other than written form. At the same time, there is also the possibility of limiting the jurisdiction of ICSID in accordance with paragraph 4 of Art. 25, stating that "*any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre*".[42] However, one of the main safeguards in this regard is the impossibility of withdrawing consent to ICSID jurisdiction. For example, in *Kaiser Bauxite v. Jamaica*, the parties entered into an investment agreement that contained an

[40] *Tradex Hellas S. A.* (1996).
[41] Литовченко (2016) 99-103.
[42] ICSID Convention (1966) art. 25, para. 4.

arbitration clause to refer disputes related to bauxite mines in Jamaica to ICSID. Following the signing of the agreement, Jamaica sent a notice to the Centre stating that it did not accept ICSID jurisdiction over disputes arising from investments related to mineral resources and minerals. After the dispute arose, Jamaica referred to that notice when the jurisdiction of the Centre was considered, however, the arbitral tribunal indicated that the application was made after an agreement was reached between the parties to refer the dispute to ICSID, and Jamaica's notice can only apply to disputes, arising in the future and cannot be retroactive.[43] At the same time, the absolute nature of consent is enshrined in Art. 26 of the Convention as it was mentioned *supra*.

It should be noted that consent can also be conditional, for example, in the case when the parties to the investment agreement, which are not subject to the jurisdiction of ICSID, stipulate in the agreement the transfer of dispute to ICSID if in the future the relationship between them develops in a certain way or the status of the parties changes, which will allow them to submit the dispute to ICSID for consideration. For example, in the case of *Holiday Inns v. Morocco*, the jurisdiction of the Centre was established despite the fact that the agreement was concluded before the ratification of the Convention by one of the parties. In this case, the arbitrators referred to the fact that the Convention allows the parties to enter into an arbitration agreement that will enter into force upon the fulfilment of certain requirements, such as the full accession of the States concerned to the Convention, or the incorporation of the company mentioned in the agreement. Subject to this presumption and within the meaning of the Convention, the date of consent expressed by a party will be the date on which all

[43] *Kaiser Bauxite Company* (1975).

jurisdictional requirements against one of the parties are satisfied.[44]

Another question regarding the jurisdiction of the Centre arises when there is no express arbitration clause in the investment agreement, but the dispute resolution is based on a BIT provisions. In this case, international investment law uses a special mechanism called the "umbrella clause", which consists in including in the text of the international investment agreement a provision that the recipient State undertakes to fulfil any obligation assumed in relation to investments made on its territory by foreign investors. According to experts, this provision is present in about 40% of bilateral investment agreements.[45] In international investment law, umbrella clauses are applied in accordance with the principle of *pacta sunt servanda* (agreements must be kept). However, there is no single approach to resolving disputes in the event of a conflict between an investment agreement and a BIT. For example, in *SGS v. Pakistan*[46], in resolving the issue of the priority of the arbitration clause of the bilateral agreement over the investment agreement clause, the arbitrators noted that:

> We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as "disputes with respect to investments," the phrase used in Article 9 of the BIT. … In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at

[44] Лалив (1993) 667–668.
[45] OECD (2008).
[46] *SGS Société Générale de Surveillance S.A.* (2003).

> naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent ... We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as concerns the Claimant's contract claims which do not also amount to BIT claims, and it is a clause that this Tribunal should respect.[47]

At the same time, in the decision in the case of *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*[48], it was noted that a violation by the State of its contractual obligations can simultaneously act as a violation of international legal norms and a bilateral investment agreement. The panel of arbitrators pointed out that in the presence of a valid arbitration agreement between the parties, the Centre should not recognize its competence to the detriment of such an agreement. However, in the practice of the tribunal there is no unified approach to this issue, as, for example, in the case of *Noble Ventures Inc. v. Romania*[49], where Art. 31 of the Vienna Convention on the Law of Treaties and the intentions of the parties were taken into account. According to the provisions of the Vienna Convention, *"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".*[50] In this regard, ICSID referred to the fact that the bilateral agreement imposes obligations on the host State that go beyond the guarantees provided by the investment agreement, and any other interpretation of art. II (2) (c) of the bilateral agreement between Romania and the United States completely deprives its provision of practical significance.

5. Conclusions

[47] *SGS Société Générale de Surveillance S.A.* (2003).
[48] *SGS Société Générale de Surveillance S.A.* (2004).
[49] *Noble Ventures Inc.* (2005).
[50] The Vienna Convention on the Law of Treaties (1969) art. 31.

Summing up, it can be concluded that the problems of ICSID jurisdiction are extremely relevant, and mistakes made during drafting of investment agreements, as well as bilateral and multilateral investment treaties may exclude the competence of the Centre. When drafting a document that identifies ICSID as a forum for resolving emerging disputes, it is necessary to carefully check the compliance of the document with the requirements of the Convention and international law. Deviation from the aforementioned criteria may result in the State hosting the investment pleading that the Centre lacks jurisdiction. At the same time, in order to minimize risks, it is recommended to use the Model Clauses developed by specialists and published on the Centre's website when drawing up investment agreements.[51]

It should be noted that a State that aims to attract more investment should clearly establish in investment agreements, as well as in bilateral and multilateral investment treaties the possibility of applying to ICSID in accordance with art. 25 of the Convention. At the same time, the question of the jurisdiction of the Centre is paramount for investors, due to the fact that an incorrect reference or interpretation of the request of arbitration, may lead to significant financial losses (including expenses for applying to ICSID) for the investor. It is necessary to note that the understanding by the lawyer, representing interests in the dispute, of the basic structure and case law of ICSID in determining jurisdiction, would be a crucial element when referring to the Centre. Such an understanding on the part of lawyers will make it possible to build the correct structure of actions at the preliminary stage of the proceedings.

[51] ICSID (2022).

In this regard, when concluding an investment agreement with an administrative-territorial unit or body of a contracting State that contains a reference to ICSID, it is necessary to carefully analyse the arbitration clause for its validity under the jurisdiction of ICSID.

As has been proven throughout this study, the main line of defence for host States is to invoke the lack of jurisdiction of the Centre, which is based on art. 25 of the Convention. The most common argument cited by States are the inexistence of the legal nature of the dispute, the invalidity of consent to the dispute before ICSID, and the lack of a Convention-compliant nationality of the investor. At the same time, States may allege that the investment does not meet the investment evaluation criteria or has not sufficiently contributed to the development of the host State. This leads to the conclusion that the very concept of investment is one of the key issues in determining the jurisdiction of the Centre. In this sense, one of the main problems in defining this concept is not only an unclear definition of what is considered an investment, but also a common tautology in the definition. A large number of definitions explain the term by the term itself, without revealing clear evaluation criteria, which leads to incorrect logical reasoning. In order to give the concept of "investment" a clear meaning in which this term is understood by the parties when concluding contracts, it is necessary to avoid any tautologies and vagueness. As practice shows, an unclear definition can lead to a broader interpretation on the part of the Centre, which is not always beneficial to one side or another.

In practice, both ICSID doctrine and case law, when interpreting the term investment, in most cases refer to: significant length of time; a guarantee of a commensurate return on investment; element of risk for both parties; significant involvement of an investor in a project or transaction; and of

great importance for the development of the host State (this item is sometimes combined with others).

The development factor has recently become more and more ambiguous in the practice of the Centre, and its use as a sub-element of other criteria does not allow unifying the practice of ICSID on the issue of determining investments. The concept of economic development is enshrined in the preamble to the Convention and the report of the Executive Directors. In this regard, it can be concluded that in the case when investments do not lead to the development of the recipient State it is not covered by the Convention. Notwithstanding, the practice of the Centre is ambiguous in this matter, since the arbitration system of the Centre is not bound by the principle of *stare decisis*, which in turn reduces the predictability of the outcome when applying for dispute resolution to ICSID.

As has been shown throughout the study, compliance with the conditions discussed above and following the recommendations provided, ensures the emergence of ICSID jurisdiction and allows the parties to submit disputes to the Centre. The parties should take into account these conditions already at the early stages of entering into international investment activities. At the same time, it may be difficult for the parties to fulfil these conditions due to a number of reasons, such as different criteria that define the concept of "investment", the question of how to reach agreement to refer a dispute to ICSID *etc.*, which indicates the need for further improvement of legal regulation on this issue.

Literature

Primary sources
International Centre for Settlement of Investment Dispute, Convention on the Settlement of Investment Disputes between

States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention')
<https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> accessed 23 September 2022
ICSID Additional Facility Rules, International Centre for Settlement of Investment Disputes (April 2006) <https://icsid.worldbank.org/rules-regulations/additional-facility> accessed 19 September 2022.
ICSID Model Clause, <https://icsid.worldbank.org/resources/content/model-clauses> accessed 19 September 2022.
United Nations, The Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331
Amco Asia Corp. v. Indonesia, ICSID Case No. ARB/81/1, Award on the Jurisdiction (25 September 1983)
Autopista Concesionaria de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 September 2001)
Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural order No. 2, (May 2006)
Cable Television of Nevis, Ltd. v. Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award of the Tribunal, (16 December 1996)
Joy Mining Machinery Ltd. v. Arab Republic of Egypt. ICSID Case No. ARB/03/11, Award on Jurisdiction, (30 July 2004)
Kaiser Bauxite Company v. Jamaica, ICSID Case No. ARB/74/3, (6 July 1975)
Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia, ICSID Case No. ARB/83/2, Award (31 March 1986)
Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award (12 October 2005)

Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case № ARB(AF)/11/1, Excerpts of the Award, (30 April 2014)
Phoenix Action, Ltd. v. Czech Republic, ICSID Case № ARB/06/5, Award, (15 April 2009)
Salini Costruttori S. P. A. and Italstrade S. P. A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (23 July 2001)
SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, (6 August 2003)
SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, (29 January 2004)
Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, ICSID Case No. ARB/82/1, Award, (25 February 1988)
Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, (3 August 2006)
Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (29 April 2004)
Tradex Hellas S. A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, (24 December 1996)
Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1 Award, (16 February 1994)
Secondary sources
Baldwin, E., Mark, K., and Michael, N. 'Limits to Enforcement of ICSID Awards' (2006) 23 (1) Journal of International Arbitration 1-24.
Billiet, J., Maria, E. B., and Cari-Dee, L. *International Investment Arbitration: A Practical Handbook*. (Antwerpen, Maklu, 2016).

Cantelmo, T., *Enforcement of Arbitral Awards in ICSID Arbitration*. (Doctoral Thesis, Napoli: Università degli Studi di Napoli Federico II, 2017).
Collins, D., *An Introduction to International Investment Law*, (2nd edn Cambridge University Press 2022).
Emmanuel, G., Ilija, M. P., 'State Compliance with Investment Awards' (Fall 2020) 35 (3) ICSID Review - Foreign Investment Law Journal 540–594.
Fatouros A., *The Impact of International Organisations of Legal and Institutional Change of the Developing Countries*, (International Legal Centre 1977)
Foster, G. K. 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform' (2008) 25 (3) Arizona Journal of International & Comparative Law 666-731.
ICSID, *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, (1968) Volume II-1 < https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> accessed 19 September 2022.
ICSID, *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, (1970) Volume I < https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf> accessed 19 September 2022.
International Centre for Settlement of Investment Disputes. Annual Report. (ICSID 2022) <https://icsid.worldbank.org/sites/default/files/publications/Th

e_ICSID_Caseload_Statistics_2022-2_ENG.pdf> accessed 17 July 2022.
ICSID, *Notifications concerning classes of disputes considered suitable or unsuitable for submission to the centre (ICSID/8-D)* (2020)
<https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf> accessed 13 July 2022
Krajewski, M., and Rhea, T. H., *Research Handbook On Foreign Direct Investment.* (Cheltenham: Edward Elgar Publishing, 2019).
OECD, 'Interpretation of the Umbrella Clause in Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, (2008) OECD Publishing
<https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf> accessed 19 July 2022.
Schreuer, C. H., *The ICSID Convention. A Commentary*. (Cambridge University Press, 2001)
Schreuer, C. H., Loretta, M., Reinisch, A., and Sinclair, A., *The ICSID Convention: A Commentary*. (Cambridge University Press, 2013).
Shihata, I. F. I., 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (Spring 1986) 1 (1) ICSID Review - Foreign Investment Law Journal 1–25.
Абашидзе А.Х., Солнцев А.М. *Мирное разрешение международных споров: современные проблемы.* (Вестник Российского университета дружбы народов, 2012).
Бабкина Е.В. 'Международный центр по урегулированию инвестиционных споров как эффективный механизм разрешения споров между инвестором и государством-реципиентом' (2016) 8 Journal of the Belarusian State University International Relations

Богуславский М.М., *Международное частное право (*М., Юристь, 2004).
Козменко А.В. *Вопросы юрисдикции международного центра по урегулированию споров между государствами и иностранными лицами*, (Вестник Российского университета дружбы народов, 2011).
Лалив П. *Первый арбитраж Всемирного банка (Холидей Иннс против Марокко) — некоторые правовые проблемы*, (ICSID Reports № 1. — 1993).
Литовченко Д. В. *Проблемы определения юрисдикции в Международном центре по урегулированию инвестиционных споров*. (Актуальные проблемы права: материалы V Междунар. науч. конф. —Буки-Веди, 2016).