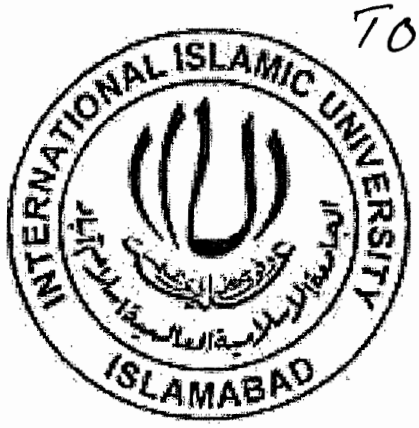
"INFRASTRUCTURE OF INTERNATIONAL INVESTMENT ARBITRATION AND DOMESTIC LAW OF PAKISTAN IN THIS PERSPECTIVE"



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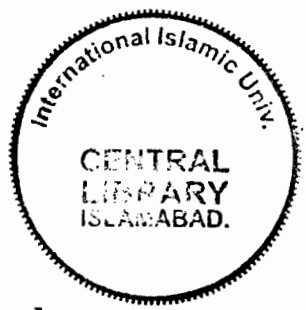

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APPROVEL SHEET

It is hereby certified that Mr. Muhammad Muzamil Hussain, Reg. No : 379-FSL/LLM/F05, has made all recommended changes in his thesis "Infrastructure of International Investment Arbitration and Domestic Law of Pakistan in this Perspective" for the partial fulfillment of requirements of LLM (Shariah & Law) Degree.

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ABSTRACTS / CONCEPTUAL DESCRIPTION

This thesis is an extensive analysis of infrastructure of international investment arbitration with an aim to clarify rule making process for protection of foreign investment. It begins with the introduction to the alternative dispute resolution mechanism and after defining arbitration in general it brings into light the emergence of international investment arbitration as a new genre with its distinguished character. Islamic concept of arbitration based on the Quran, Sunna, Consensus and Analogy is briefly described.

Infrastructural study of arbitration for international investment disputes is done with the focus upon the final and binding nature of award under International Centre for the Settlement of Investment Disputes (ICSID). Current approach to incorporate the mechanism of ICSID arbitration in bilateral treaties and multilateral treaties as in North–American Free Trade Agreement (NAFTA) and Energy Charter Treaty (ECT) is discussed. Availability and concept post award remedial steps under ICSID convention is analyzed.

Practice of arbitration and its legal aspects of Arbitration Law in Pakistan are given the consideration. Need for further development in laws of Pakistan to achieve more efficiency and harmony within international investment arbitration is figured out to encourage more foreign investment.

Chapter one provides the definition of arbitration and Islamic concept of arbitration briefly. Chapter two discusses the concept of investment arbitration, its inclusion in international investment agreements; its role is settlement of investment disputes. Chapter three focus on infrastructure of investment arbitration under ICSID convention and its additional facility rules. Chapter four describes the system of challenging arbitral awards and available grounds for post award remedies under ICSID convention. Chapter five explains challenges in international investment arbitration in Pakistan with a conclusion at the end of thesis.

INFRASTRUCTURE OF INTERNATIONAL INVESTMENT ARBITRATION AND DOMESTIC LAW OF PAKISTAN IN THIS PERSPECTIVE

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CHAPTER 1

INTRODUCTION TO INTERNATIONAL INVESTMENT ARBITRATION

1.1 Introduction to Different Methods of Alternative Dispute Resolution

1.2 Definition of Arbitration

1.3 The Evolution Towards Investment Arbitration

1.3.1 Its History - First Phase 1959-1989

1.3.2 Second Phase since 1989

1.4 Concept of Arbitration in Islam

1.1 Introduction to Different Methods of Alternative Dispute Resolution

The legal maxim "ubi jus ibi remedium" rightly laid down the foundations of legal systems in every human society. It means that whenever any wrong is done to a person, he has a right to approach the court of law. Delay of resolution of the cases created distrust and annoyance among the people upon the court system. The cliché "justice delayed is justice denied", paved the way for discovery of an alternative forum known as Alternative Dispute Resolution ("ADR").[1]

The significance of the alternative dispute resolution mechanism can be appositely put in the words of former US President Abraham Lincoln:

"Discourage litigation; persuade your neighbors to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, waste of time" [2]

Method of alternative dispute resolution was introduced in ancient Greek time by using process of mediation or arbitration based on principle of mutual retaliation and reciprocity, therefore , it is as old as civilization itself.

"Alternative Dispute Resolution (ADR) is a procedure or combination of procedures entered into voluntarily by the parties to a dispute or disagreement. ADR has also been described as Appropriate Dispute Resolution."[3]

Romans set an example for establishment of the judicial system by appointing magistrates in courts. System of INNS was introduced by King Edward-I in 1292. Colonial rule in sub continent and in several parts of the word paved the way for establishment of courts and the legal profession which made difficult for antique system of alternative dispute resolutions to prosper swiftly. When courts were burdened with huge number of cases and people frustrated with postponement of their cases, alternative dispute resolution measures were recognized as a swift, economical and valuable method.

Now in this century alternative dispute resolution is emerging as Dispute settlement through ADR is not only domestic but also a growing international trend in international

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1 Ravinder Singhani, Alternative dispute resolution: a solution a. I.C.C.L.R. Page 332, Issue 3 2008

2 Ravinder Singhani, Alternative dispute resolution: a solution a. I.C.C.L.R.332 Page 332, Issue 3 2008

3 http://www.alway-associates.co.uk/alternative-dispute-resolution.as; accessed on 10/12/2009.

trade and investment agreements.[4]

The expression "alternative dispute resolution" is explained as a "collective description of methods of resolving disputes otherwise than through the normal trial procedure. In recent years, however, the expression ADR has been largely used synonymously with mediation, which is merely one form of ADR amongst many.[5]

Firm rules are set in every system for proceedings whether criminal or civil, where litigant have no control on commencement or continues of proceeding. In litigation rules of procedure are laid down through enactment or regulation or court orders. In ADR rules are flexible as these can be amended.

The pacific means of dispute settlement are traditionally classified into two groups: diplomatic-political means & adjudicational-legal means. Diplomatic-political procedures (such as negotiation, inquiry, mediation, conciliation) seek to reconcile interests and their outcome is not in itself binding. Legal-adjudicational procedures (arbitration and litigation) apply international law and determine rights; they culminate in a *binding* decision which cannot be unilaterally evaded by one party. [6]

"An approach, where ADR procedures are broadly divided into two categories; namely, adjudicatory and non-adjudicatory, has been discussed. The adjudicatory procedure leads to a binding ruling that decides the case. The non-adjudicatory procedure is set for settlement of disputes by agreement of the parties without adjudication."[7] Some widely used ADR procedures include conciliation, arbitration, early neutral evaluation, expert determination and med-arb, along with a variety of ombudsman schemes and regulatory schemes designed to resolve disputes otherwise than through the courts.

Adjudicatory Procedure/ Definitive Determination

While first we look at set of procedures where third party's decision is imposed and that is as categorized definitive determination of disputes by Julian Lewd, Loakas and Stefan Kroll.

Expert Determination:

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4 Aftab Ahmed Khan ,Arbitration/ADR Versus Litigation by , Surridge & Beecheno Published September 4, 2006 - Karachi Pakistan.

5 ADR and public law by Michael Supperstone Daniel & Stilitz Clive Sheldon.

6 A. Peters , "International dispute settlement: a network of cooperational duties", E.J.I.L. Issue 1 -2003 .

7 http://www.sethassociates.com/alternative_dispute_resolution.php,accessed on 10/12/2009

The expert, appointed by the parties, decides the dispute finally having binding effect on the parties. Procedure is set by the expert, with or without agreement of the parties. No formal hearing is carried out for expert decision; decision is made from written submissions or meetings. The expert has the discretion to investigate conclude the decision as per his investigations, without referring back to the parties.

Where factual evidence are not involved and issue are of expertise and/or of law, then expert determination is best method to be applied for conflict resolution. The process by which the decision is reached is informal. Limited grounds arising from its fundamental validity are available to challenge the expert decision and differences on issues of fact, law or professional opinion can not serve as proper ground for challenging the decision.

Enforcement of decision in international disputes is not a simple matter and calls for exceptional consideration. Expert determination is a useful option for the following reasons.

It is also generally recognized that the parties can agree an expertise-arbitrage whereby they appoint an expert to determine technical disputes and to evaluate assets or damage. Agreement gives the expert authority to make binding decision.[8] ICC's International Centre established in 1976, co-operates with several professional organizations where parties can obtain advice on specific characteristics of each case. Expert appointed by parties is bound to observe the limits agreed between parties while rendering his decision.[9]

Adjudication:

In adjudication disputes are solved on an expedited basis and decisions are binding, but their finality is not necessary. Therefore, may it is interim dispute resolution method, although no further proceedings is sought in many cases. In England, it is made necessary by enactment for all agreements involving the construction operations. This method of dispute resolution is common in construction contracts. [10]

Baseball Arbitration:

Baseball Arbitration is given the name of pendulum arbitration or last or final offer.

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8 Gaillard and J. Savage , "Fouchard Gaillard Goldman on International Commercial Arbitration", Page 8 & 9 (Edition 1999), Kluwer Law arbitration ,

9 Craig, Park, Paulsson, ICC Arbitration, Page No 701-705

10 Julian, Mistelis and Kröll, "Comparative International Commercial Arbitration", paragraph 1-39 (Edition 2003)

Claims and their admission are decided by the disputant parties and the arbitrators can only render awards. Final and best offer in is directly submitted by every party with tribunal without disclosing to any other person. The tribunal has assigned duty to select the best suitable offer as tribunal's evaluation. This procedure is adopted to coerce both sides to decrease the gap in claims because extravagant claim will lessen the chances for his success. "Final offer arbitration is potentially unfair unless all parties have essentially equal access to the basic facts."[11] Professional athletes' contracts are negotiated by the aforesaid technique in United State; therefore, it is names as "baseball" arbitration.

Arbitration is categorized as one of the definitive determination procedure; it will be discussed separately after the other methods of Alternative Dispute Resolution (ADR).

Non-Adjudicatory Procedure/Method

Negotiation:

First and most apparent method is straightforward negotiations between the parties but most of time it is not an easy way to solve the problem where distrust already exists. Negotiation means communication between disputing parties, without third-party involvement, directed at achieving a joint decision.[12] Method of negotiation is regarded as a elastic and casual. Flexibility can be exercised while selecting the venue, schedule, points d discussion, subject matter and party's representative. Negotiation is considered as the primary approach to resolve any dispute. However, this approach may face set back due to distrust and stubborn situation. Many arbitration clauses (*compromis*) in material treaties frequently provide for consultations as a mandatory first step for dispute settlement as in NAFTA and energy charter treaty .

It is observed that several difficulties are experienced while negotiating the dispute relating to international commercial disputes or international investment disputes, though negotiation is natural method of resolving domestic commercial disputes.

First, for successful negotiation parties should be disconnected and there are required to be objective about the issues. Their willingness to communicate and compromise with each other is

11 http://www.ombuds.org/Cyberweek2002/library/ADR%20in%20England%20and%20Wales.pdf; accessed on 11/02/2009

12 A. Peters , "International dispute settlement: a network of cooperational duties", E.J.I.L. Issue 1 -2003 .

vital to pave the way for successful negotiation. These condition, however, are not always easy to discover because parties often have hard mind-set towards each other. Thus, negotiation as procedure to resolve the dispute may not always be probable.

Secondly, disputes in international commerce tend to involve parties belonging to different cultures. When an international commercial dispute has arisen, disputants experience more difficulty than parties faced with dispute within the same culture. This is because there is often no common basis for negotiation as parties from different cultures tend to think differently and have different perceptions of what is right and what is wrong. Further, different styles of negotiation due to different cultural influences may make it much more difficult for parties to reach a compromise.[13]

Mediation:

Mediation is assistance provided by third party to two or more interacting parties to resolve the dispute, such third party usually have authority to impose its outcome. Mediation is considered as one of the oldest structure for conflict resolution. This ancient procedure is used for conflict management process to resolve the international disputes in various arenas as trade, commerce and banking. Specifically, mediation is employed and studies in international relations labor management –negotiations, community disputes, and legal disputes.[14]

This method is aimed to resolve the disputes by a skilled and impartial person known mediator. It is sometimes called "managed private negotiation". The mediation process is performed as per the consent of the parties who are agreed accept the decision and assistance of mediator for resolution. [15] For mediation to occur, two processes must mesh. First, the interacting /disputing parties must request or permit a third party to mediate, second the third party must agree to mediate. Mediation proves more effective than simple negotiations.

Mediation/arbitration (med-arb)

Where the meditation process is converted into arbitration and mediator becomes arbitrator upon due failure of mediation process is called mediation/ arbitration (Med-

13 Margaret Wang , Are ADR Methods Superior to?, Arbitration International, 2000 Volume 16 Issue 2 pp. 189 - 212) (Kluwer Law International)

14 http://www.maxwell.syr.edu/campbell/programs/sawyer/papers/SLAPP%2005-06/Amisi.pdf; accessed on 16/10/2009

15 Margaret Wang , Are ADR Methods Superior to?, Arbitration International, 2000 Volume 16 Issue 2 pp. 189 - 212) (Kluwer Law)

Arb). It would be appropriate to say it mediation cum arbitration. "In this process, there is initially facilitative mediation (i.e. the mediator does not evaluate the strength of the parties' cases) followed by binding arbitration. In China, this method is usual and used frequently."[16] In this approach role and responsibility of mediator changes and emerges as an arbitrator, where mediation proves not to be successful.[17] Therefore, where mediations fails, binding nature of arbitration can substitute and powers of arbitrators are more effective.

Neutral evaluation

Legal issues or legal points are tested to evaluate their strength in a case , such test is understood as aim of neutral evaluation.. This method is mostly constructive where dispute is based upon the legal issues . A dispute or legal case is submitted for neutral evaluation giving the clear indication what would be admitted as evidence to evaluate the case during the proceeding. "A third party neutral, usually a retired judge or lawyer, gives a confidential opinion as to what the outcome of a trial would be. This procedure can be carried out entirely on paper, saving the parties the time and expense of an oral hearing. The opinion can then be used as a basis for settlement or for further negotiation."[18]

Neutral Listener Arrangement

A neutral third party is informed about the best offer of the party by the party itself . This neutral listener, which is normally an impartial third party, reports to the parties about the difference between their best offer and whether their offers are negotiable or not . With the consent of the parties, he tries to bridge the gap to resolve the dispute in amicable way.

Mini-trial

In this voluntary non-binding process, parties are afforded a chance to present their cases to a board consisting of senior members of their respective organization in presence of neutral facilitator who provide his assistance. Board/panel of seniors questions to measure the force of the cases put to them by the parties and parties make their efforts

16 http://www.ombuds.org/Cyberweek2002/library/ADR%20in%20England%20and%20Wales.pdf; accessed on 12/5/2010

17 J.Lew, L.A. Mistelis and St. M. Kröll, "Comparative International Commercial Arbitration", Page 20 (Edition 2003) Kluwer Law Arbitration .

18 http://www.ogc.gov.uk/documents/dispute_resolution.pdf; accessed on 24/11/2009 and Kevin McKee, on Alternative Dispute Resolution.

to negotiate a settlement with assistance of the facilitator.[19]

Early neutral evaluation/expert evaluation/non-binding appraisal

To evaluate the strength of the claims , parties contact a neutral evaluator in the early stages of a dispute for its resolution. "The evaluator, following an oral presentation by each party, confidentially assesses the arguments and submissions. The assessment made by the evaluator is nonbinding. No records of assessment are kept and the evaluation is considered "off the record". The aim is to demonstrate to each party the strengths and weaknesses of its case. This is intended to help parties to settle their differences by subsequent negotiation or perhaps with an independent mediator.[20]

ALTERNATE DISPUTE RESOLUTIONS IN PAKISTAN

As it has been described in the beginning that alternative dispute resolution methods are as primitive as the civilization is. This concept of settlement of disputes out side the court is not a new thought in Pakistan .In the Indo-Pak Subcontinent, theses ADRs were known as "PUNCHAIAT" or "JIRGA" system (with their local names) in rural areas wherein all disputes were brought before a committee of elders, decision rendered by committee was acknowledged, and no party could afford to oppose the decision because of social force behind the decision and fear of rejection by his tribe. "This function is voluntarily performed by the committee of the prominent people"[21] of the region and functions as an independent institution with name of panchayat in a few areas, and in others it is called jirga. Though this informal way of settlement of disputes has been exercised throughout Pakistan side by side with the formal administration of justice through judicial system, in the provinces of KP (formally NWFP) and Balochistan , system of jirga and punchayat system is more popular due to social setup of provinces. In region of FATA (Federally Administered Tribal Areas) bordering Afghanistan this traditional conflict resolution apparatus, jirga, is functional. Whenever a dispute arises, the tribal heads, settle conflicts and disputes of all types to repair and restore relationships whether personal or public, to their original position. The prettiness of the structure is that society plays its to resolve the dispute to maintain the peace and harmony.

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19 http://www.alway-associates.co.uk/alternative-dispute-resolution.asp ; accessed on 10/12/2009

20 http://www.ombuds.org/Cyberweek2002/library/ADR%20in%20England%20and%20Wales.pdf and J.Lew, L. A. Mistelis and S. M. Kröll, "Comparative International Commercial Arbitration", Para 1-51 Chapter 1 (Edition 2003) .

21 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf ; accessed on 11/12/08

Alternative dispute resolution between state agencies and citizens are thought to be introduced in Pakistan to lessen the burden of courts and to ensure the justice within short time period for benefit of government and the citizens. Such disputes are also obstacle in the development of the country and its economy.[22]

Certain legislation pertaining to family laws for marital dispute are there , where dispute must first be attempted by mediation and conciliation to be settled and only in case of failure parties proceed for litigation. "Industrial Employment laws requires a union to a negotiate before going for strike or settled through court."[23]

It has been pointed out that concept of settlement of disputes by Alternative Dispute Resolution is not new Pakistan and ADR mechanism provides alternate to litigation by avoiding lengthy and costly proceedings. Now focus needs to be shifted to arbitration, which is most significant technique among alternative dispute resolution procedures.

1.2 Concept of Arbitration

Arbitration is known as a semi-judicial and a more formal dispute resolution process whereby parties refer their dispute to the arbitrator, a qualified and independent third party, for determination. Arbitration process is aimed at 'attracting business persons who wanted speedy, inexpensive dispute settlements but who were unwilling to abandon the benefits of legal counsel and the possibility of judicial review if disadvantaged in litigation'.[24]

Concept of arbitration is simple and practice of arbitration can be traced back to primitive bodies of law. There was no legal sanction to enforce the decision, but compliance with decision/award was expected within the community in which they live and carried on their trade.

Arbitration was mainly conceived of as an institution of peace, the purpose of which was not primarily to ensure the rule of law but rather to maintain harmony between persons

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22 Aftab Ahmed Khan ,Arbitration/ADR Versus Litigation by , Surridge & Beecheno Published September 4, 2006 - Karachi Pakistan

23 http://hg.org/articles/article_1530.html ; accessed on 16/10/09

24 M. Fulton. Commercial Alternative Dispute Resolution (LBC, 1989), p. 42.

who were destined to live together.[25]

Arbitration has been defined in several ways by the legal experts in their writings and in dictionaries having their own style and wordings. Some of definitions of arbitration are narrated below to comprehend concept and the features of arbitration.

Galliard states in his book that in France, arbitration is traditionally defined along the following lines: [26]

"Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons–the arbitrator or arbitrators– who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement."

He further narrates that at first glance, there seems no much disagreement between French law & other legal systems as to the concept of arbitration. In Switzerland, for example, "arbitration has been defined as:

A private method of settling disputes, based on the agreement between the parties."[27] Its main characteristic is that it involves submitting the dispute to individuals chosen, directly or indirectly, by the parties. In international arbitration, this definition is preferable to the negative definition found in domestic law, according to which the principal characteristic of arbitration is the fact that "the dispute is removed from the jurisdiction of the courts."[28]

Shorter Oxford English Dictionary defines arbitration as "Uncontrolled decision"; "The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision."[29]

In **Halsbury's Laws of England** it is defined: "The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by

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25 A. Redfern, M. Hunter, N. Blackaby and C. Partasides , "Law and Practice of International Commercial Arbitration"", Page 2, Kluwer Law Arbitration , (2004)

26 Gaillard and J. Savage, "Fouchard Gaillard Goldman on International Commercial Arbitratio", page 5 ,Kluwer Law Arbitration ,(1999).

27 http://www.odiousdebts.org/odiousdebts/publications/TechnicalPaper.pdf ; accessed on 11/2/09

28 http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf ; accessed on 21/12/09

29 The Shorter Oxford English Dictionary ,(3rd Ed, 1969).

one or more persons (the arbitral tribunal) instead of by a court of law."[30]

Arbitration, is described as "a form of alternative dispute resolution (ADR) is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound."[31]

"A distinguished French lawyer wrote of arbitration as an "apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties." He added that, traditionally, countries of the civil law were hostile to arbitration as being "too primitive" a form of justice."[32] As Quebec, which follows the civil law , was equally hostile to foreign awards in its Code of Civil Procedure, which provided that such awards had to go through an "exemplification"process, consisting of a rehearing of the merits of the case which could result in a wholesale revision of the award. [33]

Gloria Miccioli, an American lawyer explain the arbitration as follows "Arbitration, a process used to settle a dispute in a non-judicial setting, is particularly effective for international commercial disputes because litigation in a foreign court can be time-consuming, complicated, and expensive. In addition, a decision that is rendered in a foreign court is potentially unenforcforieneable and may be partial to the party native to the court. Arbitration is a simpler process that is governed according to the rules of a neutral arbitration organization that has often been selected by means of a clause inserted into the international agreement or transnational contract. The arbitration is administered by a panel of arbitrators who are agreed upon by both parties. In addition, the confidentiality of the arbitration process is attractive to those who do not wish the terms of a settlement to be known. The growing popularity of international arbitration is a two-edged sword for the researcher: as the number of disputes that are arbitrated rather than litigated grows, so does their interest to third parties."[34]

In Arbitration, a dispute is referred to an impartial individual or group of persons, known as "arbitrators, for a decision or award based on evidence and arguments of conflicting parties. The parties involved usually agree to resort to arbitration in lieu of court

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30 Halsbury's Laws of England ,Para 601, 332 (4th ed, Butterworths 1991),.
31 http://www.answers.com/topic/arbitration; accessed on 01/6/09
32 http://www.brownwelsh.com/Archive/2005_Master_Redfern.pdf; accessed on 01/6/09

33 Gaillard and J. Savage ,Fouchard, "Gaillard Goldman on International Commercial Arbitration", Page 43 ,Kluwer Law Arbitration ,(1999).
34 http://www.llrx.com/node/479/print

proceedings to resolve an existing dispute or any grievance that may arise between them. Arbitration may sometimes be compelled by law, particularly in connection with labor disputes involving public employees or employees of private companies invested with a public interest, such as utilities or railroads.[35]

Domke defines the Commercial Arbitration "A process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator's determination, the award, will be accepted."[36]

On other hand definition of arbitration may be states as follows: "The submission of a dispute to an unprejudiced person or committee appointed by the parties to the controversy, who consent to accept and agree in advance to comply with enforcement of the award ,which is decision of arbitrators, to be rendered after arbitral proceeding when both parties have an opportunity to be heard as per principal of natural justice ."

Now the person or body who render the decision is knows as an arbitral tribunal composed of one or more arbitrators. Tribunal is assigned the job to decide and consider the case on the issues presented by each party. Decision is reduced into writing by the tribunal with reasons. The almost this it made compulsory in all rules of arbitration whether institutional or national. Award of arbitration is binding to the parties and sets out final word on the disagreement/dispute. If it is not carried out voluntarily, it may be sought by legal process against the losing party. [37]

There are some Fundamental Features of Arbitration and every definition of arbitration covers these features of arbitration. Four fundamental features of arbitration are as follows:

- An alternative to national court
- A private mechanism for dispute resolution
- Selected and controlled by the parties

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35 http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761561497 ; accessed on 01/6/09

36 JLew, L. Mistelis and S. Kröll, "Comparative International Commercial Arbitration", para 1-5 (Edition 2003) Kluwer Law Arbitration.

37 A. Redfern, M. Hunter, N. Blackaby & C. Partasides ,Law and Practice of International Commercial Arbitration, , page 141, (Edition 2004) Kluwer Law Arbitration ,

- Final and binding determination of parties' rights and obligations[38]

It seems right to say that "Arbitration is a way to settle the dispute without intervention of court. It is a process which is adopted to redress the contractual rights of the parties and to find the solution out of court through an agreed forum.

Arbitration mainly takes place out of court thought sometimes court intervention is sought in support of or against it. Two parties choose an unbiased third party, named as an arbitrator and this arbitrator renders the award and "it is usually final, and courts rarely reexamine it. What we can understand is that Arbitration is a well-established and widely used means to end disputes. It provides parties to a controversy with a choice other than litigation"[39] with binding effect of decision recognized in legal system.

Before discussing the infrastructure of international investment arbitration which, at least in the perception of states, arbitration is more flexible overall because the principle of party autonomy governs the process, It would be worthwhile to look the division of international arbitration which is traditionally measured as more elastic than litigation before an international court. International arbitration can be divided into the classical state-state arbitration, and state & private party arbitration .

State-state Arbitration: The most significant example for state-state arbitration is practice of it by WTO panels and the Appellate Body. Ethiopian-Eritrean Boundary Commission and a Claims Commission may be presented as a recent example of the institutionalization of state-state created in 2000. Two developing countries involved, in establishment of these commissions and it indicates trend to settle disputes through arbitration. However, funding of these is a severe dilemma.

Mixed Arbitration: This type of international arbitration concerns disputes between private entities and states for business affairs. This "mixed arbitration" is a quiet revolution in international dispute settlement, Two examples of functioning 'mixed' arbitration are the US-Iran Claims Tribunal, which was established after the hostage crisis of 1979 , is working United Nations Commission on International Trade Law (*UNCITRAL*) Arbitration Rules containing the some modification to it , and, with regard to investment disputes, the International Centre for the Settlement of Investment Disputes ("ICSID") framework which is discussed in this thesis.

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38 J. Lew, L A. Mistelis and S. M. Kröll, "Comparative International Commercial Arbitration", page 10 (Edition 2003) Kluwer Law Arbitration

39 http://www.answers.com/arbitration; accessed on 11/06/09

1.3 THE EVOLUTION OF INVESTMENT ARBITRATION.

Investment treaty arbitration emerged in the modern era as a new genre of international arbitration, as it is discussed that arbitration itself was used to resolve disputes and afterwards its importance was realized to settle public international disputes. Jay Treaty (of Amity, Commerce and Navigation) in 1794 is considered the first document to pave the way for international arbitration.

The Jay Treaty solved many issues to prevent the ward and increased trade.[40] This treaty contains the provision for three joint commissions to deal with border disputes and shipping issues prior to revolution.[41] "Many arbitral commissions were modeled on those of the Jay Treaty for settlement of international disputes pertaining to arising due to wars, insurrections, revolutions and the like." [42]

International investment arbitration emerged from international arbitration and it is new genre of international arbitration, on the basis that investment arbitration involves the disputes where state exercise its public authority.

Distinguish features of Investment arbitration are discussed in chapter two. It is worthwhile to mention here that the investment treaty arbitration relocate "this private adjudicative model from the commercial sphere into the realm of government, thereby providing arbitrators the authority to deal with governmental decisions which effects the investors. For this purpose, investment treaties contain arbitration provisions in order to provide an institutional forum and procedural framework for investment arbitration."[43]

Evolution of investment arbitration among international community can not be comprehended without looking into the history of investment treaties which incorporated legal principals for investment arbitration. Arbitration has its own history and as I have stated in first chapter that ancient concept of arbitration as a method of resolving disputes was very simple. While, history of international investment arbitration has two

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40 O, J. Stuart;.. "Historical Dictionary of European Imperialism." pp. 332 and Wikipedie.com.

41 Read more: http://www.americanforeignrelations.com/A-D/Arbitration-Mediation-and-Conciliation-.html#ixzz0tRoWWbrq. ; accessed on 17/12/09

42 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", E. J.I.L, 02/01/2006.

43 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006.

categories:

1) historical development of the arbitration in national legal systems and at international level and

2) legal history of rule making for protection of investment protection.

Notion of international investment arbitration is based upon the protection of rights of the foreign investor and encourage the foreign investment. As stated earlier, we can not avoid mentioning of the history of arbitration to know how system or infrastructure for international investment arbitration progressed. History of arbitration is given preference and thereafter, the history of rule making for the protection of investment is elaborated and this paved the way for introduction of infrastructure of international investment arbitration.

DEVELOPMENT OF ARBITRATION AS CODIFIED LAW: We can say that first English Arbitration Statute was the Arbitration Act of 1698/1697 and first reported case was VYNIOR'S *CASE* of 1610 where court ordered the defendant to pay the agreed penalty for refusing to submit to arbitration as he had agreed to do. On the international level Jay Treaty introduced the arbitration, though in practice, it was already common. In France, an Edict of Francis II promulgated in 1560 which made arbitration compulsory for all merchants in disputes arising from their commercial activity. Later this Edict came to be ignored. During the French Revolution, arbitration came back as the most reasonable device, in 1791; judges were abolished and replaced by public arbitrators. However, this proved to be a step too far and the French Code of Civil Procedure of 1806 turned it into the first stage of a procedure which would lead to the judgment of a court.[44]

Arbitration was being practiced at national level and Ghent Treaty was signed in December 1814, in Ghent, (in Belgium between the USA and UK after the Jay treaty . On international level an international multi party treaty or convention was much needed to link together national laws and provide a uniform solution.

In respect of arbitration as international phenomena, the **Geneva Protocol of 1923** served the purposed some way for the international arbitration agreements and issue like

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44 A. Redfern, M. Hunter, N. Blackaby & C. Partasides , "Law and Practice of International Commercial Arbitration", , page 2, Kluwer Law Arbitration , (2004).

validity of an agreement, arbitral procedure and execution of arbitral awards were agreed upon. **Geneva Convention of 1927** came following the same way to set tune and widen the scope of the Geneva Protocol. Most significant achievement was well known **New York Convention of 1958** which is also referred as Convention on the recognition and enforcement of foreign arbitral awards to strengthen the process of the international enforcement of arbitration agreements and arbitral awards.

Whereas the Swedish Chamber of Commerce's Committee was established in **1917**; Later on, Court of Arbitration of the International Chamber of Commerce in Paris was founded in **1923,** which played a crucial role for promulgation of New York Convention at the forefront of these developments among international community.

Arbitral institutions paved the way for the establishment of these international treaties and conventions. The LCIA is one of the oldest of these institutions, having been founded on November 23, 1892 as the London Court of Arbitration. In 1953, ICC produced the first draft for New York Convention 1958. But still there was a need to solve the problems related to investment of parties in third country.

Legal History of Rule Making for Protection of Investment Protection

International investment treaties need to be comprehended as process of international investment rule making. International investment rule-making emerged as distinguished phenomena during the past years "which may be divided into two phases to comprehend the prevailing issues."[45]

"The **first phase** started with the end of the World War II until collapse of the former Soviet Union in 1980and a global liberalization set in."[46] The **second phase** of investment rule making for protection of foreign investment and investor started from 1980s till the present day.

1.3.1 The First Phase

Disagreement among international community was prevailing pertaining to protection of foreign investment. This disagreement established the rout for development of international investment rule-making. Some developing countries adopted substitution policies due the economic domination.

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45 http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761574914&pn=6 accessed on 11/06/09
46 http://www.ombuds.org/Cyberweek2002/library/ADR%20in%20England%20and%20Wales.pdf

"Western Europe and North America claimed that customary international law established minimum standard of treatment to which foreign investors were entitled in the territory of the host country. Developing and socialist countries denied this fact and asserted that foreign investment was entitled to the treatment afforded by a host-country government to investments made by its own nationals."[47]

Negotiation of the proposed Havana Charter of 1948 , a defunct charter of the signed by 53 countries on March 24, 1948 was first step to establish an International Trade Organization as an effective framework for investment protection against anti-competitive business practices. United State's proposed language, for protections of foreign investment, was not accepted because of differences concerning the international minimum standard. General Agreement on Tariffs & Trade of 1949 was based on its trade related portion.

Prior to negotiation of Havana Charter, in 1945, US discussed a series of treaties with Germany, Luxemburg and Japan for trade, to include protection for investment as per customary international law which was not provided in treaties of 1920 and 1930s.[48] "United States concluded such agreements with both developed and developing countries covering protection of property in general, rather than investment per se.

In 1957, the formation of the European Economic Community, now the European Union was most complete integration of this concept. Other examples include the 1957 Agreement on Arab Economic Unity, the 1969 Cartagena Agreement for creation of an Andean Common Market, and the 1973 Agreement for Caribbean Common Market."[49]

Bilateral and regional negotiations addressed some investment issues of international rule-making among various countries. Rudolf Dolzer and Margrete identify first Bilateral Investment Treaty (BIT) concluded by Germany with Pakistan in 1959 addressing solely investment protection [50] then other countries concluded their BITs between 1960 and 1966.[51]

With the emergence of treaties of friendship, commerce and navigation from which the treaties drew inspiration, these early BITs had "provisions on the arbitral settlement of

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47 http://www.unctad.org/en/docs/iteiit20073_en.pdf

48 C Wallace , "Legal control of the multinational enterprise: national regulatory"page 52

49 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08

50 Antonio R. Parra on ISCID penal dated April 6 2000 about the rise of bit &ICSID role in the early 215r century? HeinOnline- 94 Am. Soe'y Int'l L. Proc. 41 -2000.

51 uncdat.ite/iit/2007/3, International Investment Rule-making,UNCTAD Series UN publication 2008.

disputes between the states parties but lacked similar provisions on the settlement of disputes between a state party and nationals or companies of the other state party."[52]

Feeling the need for an infrastructure of international investment arbitration, in 1965, the "World Bank opened Convention for the Settlement of Investment Disputes between states and nationals of other states for signature."[53] This convention clearly incorporated the idea of international investment arbitration and it started to flourish as new genre.

Prior to ICSID convention negotiations to establish multilateral investment rules failed because of differences among international community . Most of rule making for international investment was being done through BITs. In 1969, ICSID issued a set of "Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Bilateral Investment Treaties." These clauses included texts that states might use to record in BITs their consent to ICSID jurisdiction disputes with nationals or companies of their treaty partners.

Concept for protection of foreign property in 1967 came in to picture in OECD's proposal . "In 1974, the Establishment of a New International Economic Order (NIEO) was sought by developing countries .Austria, Japan, the United Kingdom and the United States all inaugurated BIT programs in the mid-1970." [54]
"Other significant developments in 1970s were introduction of provisions for settlement of investment disputes in Arbitration Rules of UNCITRAL 1976 and introduction of the ICSID Additional Facility Rules 1978 cover the disputes of non signatory countries to ICSID."[55] The UNCITRAL arbitration rules were ad hoc arbitration rules and provided the freedom to adopt for arbitration without being subject to any institution. With introduction of Additional Facility Rules, ICSID secretariat was given authority to manage proceedings involving non signatory states.[56] Till 1980, infrastructure of international investment arbitration was created in new form other than the international commercial arbitration.

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52 D. Kokkini-Iatridou. "Economic Disputes between States and Private Parties: Some Legal Thoughts on the Institutionalization of their Settlement", Netherlands International Law Review, 12/1986
53 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08
54 Rudolf Dolzer & Margrete Stevens, "Bilateral Investment Treaties by, The Hague:"" Kluwer Law International (1995),
55 Choudhury, Barnali. "Recapturing public power: is investment arbitration's engagement of the public interest contributing", Vanderbilt Journal of Transnational Law, May 2008 Issue
56 Antonio R. Parra on ISCID penal dated April 6 2000 about the rise of bit &ICSID role in the early 215r century? HeinOnline- 94 Am. Soe'y Int'l L. Proc. 41 -2000

1.3.2 The second Phase from 1980 – present

As we are experiencing economic slow down in 2009 and 2010, same was observed in the late 1980s, and due such economic slowdown investment environment was changed. Unwillingness of commercial banks to lend to them due to sovereign debt crisis of the 1980s was felt by developing countries. "Most readily available source of capital was foreign investment with the to have access to technology, training, know-how and world market.

Meanwhile, at the end of the 1980s, countries in Eastern Europe had begun the transition from socialism to market-based economies. By the late 1980s, large numbers of developing countries were opening their economies to market forces and seeking to attract foreign investment."[57] International investment agreements were used to attract the foreign investment with provision of dispute resolution through arbitration.

The agreements on trade-related investment measures (TRIMs) protected the foreign investment and agreement on trade-related intellectual property rights (TRIPS)[58] adopted certain rules obligating member states for protections of intellectual property against infringements.

Uruguay Round was conducted within the framework of the (GATT), spanning from 1986-1994 transformed the GATT into the World Trade Organization and came into effect in 1995. "The Uruguay Round included investment agreements with two changes. The first was the growing recognition of the connection between trade and investment and the second change was the emergence of liberalization as a major dimension of a number."[59]

Second change liberalization obligations for investment rule making was present in the 1998 ASEAN Framework Agreement[60],

In 1980s with dramatic increase in the number of BITs produced as upto 211 ,China and the United States, launched BIT programs. From about the mid-1980s, such countries began to enter into BITs referring to arbitration under the UNCITRAL Rules or the

57 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08

59 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08

60 The Association of Southeast Asian Nations, was formed on 8th August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand.

ICSID AFR 1976 , either alone or in combination with references to arbitration under the ICSID Convention.[61]

"The NAFT A includes an extensive investment rule making chapter with liberalization and protection provisions similar to those found in the BITs concluded by the United States.In 1994, the Energy Charter Treaty (ECT) was concluded among some 50 countries, including all in Europe, the former Soviet Union, as well as Australia, Japan and Mongolia. ECT incorporated the terms for investment protection and it only applies to investment in the energy sector."[62]

All of these Agreements ; NAFT A), a Mercosur Investment Protocol, and the ECT followed the pattern established by Western Hemisphere BITs. In BITs made by Western hemisphere countries in particular, such consents are often combined with further consents to arbitration, thus also opening up recourse to those other forms of arbitration if desired or appropriate.[63]

At advent of "new century, several countries began to negotiate bilateral free trade agreements (FT As) similar to NAFTA. These agreements included an extensive investment chapter that contained provisions similar to those appearing in BITs. NAFTA had included a number of provisions, especially with respect to investor-State dispute resolution, and these more elaborate provisions found their way into the post2000 FTAs, particularly those concluded by the United States."[64]

Stronger emphasis on Free Trade Agreements and treaties on economic cooperation was given to include the investment arbitration provisions. The ICSID's Regulations and Rules were modified first time in 1984 and the annulment of arbitral award rendered under ICSID rules was sought first time in 1984. "In 1987, first case was registered with ICSID on the basis of a comparable consent in a BIT." [65] Number of registered treaty-based arbitrations was 75 in 2001, while in 2007 it reached to 290. The number of investor-state arbitrations does not account for arbitrations commenced outside a treaty,

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61 Antonio R. Parra on ISCID penal dated April 6 2000 about the rise of bit &ICSID role in the early 215r century? HeinOnline- 94 Am. Soe'y Int'l L. Proc. 41 -2000

62 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08

63 As referred in 45

64 http://www.unctad.org/en/docs/iteiit20073_en.pdf; accessed on 11/12/08

65 Antonio R. Parra on ISCID penal dated April 6 2000 about the rise of bit &ICSID role in the early 215r century? HeinOnline- 94 Am. Soe'y Int'l L. Proc. 41 -2000.

for instance, pursuant to a contract.[66] Therefore trend to opt for investment arbitration is increasing.

1.4 Arbitration in Islam

"Islam is the state religion of Pakistan and the injunctions of Islam as laid down in the Holy Quran and Sunnah are mandated to be the supreme law and source of guidance for legislation and for policy-making by the government. Islam not only recognizes but also encourages settlement of disputes through arbitration. Disputes in pre-Islamic society in Arabia, which were not settled by negotiations between the parties, were settled by means of arbitration. The Holy Prophet continued the tradition and acted as an arbitrator in many instances."[67] Therefore concept of Islamic arbitration is described briefly.

Islamic Jurisprudence provides linguistic meanings and then scientific and legal definitions are narrated. In Arabic an arbitrator is referred to as Hakam. This is the person chosen to judge between conflicting parties to give sound advice and final judgments in disputes. [68]

The term 'Hakam' is one of Allah s names-The Almighty said:
"Shall I seek a judge (arbitrator) other than Allah?,[69]

The meaning of 'arbitrator' is given in the verse as - 'the righteous man seeks no other standard of judgment but Allah's.[70]Arbitration is known as "Tahkim" derived from word Hakam which is a method to settle the disputes. "Tahkim is recognized by the four sources of Shariah; the Quran , Sunnah , Ijmah'"[71] and Qiyas (reasoning by analogy).[72]

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66 Jason Clapham , "*Journal of International Arbitration*, pp. 437 - 466 and Submitted to Kozep-europai Egyetem on 2010-03-29

67 http://www.aspenpublishers.com/PDF/02558106.pdf and http://www.kluwerarbitration.com/arbitration/arb/commentary/fulltext/JournalofInternationalArbitration/2002/ by Tariq Hassan , *J. Int. A*, 2002 Volume 19 Issue 6) pp. 591 - 600
68 AI Mujam Wassit, Arabic Language Complex. Egypt , Qatari Printing Press, Administration of Islamic heritage, Revival. Qatar Vol I, P 190.
69 The Holy Quran Surah AI anaml, Verse 114
70 Mohammed A. Jabra, Thesis on Commercial Arbitration in Islamic Jurisprudence, University of Wales 2001.
71 http://www.arabtimesonline.com/kuwaitcrime/faqdetails.asp?faid=151&faqid=9; accessed on 16/11/09
72 Zeyad Alqurashi, Arbitration under the Islamic Sharia, http://www.transnational-disputemanagement.com/samples/freearticles/tv1-1-article_63.htm

Legal and Scientific Definition; After having arrived at several approximate definitions of the word 'arbitration', Muslim scholars finally defined it as "Tawliya" which means that "two adversaries accept the arbitration of an arbitrator".[73] Ibn Kodama said :

"If two men agree to make between them an arbitrator and this deed is in the interest of justice, then arbitration is acceptable.[74]

Some researchers consider arbitration to be a contract between two conflicting parties where they freely choose an arbitrator to end their dispute. It has also been defined as a contract among contracts, and finally it has been defined as "an agreement made by disputants to appoint a qualified person to settle their dispute by reference to Islamic law." Codification Islamic law started in 1876 and many concepts were defined in accordance with rules of Islamic jurisprudence.

The Code of Judicial Rules (Majallat Al Ahkam Aladliah) claims that arbitration is the act of agreeing about an arbitrator to issue a settlement between disputants.[75] Aforesaid magazine is considered to be the First Civil Codification of Islamic Code following the AI Hanafi School, 1876.While it was explained by that Arbitration was defined as appointing an arbitrator by the adversaries to settles their disputes.

Article 2091 of the Code of Legal Rules (Majallat AI Ahkam AI Shariah) stipulates that it is acceptable that adversaries agree upon an arbitrator to decide between them as a judge.[76]

There have been various definitions of "arbitration" given by different scholars but they have all had only an approximate meaning.

In Islamic Jurisprudence "arbitration" is the fact of an agreement between two adversaries brought about by an arbitrator who has settled their dispute by virtue of Islamic Jurisprudence rules. The following will explain more clearly the components of the definition of arbitration:

1. The expression "two adversaries agreeing to the use of an arbitrator" is proof that the two parties are in conflict which makes the presence of an arbitrator necessary. It is unlikely that arbitration would take place in the absence of one of the parties. "To their

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73 Zain Udin Ibn Najem (died 970 If. 1549 A.D.) Albahar Al Raeq (The Clear Sea) Sharh Kanz AI Daqaiq 2nd edition . Dar AI Maarifa. Beirut, (1333H.1912 AD.) Vol. 7 P 24.

74 Ibn Kodam, AI Muagn (General Directorate of Printing of Scientific & Economic Research.Saudi Arabia. VoL 9 P 107.

75 Article 1790 from the Magazine of Judicial Judgments.(Majallat Al Ahkam Aladliah)

76 Ahmd Al Kari. Majalat Alahkam Alashar'a (Code of Legal Rules - Study and Enquiry of Dr Abde Wahab bin Sulaiman and Dr Mohamed Ibrahim. Tehama Press, 1. Ed. 1981. P 60.

satisfaction" is the term used to signify that the opponents have agreed of their own free will to appoint an arbitrator to finalize their dispute. Arbitration can therefore be considered as a contract between the conflicting parties.

2. The expression "to settle their disputes" indicates that there is conflict. The necessity of establishing that a state of conflict exists is of paramount importance because without it arbitration becomes meaningless. Additionally, it may not be necessary for a third party to be present as one of the opponents may agree that the other act as arbitrator to put an end to the existing problem.

3. The expression "by virtue of the Jurisprudence rules" is required for the "in arbitration' process to be able to proceed. Whether used for Islamic Jurisprudence or for conventional rules. [77] There are certain limits where Arbitration can not be applied. Like Hadood cases and cases falling under State responsibility.

Historically, arbitration was practiced in Pre Islam Era among Arabs and several other ancient. [78] References of two cases , would be appropriate for citation here, which took place in pre Islam era .

i) The case of Al Shaddakj vs Ouraish and Khozaa tribes - the Quraish and Khozaa tribes were in constant conflict over the administration of Mecca and AI Kaaba. Many people died in the conflict and the tribes needed to be reconciled.They agreed to choose a competent Arabic arbitrator and decided upon All Shaddakh, a famous arbitrator from the Kanana tribe. His decision was to give AI Kaaba to the Quraish tribe and Mecca to the Khozaa tribe. The dispute was solved.

ii) The case of the Removal of the Black Stone(Hajar-e Aswad): This most outstanding issues of Arab arbitration took place at the beginning of the seventh Gregorian century when Quraich tribes met to discuss the problem of building a new Black Stone in Kaaba in Mecca City. When each tribe wanted the honour of removing the Black Stone there were violent clashes between them and they were locked in disagreement for four nights. Finally they called a meeting and decided to choose the first person entering the Kaaba from the al Salam Gate as arbitrator. The man was the Prophet Mohamed (peace be upon

77 Mohammed A. Jabra, Thesis on Commercial Arbitration in Islamic Jurisprudence, University of Wales 2001.
78 H. Fatthy, " Islamic Arbitration" (Arab Arbitration. Journal Issue 1 2000 .

Him) .The Prophet ordered a piece of cloth on which the stone was to be carried so that it could be removed by all the tribes, thus the dispute ended. [79]

Islam recognized and confirmed arbitration as method to settle disputes..[80] The Holy Quran provides for arbitration as follows : [81]

"If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things", (Quran: 4: 35.)

"The other verse in support of arbitration is as follows:

"But no, by your Lord, they can have no Faith, until they make you (O Muhammad SAW) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission"."[82]

In Sunnah: Prophet Mohammad (PBUH) recognized and practiced arbitration. He (PBUH) himself acted as arbitrator for settlement of disputes .

"He acted as an arbitrator in the dispute between several Arab tribes as in case of Black Stone (Hajar-e Aswad) after rebuilding the Kaaba.

He also chose arbitration to settle the dispute between himself and Bani Anbar."[83]

Treaty of Medina of 622 A.D. (a security pact among the city's Muslims, non-Muslim Arabs, and Jews) called for arbitration of any disputes by the Prophet Muhammad. Prophet himself resorted to arbitration in his conflict with the tribe of Banu Quraizah [84]and most important event in the arbitration in the era of Prophet Muhammad, (PBUH) was the case of Quraizah, and how to deal with them. It was the Jews of Bani Qurayza have given their covenant of the

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79 Abdel Malek Bin Hasham , AI Siraj AI Nabawiva (The Prophetic Bibliography). Mecca Printing Press Hadj Abdesalam Shakroun 1971 Vol I pp 123-124.

80 H. Fatthy, " Islamic Arbitration" (Arab Arbitration. Journal 2000 1.

81 See the Holy Quran. Nissa Surah, Verse 35.

82 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm; accessed on 21/10/09

83 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm

84 Charles n Brower , J. K Sharpe, Int. Arbitration and Islamic World, The American Journal of Int. Law Vol. 97-2003 Page 643. http://www.jstor.org/pss/3109849

Prophet (PBUH), but they reneged on their reign in the battle of the trench as the Quraish had offered to help them to lay siege to the Muslims. Saad bin Maaz was appointed to decide the matter as arbitrator and laws of arbitration was Jewish rules in case of treachery. [85]

Imam Abdullah bin Abass protested during a discussion with AI Karije, and after his protest he claimed - Allah made men's arbitration trustworthy.

Arbitration was practiced by the companions of the Prophet (PBUH). Zayd Bin Tabit was an arbitrator during the arbitration process between Omar Bin AL Kbatab and Ubai Bin Kaab over dispute of garden .When Omar told Ubai Bin Kaab to choose an arbitrator to settle their dispute, he proved that both had accepted arbitration. They wanted to end their dispute by arbitration since they could choose an arbitrator but they did not choose him as a judge.

Omar's decision to accept arbitration appears to be clear from the preceding narration.

Ibn Abi Malika narrated the following: "Talba Bin Abdullab borrowed money from Othman Bin Affan.

Thus they chose Jeber to arbitrate between them; the choice was given to TaIba rather than Othman and they accepted the award. From this case it can be seen that Othman, TaIb bin Abdullab and Jeber bin Motam accepted arbitration, which gives an example of permission being granted for arbitration from the Prophet's companions.

A political case between the Ali Ben Abi Taleb and Amir Muawya is well known which created doubt about concept of arbitration between two groups .. The two arbitrators, Abu Mussa AI Ashari and Omar Bin AI Aas, were nominated in the arbitration .[86] "Division of opinion between Islamic Law scholars over the concept of arbitration mainly resort to this incidence of arbitration which was opposed by the Khawarege (the people who opposed the resort to arbitration by Ali Bin Abi Taleb). Actually it is use of word *"HAKAM"* which has created confusion which is to define different meanings. [87]

The Islamic law clearly differentiates between conciliation and arbitration having binding force. In certain matter conciliation is not like acts against God's commands or the matter settled by conciliation falls in the ambit of rights of God, i.e., crimes and their sanctions.

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85 Abdulhamid El-Ahdab, Arbitration WIth The Arab Countries Page 13 (2d Ed.I999);

86Mohammed A. Jabra, Thesis on Commercial Arbitration in Islamic Jurisprudence, University of Wales 2001.
87 Saed Damass, Arbitration Contract between Ali & Muawia M.A Thesis. History & Civilizations Department, Imam Mohamed Bin Saud Islamic University, Riyadh. 13998/1979 A.D. PP.113-114.

Although arbitration is recognized by all sources of Shariah, but it did not receive close attention in the doctrinal writings because Islamic Judiciary was sufficient and developed enough to provide suitable solutions to all types of problems which arose from the social life of that time. Scholars of Islamic jurisprudence consider arbitration to be included within the judicial authority.

The scholars **of Hanafi School** emphasize on the contractual nature of arbitration and consider it legally close to agencies and conciliation. Thus, to them an arbitral award which closer to conciliation than to a court judgment, is of lesser force than a court judgment. Nevertheless, under this school the disputing party cannot be relived from being obligated to abide by the award because the agreement to resort to arbitration binds the parties like any other contract. The majority of books of the Hanafi school of jurisprudence such as Ai Hidaya written by AI Marghinani (died 593 HJ1172 AD.) and Fath Al Qadir written by Ibn Humam (died 681 HJI260 A.D.)dealt with arbitration within the chapter of judicial authority. Other books include Adab Alkda35 by AI Tabri and Rwdat Alkodat by Samnani (died in 499H/197 AD.)."[88]

According to the **Shafi School** arbitration is a legal practice, the position of arbitrators is inferior to that of judges since arbitrators under this School are liable to be revoked up to the time of the issuance of the award. The Shafi school was famous for both AI Mawridi (died 450H/I029 A.D.) who wrote Al Hawe and Al -Nawawi (died 676H11055 AD.) who wrote Rwadat Altalebeen (Garden of Demanders).

"Under the **Hanbali School,** a decision made by the arbitrator has the same binding nature as a court's judgment.[89] Arbitrator should have qualities of Judge. The Hanbali school was noted for famous authors like Ibn Kodama, (died 620H/1199 AD.) who wrote The AI Mugni and Ibn Mutlih (died 884B) who wrote Almobdea and Al Bahtti. (died 1046H1162S A.D.) who wrote Kashef Alkinaa.

"The **Malikis** trust and accept arbitration to resolve disputes with consent of disputing party. This is explained by the fact that one relies upon the conscience of the other parties. "[90] Revocation of authority of arbitrator is not permitted after the beginning of arbitral proceeding. The Maliki school was renowned for Almontga Al Baji (died 494H/I073 A.D.) and also for Ibn Farhoun (died 799H/1378 A.D.) who wrote Tabserat Alhokam.

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88 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm; accessed on 09/08/09

89 http://www.arabtimesonline.com/client/faqdetails.asp?faid=151&faqid=9 and Abdul Hamid El-Ahdab, "Arbitration With the Arab Countries," (The Hague: Kluwer Law International, 1999) at p. 16

90& 81 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm; accessed on 09/08/09

Main Features of Arbitration under Islamic Law

"Arbitration agreement is the principal basis for conferring upon the arbitrators the power to issue binding decisions and it depends upon the full and valid consent of the parties."

"Whether the arbitration agreement should be in writing or oral is not discussed by any school in Shariah. However, in the leading case between the Caliph "Ali Ben Abi Taleb" (the fourth rightly guided Caliph) and "Muawya Bin Abi Sofian", written deed stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issue of the award. In this dispute the parties used arbitration to settle their dispute, but the arbitration clause was not effective."[91]

"The doctrinal writings of the scholars of the Shariah Schools are silent about arbitration clauses, which refer future dispute to arbitration. This issue has been a subject of controversy among some classical scholars of Shariah According to the principle of freedom of contracts under Islamic Shariah, parties are free to include any clause in their contract as long as it dose not permit acts against Principals of Shariah. Classical Muslim jurists question the binding force of arbitration agreement. To them, arbitration agreements are revocable options rather than contractual undertakings. This idea was incorporated in Article 1848 of Al-Majala based on Hanafi School of thought."[92]

The modern trend in Islamic law is to consider the arbitration agreement binding upon the parties once it has been entered into. It is the direct application of the Quran when it states "...and fulfill every agreement, for every engagement.."

Procedural formalities may agreed upon by the parties. Arbitrators may be revoked in Shafi and Hanafi schools any time any time. However, in view of the Maliki School is not permitted after start of proceeding . This view seems to meet the requirements of international standard of arbitration at global level.. Imam Mohammad Al Shaibani has discussed international obligations on basis of reciprocity in Al Sair Al Kabeer.

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91 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm accessed on 09/08/09

92 http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm accessed on 09/08/09

It would be relevant to say that settlement of disputes by Alternative Dispute Resolution is not new concept in Pakistan and adoption of ADR mechanism provides alternate to litigation by avoiding lengthy and costly proceedings. Arbitration is most significant technique among alternative dispute resolution procedures.

It may be inferred from preceding discussion that Arbitration, a most significant technique among alternative dispute resolution procedures, is one of the ways to settle the dispute without intervention of court. It is a process which is adopted to redress the contractual rights. International arbitration is measured as more elastic than litigation before an international court. International arbitration has two kinds: state-state arbitration, and arbitration between state and private party. Arbitration provision for settlement of trade related disputes in BITs paved the way for introduction of the ICSID Convention for investment arbitration.
Contractual principals of Islamic jurisprudence provide foundation for development of arbitration and this Islamic concept may use as useful tool to promote the settlement of disputes through arbitration.

CHAPTER 2

INTERNATIONAL INVESTMENT AGREEMENTS & DISPUTE ARBITRATION

2.1 Introduction to International Investment Agreements

2.2 Investment Agreements and Their Kinds

A) Bilateral Investment Agreements

B) Double Taxation Treaties

C) Preferential Investment Agreements

2.3 Features of Investment Dispute Arbitration

2.4 Settlement of International Investment disputes

2.4.1 Concept of and methods of investment arbitration under North – American Free Trade Agreement

2.4.2 Provisions of Investment Arbitration in Energy Charter Treaty

2.5 Issues and Challenges in International Investment Arbitration.

2.1 Introduction to International Investment Agreements

"Foreign investment is considered as an integral part of economy of developing countries for their key projects to build infrastructure and to exploit available natural resources."[93] For purpose of financing their projects by foreign investors, state, or its corporate bodies sign the contracts or and agreement with the international (foreign) investors. Such agreements in international community for purpose of investment among two or more nations are known as international investment agreements. "And development of international investment agreements with protection clauses was primarily a response to the uncertainties and inadequacies of the customary international law. In addition, capital exporting states sought to obtain better market access commitments from capital importing states for investors and investment, and to obtain progressive development in the standards of investment protection."[94] To create trust of the international investors and establish the safe environment for investment, states sign the agreement containing settlement clause of investments arbitration.

Most of these agreements are signed between two different states, whereas by the virtue of these agreements international investor's confidence is built. When an agreement is signed between two states to create the environment for international or foreign investment it is regarded as international investment agreement. Criterion of 'internationality' of a dispute is defined by Anne Peters that it lies in the *legal substance of the dispute.* International disputes are those in which the rivalling claims are based on international law. This will *normally* go hand in hand with the parties being (at least so-called ' limited') subjects of international law.[95] Before providing the definition on investment it would be appropriate to mention that international investment agreement is an agreement which contains the two elements, first internationality and second it relates to foreign investment. Internationality and investment should correlate with each other and they should not be identified separately.

Though the term "investment" appears in the title of the Convention, but it is not defined in the ICSID Convention which specially aiming at settlement of "investment disputes . "Investment" within the scope of Article 25 has been set as precondition to

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93 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf-on 11/26/08

94 http://ita.law.uvic.ca/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf and A. Newcombe & Paradell, "Law and Practice of Investment Treaties: Standards of Treatment", pp. 1 - 74(Kluwer Law International -Edition 2009)

95 Anne Peters , "International dispute settlement: a network of cooperational duties" E.J.I.L. Issue 1 -2003

determine the jurisdiction of ICSID tribunal."[96] After discussion, drafters finally decided not to assign a definition in the Convention. Several explanations have been proposed for the absence of a definition. Drafters considered that not including a definition would enable the Convention to accommodate different types of investment in future.[97]. Keeping in view topic of thesis, it seems appropriate to recite the definition of investment as provided in different convention, enactments or decisions. It is mentioned as condition in article 25 of the ICSID convention that only investment dispute, having ingredient of internationality, can be arbitrated under ICSID.[98]

"An "investment" is generally defined to include movable and immovable property, shares in companies, contractual rights and public law rights. In relation to shares in a company constituting an "investment," the tribunal in ***CMS v. Argentina*** confirmed that even minority shareholders could bring claims in their own right as investors .[99]

The pertinent provisions to investment in the Energy Charter Treaty may be summarised as follows; First, there are the definitions of " Investment" and " Investor" in Art.1. " Investment" is defined broadly, in Art.1(6), to mean " every kind of asset, owned or controlled directly or indirectly by an Investor". [100]

The US-Singapore FTA adopts a different approach, requiring that a qualifying investment show certain characteristics of an investment. [101]

In Article 31(1) of the Vienna Convention says it important to keep in mind the purpose of investment treaties when interpreting their provisions:

> *"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 light of its object and purpose."* [102]

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96 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

97 W. Hamida , "Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control", JIAr. 2007 Volume 24 Issue 3- pp. 287 - 306 ,

98 J. Lew, L. A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Page 776 chapter 28 (Edition 2003) Kluwer Law Arbitration."

99 Peter J. Turner, Mark Mangan, et al. , Investment Treaty Arbitration, JIAr. 2007 Volume 24 Issue 2 pp. 103 – 128.

100 Laurence Shore , The jurisdiction problem in Energy Charter Treaty claims , Int. A.L.R. 58 , 2007.

101 John Savage , ITA & Asia, AIAJ, 2005 Volume 1 Issue 1 pp. 3 – 48.

102 Vienna Convention.

"In the even more recent decision of El Paso. Ltd. v. Argentina (April 2006), the ICSID tribunal rejected any approach to the interpretation of a BIT which favored one particular party over another." [103]

Whether Pre-investment expenditures for future investment fall within the ambit of the Convention or not became an issue in *Mihaly v Sri Lanka.*[104] The dispute arose out of a build operate and transfer contract where at the end of the bidding process, a letter was sent to the claimant that further negotiations would be made exclusively with it for a certain period. ICSID tribunal held that the costs incurred did not constitute an investment. Sri Lanka had consistently made it clear that the documents exchanged did not create any obligation to enter into a contract.

"Fedax v Venezuela [105] deals with the interpretation of investment, question of promissory notes issued by Venezuela was raised . whether , these are part of investment of not? The tribunal, after analyzing the drafting history of the Convention and subsequent case law, held that Article 25(I) covers direct and indirect foreign investments. Since the Treaty covered "every kind of assets" the tribunal was of the view that the promissory notes fell within the scope of the ICSID Convention."[106]

In *Patrick Mitchell v. Congo*, the ad hoc committee observed that definition of investment should be looked in investment treaty or agreement of parties. Ad hoc committee endeavored to characterize the existence of an investment by relying on an objective test, independent from the definitions contained in the BIT in question. In another words, to fall under the jurisdiction of an ICSID investor-state arbitration, every investor must show the existence of a protected investment both within the meaning of the BIT and the Convention.

" It may be inferred from the case-law as and legal scholarship that investment has the following typical characteristics:

- the project should have a certain duration
- there should be a certain regularity of profit and return
- there is typically an element of risk for both sides

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103 Peter J. Turner, Mark Mangan, et al. , Investment Treaty Arbitration, JIAr. 2007 Volume 24 Issue 2 pp. 103 – 128.
104 ICSID, 15 March 2002, ARB/00/02, Mihaly v Republic of Sri Lanka, 17(7) Mealey's IAR A1 (2002).
105 ICSID, Decision, 1997, , Fedax NV v Venezuela, 37 ILM 1378 (1998), XXIVa YBCA 23 (1999).
106 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", para 60-28 (Edition 2003) Kluwer Law Arbitration)

- the commitment involved would have to be substantial
- the operation should be significant for the host state's development."[107]

It can be concluded that investment treaty arbitration or international investment arbitration, which is rapidly-growing, is grounded on treaty protection. These international investment agreements are of great importance to decide nature of dispute when it arises between two nations or national of one state and other state or its corporate body.

2.2 Investment Agreements and Their Kinds

For historical and political reasons, protection to foreign investors has been mainly provided through different kinds of international investment agreements e.g. multilateral agreements, bilateral treaties, double taxation treaties and preferential treaties. Most investment treaties contains provisions for investment arbitration. [108] "The international legal framework governing foreign investment consists of a vast network of international investment agreements supplemented by the general rules of international law. Although other international treaties interact with this network in important ways, international investment agreements are the primary public international law instruments governing the promotion and protection of foreign investment. International investment agreements texts differ in many important respects, but they are also remarkably similar in structure and content: most international investment agreements combine similar (sometimes identical) treaty-based standards of promotion and protection for foreign investment The network of international investment agreements provides foreign investors with a powerful and dynamic method of international treaty enforcement. After World War II, the process of international economic integration was rekindled, leading to the emergence of the contemporary investment treaty framework. It is crucial to understand

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107 L. Mistelis and J.D.M. Lew, Study guide on investment arbitration and pecialist arbitration, Publications Office, University of London 2005.i.e
http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

108 As per previous reference 37

current debates and contentious issues in investment treaty law and their kinds."[109]

In most of the international investment agreements arbitration is provided as method of settling a dispute which evolve around the investment .International investment agreements typically include: "(i) initial provisions establishing the scope of coverage of the International investment agreement by way of defining who are the 'investors' and what are the 'investments' benefiting from treaty protections, as well as often defining the notion of territory of the contracting parties, so that investments made in that territory of a contracting party by investors of another contracting party qualify as protected 'foreign' investments; (ii) clauses establishing the substantive protections accorded to those investors and/or investments; (iii) dispute resolution mechanisms both for disputes between the contracting parties and between an investor of a contracting party and another contracting party (investor-state arbitration); (iv) provisions on subrogation and on the preservation of more favourable rules to the investors (the preservation of rights clause); and (v) final provisions on entry into force and termination.[110] Three kinds of international agreements have been discussed briefly to understand the concept of agreements and type of protection granted to investor though mechanism of investment arbitration."[111]

A) Bilateral Investment Agreements or Bilateral Investment Treaties

The development of International investment agreements was primarily a response to the uncertainties and inadequacies of the customary international law. In addition, capital exporting states sought to obtain better market access commitments from capital importing states for investors and investment, and to obtain progressive development in the standards of investment protection. As already noted, although there were early efforts to create an international framework for foreign investment, disagreement between capital exporting and importing states about standards of treatment for foreign investors derailed the conclusion of a multilateral treaty. As a result, capital exporting

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109http://ita.law.uvic.ca/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf and see William W. Park & Guillermo Aguilar Alvarez, "The New Face of Investment Arbitration", 28 YJIL (2003) 365. and Emmanuel Gaillard, "The Denunciation of the ICSID Convention", NYLJ (June 2007) 26.

110 Emmanuel Gaillard, "The Denunciation of the ICSID Convention", NYLJ (June 2007) 26.and William W. Park & Guillermo Aguilar Alvarez, "The New Face of Investment Arbitration", 28 YJIL (2003) 365.

111 http://ita.law.uvic.ca/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf

states began concluding Bilatral Investment treaties dedicated to foreign investment promotion and protection.[112]

A bilateral investment treaty (BIT) is a treaty between two states in which each assumes obligations in respect of investments made in their territory by the other's investors, directly enforceable by an investor through international arbitration.[113] "BIT binds only the two signatory states, the general effect of the BIT movement has been to establish an increasingly dense network of treaty relationships between capital-exporting states and developing countries."[114].

United Nation Conference on Trade and Development ("UNCTAD") has given its definition of BITs as follows:

"Bilateral investment treaties are agreements between two countries for the reciprocal encouragement, promotion and protection of investment in each other's territories." [115]

"Bilateral commercial treaties have been a traditional method of facilitating trade between states. Early treaties were intended to facilitate trade and shipping, they occasionally contained provisions affecting the ability of one country's nationals to do business or own property in the territory of the other state. New and important phase in the historical development of the BIT began on the eve of the 1960s. Germany took the lead in this new phase of bilateral treaty making. After concluding the first such agreement with Pakistan in 1959, Germany proceeded to negotiate similar treaties with countries throughout the developing world."[116]

"Many BITs contain an "umbrella clause." Umbrella clauses generally require each contracting party to observe any obligations it may have entered into with regard to investments of nationals or companies of the other contracting party. At its highest, the umbrella clause has been held to elevate all breaches of contracts entered into between the state and the investor to the level of breaches of the treaty. Most BITs contain

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112 http://ita.law.uvic.ca/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf ans see William W. Park & Guillermo Aguilar Alvarez, "The New Face of Investment Arbitration", 28 YJIL (2003) 365. and Emmanuel Gaillard, "The Denunciation of the ICSID Convention", NYLJ (June 2007) 26.

113 Peter J. Turner, Mark Mangan, et al. , Investment Treaty Arbitration, JIAr. 2007 Volume 24 Issue 2 pp. 103 – 128.

115 http://www.unctadxi.org/templates/Page____1006.aspx. accessed on 09/11/09

116 http://stephankinsella.com/texts/salacuse_bit_by_bit.pdf and R. Doak Bishop, James Crawford and W. Michael Reisman, Foreign Investment Disputes Cases, Materials and Commentary, (2005), pp. 1 – 17.

provisions guaranteeing the right of the investor to repatriate capital and profits. Obligations related to expropriation are at the heart of all BITs . This form of expropriation may take place by the enactment of a law that declares that ownership of a particular asset is automatically converted from the investor to the state."[117]

"Differences exist in the scope of investor protection provided in of these treaties and in the type of arbitration provided in them Frequently the clauses provide for ICSID arbitration, or give the investor a choice between ICSID and other institutions such as the ICC, the AAA or the SCC."[118] Sometimes it provides first for negotiations or other diplomatic efforts to settle the dispute amicably.[119] Several arbitration proceedings were initiated based on provisions in these treaties "In a recent case a party successfully invoked a bilateral international treaty despite an exclusive jurisdiction clause for the main claim in ***Vivendi Universal vArgentine Republic.***"[120]

B) Double Taxation Treaties

It has been clarified in discussion of Bilateral Treaties that "their stated purpose is to protect and promote foreign investments. Double taxation treaties are intended to reduce the administrative complexities of foreign investments as well as confront double taxation problems faced by investors. First of all, while Double taxation treaties are more or less standardized documents"[121] than bilateral investment treaties in their substantive and procedural provisions. "Bilateral investment treaties which incorporate a legally binding consent to arbitrate a wide range of investment disputes with private investors are likely to be valued more highly by investors than where such consent is limited or absent."[122]

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117 Leeks, Annie. "The relationship between bilateral investment treaty arbitration and the Wider Corpus of Internation", University of Toronto Faculty of Law Rev, Spring 2007 Issue

118 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

119 Blessing, Introduction to Arbitration, para 332; for an overview see Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments", 12 ICSID Rev-FILJ 287 (1997) 322 et seq.

120 http://hukukcu.com/modules/smartsection/makepdf.php?itemid=103 accessed on 2/3/09

121 http://www.globallawbooks.org/reviews/detail.asp?id=544 accessed on 5/10/09

122 L. S. Poulsen. "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows", European Journal of International Law, 08/01/2009

The main purpose of international taxation agreements or bilateral tax treaties is the regulation of imposition of taxes income of multinational enterprises . On rare occasions, a government may agree on an *ad hoc* basis to arbitrate disputes over the quantum of a foreign investor's tax liability.[123]

Much more common, however, are treaty-based claims by investors alleging that the host state imposed tax in a discriminatory or arbitrary manner, or used tax as a vehicle for expropriation without compensation.[124] In an investment dispute, the very legitimacy of the tax is put into question.

It can be understood that developing countries revenues are deemed to decrease by giving relief of taxation. [125]
The Treaty of Versailles gave the impetus to a large number of bilateral tax treaties in Central Europe. (he League of Nations Fiscal Committee, reporting in 1928, formulated the principle of 'economic allegiance' . In 1928 a general meeting of Government Experts on Double Taxation and Fiscal Evasion prepared model bilateral conventions on tax matters, which proved of the greatest value in facilitating the negotiation of tax treaties. In Mexico City by two Regional Tax Conferences in 1940 and 1948 further progress was made. Mexico and London drafts of Model Bilateral Tax Conventions were divided under the following heads: Prevention of the Double Taxation of Income and Reciprocal Administrative Assistance for the Assessment and Collection of Direct Taxes. Most Favored Nation clause has no application to reciprocal taxation treaties.[126]

No consensus exists among jurists on why tax measures should receive special attention in investment treaties. The best account for taxation's special status probably lies in the very nature of taxation. As mentioned earlier, tax constitutes a form of confiscation, thus opening the way to investor arguments (however misconceived) that an actionable taking of property has occurred. In particular, taxes lend themselves to characterisation as a form of indirect or "creeping" confiscation, which might in principle give rise to claims under investment treaty provisions related to expropriation and discrimination. The only escape lies in ceasing the activity that otherwise triggers the tax. [127]

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123 Emmanuel Gaillard, "Tax Disputes between States and Foreign Investors", NYLJ (April 1997).
124 Thomas Wälde & Abba Kolo, "Investor-State Tax Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty", 35 Intertax August/September 2007)
125 Edited by Karl P. Sauvant and Lisa E. Sachs , Double Taxation Treaties, and Investment Flows E.J.I.L. 2009 935 .
126 The International Law Quarterly, Vol. 1, No. 1 (Spring, 1947), pp. 44-47 Published by: Cambridge University Press.
127 William W. Park , Part II Substantive Rules on Arbitrability, Chapter 10 - Arbitrability and Tax in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), Arbitrability: International & Comparative Perspectives, (Kluwer Law International 2009) pp. 179 - 206

C) Preferential Investment Agreements

"Preferential Investment Agreements are concluded for the purpose of facilitating international trade and the transfer of factors of production and technology for development of host countries."[128] The development of International investment agreements is response to the uncertainties and inadequacies of the customary international law.

"Mostly economic integration agreements is aimed at , by of way of establishing the free trade agreements (FTAs), economic partnership agreements (EPAs) or similar types of agreements. Preferential investment agreements cover provisions dealing with foreign investment and they are also known as Preferential Trade and Investment Agreements (PTIAs). When they are named as PTIAs, the section dealing with foreign investment forms only a small part of the treaty, usually encompassing one or two chapters. Other issues dealt with are trade in goods and services, tariffs and non-tariff barriers, customs procedures, specific provisions pertaining to selected sectors, competition, intellectual property, temporary entry of people, and many more." [129]

Preferential trade and investment agreements pursue the liberalization of both trade and investment in the context of this broader focus. Frequently, the structure and appearance of the respective chapter on foreign investments is similar to a BIT.A notable example of these agreements is the North American Free Trade Agreement (NAFTA). While the NAFTA agreement deals with a very broad set of issues and this agreement covers detailed provisions on foreign investment similar to those found in bilateral investment agreements. [130]

In light of above mentions examples it may be inferred that these preferential trade and investment agreements are concluded for the reciprocal encouragement, promotion and protection of investment in each other's territories both bilaterally and multilaterally.

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128 Submitted to American University of Athens on 2010-02-26

129 Submitted to American University of Athens on 2010-02-26

130http://en.wikipedia.org/wiki/International_Investment_Agreement#Preferential_Trade_and_Investment_Agreements from internet on 1/8/10.

2.3 FEATURES OF INVESTMENT DISPUTES ARBITRATION

The current network of investment and free trade agreements was adopted to enhance economic cooperation and cross-border capital flows through a two-part regime: (i) substantive investor protections against discrimination, confiscation and other unfair governmental measures, and (ii) a relatively neutral dispute resolution mechanism in the event of disagreement on how those protections should operate.[131] Investment arbitrations are initiated against a host state by aggrieved investors. The investor will elect one of the dispute resolution methods found in the treaty. [132]

"Investment disputes differ in several respects from ordinary commercial disputes. Facts in issue may be of considerable political implications. The investment mostly connected or associated with an infrastructure the completion of which is of significant importance for the national progress and economy. Disagreements often concern the objectives of the investment, the repatriation of revenues and the ultimate control and benefit of the investment the outcome of the dispute may also affect the general investment climate in a country. The tribunal interprets the statutes, treaties and conventions, to see whether the dispute falls within the ambit of the state's obligation to arbitrate in these instruments. Consequently, the nationality of the investor is often an issue of the utmost importance, since the offer to arbitrate may only extend to nationals of certain countries." Investments are frequently done by local special purpose companies to meet requirements of local participation and consortia are structured in a way to allow maximum profits and tax advantages."[133]

In addition, to other differences one party in this type arbitration is a state vested with sovereign powers, which is nevertheless in need of foreign investment and is bound by international instruments. "This element of investment arbitration is the authorize of international claims by foreign investors against the state in disputes arising from the state's exercise of public authority, and without any requirement for claims to be filtered by the investor's home state or by an international organization. State gives a prospective or general consent to the arbitration under investment treaties, of future investment disputes. Retrospective consent differs from an advance/prospective consent. Since the former is

131 William W. Park & Guillermo Aguilar Alvarez, "The New Face of Investment Arbitration", 28 YJIL (2003) 365. and Emmanuel Gaillard, "The Denunciation of the ICSID Convention", NYLJ (June 2007) 26.
132 John Savage , "Investment Treaty Arbitration and Asia: Survey and Comment", A.I.A.J , 2005 Volume 1 Issue 1 pp. 3 – 48.
133 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 12-28 .

given after the events in question have taken place, a state is more able to anticipate the significance of its acceptance of compulsory arbitration. By giving a general consent in an investment treaty, the state exposes itself to claims by any foreign natural person or multinational enterprise with an economic interest that may be detrimentally affected by the state's exercise of public authority. As a result, investment arbitration encompasses future disputes. Investment treaties define the scope of the state's consent and the jurisdiction of international tribunals in broad terms, generally apply international standards of investor protection to virtually any sovereign act of the state, and define ' investment' to include a very wide range of assets."[134]

Dispute resolution systems under ICSID, known as international investment arbitration system , effectively detaches itself from the other forms of arbitration due to its peculiar nature. Investment arbitration under ICSID is a special means of dispute resolution created by an instrument of public international law. Profoundly, reflected nature and the characteristics of ICSID arbitration can be well comprehended in following features :

- ICSID proceedings are completely detached from any domestic system of law. It is often said that in ICSID proceedings the *lex arbitri* is the ICSID Convention itself. The seat or place of arbitration has no effect on arbitration proceedings.

- As discussed in preceding paragraph, despite being governed by international law, ICSID tribunals deal with disputes which are brought by entities (individuals or private companies) with no international law status against sovereign states and which mainly arise out of relationships with strong commercial connotation.

- Recognition and enforcement of ICSID awards amongst Member States are carried out through a system provided by the ICSID Convention itself excluding the general instruments available in international commercial arbitration, specifically by New York Convention 1958.

- The special nature of ICSID arbitration also affects the characteristics of ICSID tribunals, the actual powers of which remain sometimes uncertain.

- Unlike international commercial arbitration, ICSID proceedings and ICSID awards are normally disclosed to the general public. • Depending on the circumstances of the case, amici curiae can be allowed to participate in the proceedings.[135]

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134 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

135 Domenico Di Pietro ,The use of precedents in ICSID arbitration. Regularity or certainty, Int. A.L.R. 92 2007

" Investment arbitration under ICSID provided an example of delocalised arbitration proceedings governed solely by international rules and not submitted to the provisions of any one national arbitration law.[136] In particular, an ICSID award is not submitted to the scrutiny of national courts for annulment or enforcement. The only means of redress is the delocalised internal ICSID annulment procedure and a facilitated procedure for the recognition and declaration of enforceability by ICSID." [137] Based upon the inferences narrated above it may be said that "investment arbitration should be treated as a unique, internationally-organized strand of the administrative law systems of states. The subject matter of investment arbitration is a regulatory dispute arising between the state (acting in a public capacity) and an individual who is subject to the exercise of public authority by the state. It is designed to resolve disputes arising from the exercise of public authority by state against the foreign investor. The investment arbitration tribunal is semi-autonomous because its decisions are insulated from court supervision. It is international because its authority derives from a treaty. It is an administrative review agency because, but for its establishment in the international sphere, it would be performing a role similar to that of a semi-autonomous domestic tribunal charged with resolving regulatory disputes. Being constituted at the international level for the purpose of disciplining the governmental action of states, the investment arbitration tribunal forms a novel and unique extension to the conceptual architecture of administrative law."[138]

As a result of emergence of investment arbitration, the "capacity of investors to make and enforce international claims under investment treaties is unrivalled. Investment arbitration arguably subjects the regulatory relationship between the state and investors to control via international adjudication to a greater degree than any international adjudicative arrangement since the colonial era. For this reason, the regime of investment arbitration should be recognized as constituting an exceptionally important and powerful manifestation of international law."[139]

2.4 SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

International investment disputes may arise for numerous reasons. If expected benefits of international investment to the host state, such as, the transfer of assets, technical and

136 Broches, "Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 – Explanatory Notes and Survey of its Application", XVIII YBCA 627

137 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

138 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

139 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

management skills, the creation of employment, the building of infrastructure and the earning of export income are not maintained, the chances of disputes may grow. It is well understood phenomena that the international investment transaction always involves an obsolescing bargain ,in that the initial attraction of the foreign investor When the initial favorable appreciation of the impact of the international investment on the host economy changes, disputes with the foreign investor, are likely to arise. Sometimes political and other conditions in the host state may trigger disputes. [140] Proliferation of investment treaties has led to a surge in investment treaty claims[141]

Investment treaty arbitrations are generally brought against a host state by one or more aggrieved investors. The investor accepts the offer of arbitration which it contends the state has made in the treaty. [142] Investors have traditionally preferred ICSID arbitration to the other dispute resolution options offered in investment treaties with the perception that ICSID's affiliation with the World Bank will also boost the enforceability of an ICSID award.[143] The first arbitration ICSID under an investment treaty is thought to be the case brought by Asian Agricultural Products Ltd ('AAPL') against Sri Lanka in 1987. [144]

When parties think that ICSID arbitration may create difficulties, they opt for other forms of arbitration offered by investment treaties. They have vide choice to select UNCITRAL Arbitration Rules as *ad hoc arbitration* (not administered by an institution) , Permanent Court of Arbitration, the London Court of International Arbitration). Some investment treaties also provide for arbitration under the rules of the Regional Centre for Arbitration in Kuala Lumpur, [145] the Regional Centre for International Commercial Arbitration in Cairo,[146]the International Chamber of Commerce and the Stockholm Chamber of Commerce. The arbitration rules of ICSID's 'Additional Facility' may be used for proceedings between states and foreign nationals that fall outside the scope of the ICSID Convention.[147]

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140 M. Sornarajah , "The Settlement of Foreign Investment Disputes", page 27 (edition 2000), Kluwer Law Arbitration

141. Peter J. Turner, Mark Mangan, et al. , Investment Treaty Arbitration, J.I.Ar. 2007 Volume 24 Issue 2) pp. 103 - 128).

142 John Savage , Investment Treaty Arbitration and Asia: Survey and Comment, A.I.A.J , 2005 Volume 1 Issue 1 pp. 3 – 48

143 R Dolzer and M Stevens, "Bilateral Investment Treaties (1995)", Kluwer Law International 1995.

144 Asian Agricultural Products Ltd v Democratic Republic of Sri Lanka Case No ARB/97/3 (ICSID), Award (27 June 1990), 4 ICSID Reports 246 (1997) ('AAPL v Sri Lanka').

145 See, eg, the Sri Lanka-Egypt BIT (1996), Art 8.

146 See, eg, the Indonesia-Egypt BIT (1994), Art 9; the Pakistan-Egypt BIT (2000), Art 8; and the Sri Lanka-Egypt BIT (1996), Art 8.

147 John Savage , Investment Treaty Arbitration and Asia: Survey and Comment, A.I.A.J , 2005 Volume 1 Issue 1 pp. 3 – 48

2.4.1 Concept of and methods of investment arbitration under North –American Free Trade Agreement

The North –American Free Trade Agreement established a mechanism for investor-State settlement of dispute allowing an investor to file a direct claim against a NAFTA party before an international arbitral tribunal.[148] NAFTA is aimed to promote cross-border investment between the three countries and to ensure their successful implementation. In particular, the Agreement took into consideration the need to protect Canadian and American investors against eventual measures of expropriation taken by the Mexican government. NAFTA creates an innovative regime for the resolution of a broad scope of investment disputes between Parties to the Agreement and investors of another Party. While many details regarding its breadth of application, operation and effectiveness are yet to be explored and determined, it represents a remarkable tool for private investors.[149]

In 1993 , "United States, Canada and Mexico interred into a North American Free Trade Agreement (NAFTA) to create a widely liberalised common market between the three countries. A dispute settlement mechanism, in NAFTA, incorporated in three different chapters and Chapter 11 is most significant among them."[150] It deals with investments and is divided into three parts: Part A contains the substantive obligations; Part B describes the dispute settlement mechanism; and Part C defines the significant terms used in the Chapter.

One of the most important features of Chapter 11 is its broad scope of application, in terms of both parties and subject matter. Although the relevant provisions have yet to be interpreted and their limits tested, there can be no doubt that they will have broad application and will offer fertile ground for the creative fashioning of claims to take advantage of an attractive dispute resolution regime. The principal right to bring a claim for arbitration under Chapter 11B resides in an 'investor of a Party'. This expression includes a State Party or a State enterprise thereof, or a national or an enterprise of a Party, that seeks to make, is making or has made an investment. As a result, investors are not necessarily always private parties and can be a Party or a State enterprise of a Party.

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148 Patrick Dumberry, Expropriation under NAFTA Int. A.L.R. 96 2001.
149 Henri C. Alvarez , Arbitration Under the North American Free Trade Agreement, Arbitration International, 2000 Volume 16 Issue 4) pp. 393 - 430
150 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

However, the right to bring a claim only arises from measures adopted or maintained by a Party.[151]

Certain standards of treatment are guaranteed in Part A and these are :, "national or most favoured nation treatment, , freedom from performance requirements, the right to control the investment, the right to repatriate profits without restrictions, certain conditions of expropriation and information requirements. Cause of Action for an alleged violation to an investment is defined in Article 1139, while procedure of settlement is given in provisions of Part B. When we analyze non-mandatory provisions of Article 1118 the disputing parties are required to try to settle any disputes amicably. The option of arbitration is available to proceed to arbitration with 90 days notice of his intention and it is provided that six months have elapsed since the events giving rise to the claim. This time are intended to give the state the opportunity to reconsider the alleged violation, essentially a cooling off period;"[152]

In NAFTA, Articles 1116 and 1117 allow the investor of a Party to submit to arbitration a claim that another Party has breached an obligation under Chapter 11A The investor has the choice to initiate arbitration under the ICSID Convention, the ICSID Additional Facility Rules or as an *ad hoc* arbitration under UNCITRAL Rules. Investor waives his right to continue the same claim before other courts or tribunals under article 1211.

Settlement of dispute mechanism, which can be invoked by party sustaining the loss due measures adopted or maintained by other party to NAFTA is narrated in chapter 11 of NAFATA. It is required to be prove that alleged measures have breached the provisions in Part A of the same Chapter. Use of nationalization or expropriation is described as measure against investor But NAFTA does not define the words nationalization or expropriation. Article 1110 states as follows:

" No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (" expropriation"), except:

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151 Henri C. Alvarez , Arbitration Under the North American Free Trade Agreement, Arbitration International, 2000 (Volume 16 Issue 4) pp. 393 - 430

152 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

Trakman, "Arbitrating Investment Disputes Under the NAFTA", 18(4) J Int'l Arb 385 (2001) 397.

(a) for a public purpose;

(b) on a nondiscriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6."[153]

Art. 1105, as mentioned in clause c , indicates that the treatment accorded to an investor must always meet the minimum standard reserved to investors in accordance with international law.

Para. 2 of Article. 1110 as mentioned in clause D indicates that "compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place, and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. Compensation shall be paid without delay and be fully realizable."[154] Paras. 3 -6 of Article 1110 deal with the interest on payment and currency conversion.

The investor's right to initiate arbitration proceedings under Chapter 11 NAFTA has generated substantial case law. This is largely due to the fact that the requirements relevant to reaching the threshold of Chapter 11B, in particular the notions of "investment" and "measure" are defined and interpreted very broadly. According to the definition in Article 1139(34) "investment" only excludes financial rights arising out of contracts of sale and services but covers a number of issues which go beyond the classical definition of investment . Controversy about Article 1110 comes from the use of the word " measures tantamount to nationalization or expropriation" . Usually bilateral investment treaties do not use this expression, instead, they rather employ phrases such as measures having " similar effect" or " effect equivalent" to expropriation.[155] Whenever used, the expression " measures tantamount" also has a different meaning. An extension of the notion of expropriation under NAFTA would in turn rightfully raise

153 http://www.maeci-dfait.gc.ca/nafta-alena/chap11-en.asp: on 10/12/09

154 http://cupe.ca/HealthCareTrade/4585 form internet on 1/8/10

155 R. Dolzer & M. Stevens, "Bilateral Investment Treaties ",(Martinus Nijhoff Publ., The Hague, 1995) at pp. 100-101, and Patrick Dumberry, Expropriation under NAFTA Int. A.L.R. 96 2001.

concerns about the future ability of governments to pass and implement policies on vital national areas of concern, such as environmental protection and health and safety issues.

It is, however, important to know that whenever the investor claims a violation of an obligation under Chapter eleven a claim for breach of an investment contract it should claim infringement of Chapter eleven . [156] The jurisdiction of a tribunal established under Chapter 1 1B had to be considered in *Ethyl Corporation v Canada*, which was one of the first arbitrations under NAFTA, where Canada challenged the jurisdiction of the tribunal. The tribunal rejected the it held that there was no need to give a restrictive application to the relevant provision of Chapter 1 1B. Article 1136 provides a number of interesting rules with respect to the enforcement of the award of a tribunal. Article 1136(3) imposes waiting periods before which a disputing party may not seek enforcement of an award.

With regard to parties of NAFTA it is worth while to mention that United States is the only State party which is also a party to the Convention on the Settlement of Investment Disputes (ICSID Convention). It will be discussed in chapter three that ICSID-Additional Facility Rules, however, allow for arbitration between an investor who is a national of a State party to ICSID and Non-Member States. Until such time as Canada and Mexico accede to the ICSID Convention, NAFTA Chapter 11 arbitrations involving Canada or Mexico, therefore, cannot be conducted under the ICSID Convention and the ICSID Arbitration Rules. Instead, such arbitrations may be conducted only under the ICSID- Additional Facility Rules or the UNCITRAL Arbitration Rules. Limited grounds for the annulment under Article 52 of the ICSID Convention, as discussed in previous chapter, do not apply.[157] Annulment of arbitral awards rendered under the ICSID-Additional Facility Rules or the UNCITRAL Arbitration Rules will take place in the national courts and under the national laws of the place of the arbitration, in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[158]

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156 J D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 26-28 (Edition 2003) Kluwer Law Arbitration.

157 Christoph Schreuer, " Commentary on the ICSID Convention" , (1998) 13 ICSID Rev.-Foreign Inv. L.J. 478, 51.

158 Carolyn, Eckhard and Chiara Giorgetti, "The new frontier of investor-state arbitration: annulment of NAFTA awards" *Int. A.L.R. 58 2008.

2.4.2 Provisions of Investment Arbitration and Arbitration Mechanism in Energy Charter Treaty

For many political reasons, foreign investment was protected mostly through bilateral agreement or treaties. Now multilateral treaties are being signed to protect the international investment by the foreign investors and ECT & NAFTA are the most notable exceptions to trend of signing the bilateral treaties. It necessary to know the nature and mechanism of protection granted to investor for resolution of investment disputes under ECT. One of the main tasks of the ECT is to create a favourable and non-discriminatory environment in the energy sector through the protection of foreign investments. Investment in the energy sector has undergone significant transformation in the last two decades. Western states' reliance on imported oil and gas has increased. At the same time, privatization, liberalization, and deregulation became the dominant view in the energy-producing states, leading those states to adopt guarantees against discrimination, expropriation without compensation, unjustified restrictions on the transfer of funds, and breaches of investment contracts by the host states. The Energy Charter Treaty (ECT), a Multilateral Investment Treaty (MIT) instrument concluded as a unique framework for such energy cooperation between investors and the host states.[159] Importance for international investment in Energy Sector can be well understood in this period by our nation. The Energy Charter Conference, in Brussels on 20 November 2006, has unanimously invited the Pakistan to become the 53rd member of the ECT, opening the way for Pakistan to accede to ECT. "This is a significant decision for the Energy Charter process, for Pakistan, and for international energy cooperation" said the Chairman of the Energy Charter Conference, Mr Henning Christophersen. "Demand for energy is growing rapidly in Pakistan and across South Asia. This will require new investments in energy production and infrastructure, and attention to the environmental impact of energy use. The Energy Charter can help Pakistan to meet these challenges."[160] Provisions found in the ECT have themselves been the subject of numerous and learned analysis.[161]

Important differences remain in the ways "investment" is interpreted by each respective arbitral tribunal. Study topic relates to ICSID Convention which sets a higher threshold for what constitutes an investment. It seems appropriate to analyze the ECT briefly

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159 Energy Charter Treaty, Final Act, December 17, 1994, 2080 U.N.T.S. 100 (No. 36116), 33 I.L.M. 360,Energy Charter Secretariat, 1994 Treaty, available at <www.encharter.org>.

160 http://www.encharter.org.

161 Philippe Pinsolle, The dispute resolution provisions of the energy charter treaty, Int., A.L.R. 82 2007.

which provides a system for the resolution of disputes between member states and, in the case of investments, between member states and foreign investors. "The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects signed in December 1994 and entered into legal force in April 1998."[162] As narrated earlier that ECT is a multilateral treaty which applies only to economic activities in the energy sector. It is to be noted that the ECT is more than a typical investment treaty. In addition to provisions pertaining to the promotion and protection of investment in the energy sector, the ECT also contains provisions covering trade, competition, access to capital, transfer of technology, environment and transit. [163]

Energy charter Treaty provides three possible avenues to foreign investors to initiate a claim against a Member State: (1) arbitration before the ICSID Convention (2) ad hoc arbitration established under the rules UNCITRAL arbitration, or; (3) arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.[164]

Provisions of ECT may be looked into summarily as follows.

First, the definitions of " Investment" and " Investor" are defined in Article 1 " Investment" is defined broadly, in Article 1(6), to mean " every kind of asset, owned or controlled directly or indirectly by an Investor" , and a list of what " Investment" includes is provided at Art.1(6)(a)-(f). Article 1(6) clarifies that "Investment" :

"refers to any investment associated with an Economic Activity in the Energy Sector [defined at Article 1(5)] and to investments or classes of investments designated by a Contracting Party in its Area as ' Charter efficiency projects' and so notified to the Secretariat" .

It means that investment in energy sector is covered under this treaty and therefore its name portrays its specific character .

While " Investor" is defined at Article 1(7) which means:

" (i) a natural person having the citizenship or nationality of or who is permanently residing in that

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162 http://r0.unctad.org/infocomm/anglais/gas/ecopolicies.htm accessed on 12/9/09

163 Adnan Amkhan ,Consent to submit investment disputes to arbitration under Article 26 of the Energy Charter Treaty Int. A.L.R. 65 2007 .

164 Domenico Di Pietro, The use of precedents in ICSID arbitration is it a regularity or certainty? Int. A.L.R. 92 2007.

Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party" .

Purpose of Establishment of the ECT is described in Article 2 :

" a legal framework in order to promote long-term cooperation in the energy fields, based on complementarities and mutual benefits, in accordance with the objectives and the principles of the [European Energy] Charter" .

The fact that the method for allocating jurisdiction, to avail the protection and arbitration mechanism, is based primarily on a determination of the part of the ECT that falls under the jurisdiction is confirmed by the way in which the exception to that jurisdiction is identified.

Umbrella clause having notable exception to the scope of the jurisdiction of an arbitral tribunal stems from the fact that certain states have excluded from this jurisdiction , is found in the last sentence of Art.10(1) of the ECT. This sentence reads as follows:

" Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." [165]

Part III relates to " Investment Promotion and Protection" . The final article of Pt III, Art.17, provides for the " Non-Application of Article III in Certain Circumstances" :

" Each Contracting party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or

(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:

(a) does not maintain a diplomatic relationship; or

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165 Philippe Pinsolle ,The dispute resolution provisions of the Energy Charter Treaty , Int. A.L.R. 82 2007.

(b) adopts or maintains measures that:"[166]

Part V of the ECT prescribing the our focal point i.e " Dispute Settlement" . Article 26 is lengthy, specific provisions of the Article 26 are considered below in very summary form:

Para.(1) of the Article 26 refers to disputes between a contracting party and an investor of another contracting party:

"relating to an Investment of the latter in an Area of the former, which concern an alleged breach of the former under Part III" ;

Para.(2) of the article provides the investor certain options for dispute resolution;

Para.(3)of the article refers to the contracting party's unconditional consent to international arbitration;

Para.(4)of the article refers to the Investor's selection of International Centre for Settlement of Investment Disputes (ICSID) (or ICSID Additional Facility) arbitration or United Nations Commission on International Trade Law (UNCITRAL) ad hoc arbitration or Stockholm Chamber of Commerce arbitration;

Para.(5) of the article refers to the consent to arbitration and " agreement in writing" requirements of the ICSID and New York Conventions as being satisfied by the para.3 consent and para.4 submission to arbitration;

Para.(6) of the article states that the arbitral tribunal " shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law" ;

Para.(7) of the article refers to ICSID Convention Art.25(2)(b) and addresses the question of foreign control of an Investor " other than a natural person" which has the nationality of a contracting party to the dispute; and,

Para.(8) of the article concerns arbitration awards.

ECT makes it clear that a claimant must satisfy the precondition of being an "Investor" of a contracting state with an investment in the area of another state to avail arbitration

166 http://mirror.unep.org/DPDL/law/PDF/Selected_text_Pages(186_500).pdf accessed on 17/11/2009

mechanism. In ECT case of *Petrobart Limited v the Kyrgyz Republic*[167] the tribunal clearly considered that it had to come to a finding on investor/investment status as a matter of jurisdiction and considered Art.17. In another ECT case, *Nykomb Synergetics Technology Holding AB v the Republic of Latvia,* "Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm."[168] tribunal identified investor/investment status as a jurisdictional issue.[169] In the Article .17(2), it is expressly stated that the contracting party must establish these characteristics; no such burden is identified in Art.17(1).

It is well known fact that to initiate the arbitration proceeding there should be a clear arbitration agreement .In the context of the ECT, there are two constituent elements of an arbitration agreement: (1) the initial standing offer by each ECT contracting party to consent to arbitration i.e under article 17 and; (2) the subsequent acceptance of this standing offer by an investor. For the investor's consent , three further elements must be present. First, the consent to arbitrate the dispute must be offered by a *qualified investor* . It should be covered under definition of investor . Secondly, the consent *must be in writing,* and thirdly, an attempt to *settle the dispute amicably* must already have taken place within a period of three months.

It is to be recalled that ECT Art.26(3) explicitly provides that:

" ...each Contracting Party...gives its unconditional consent to the submission of a dispute to international arbitration... *in accordance with the provisions of this Article.* "

Additionally, Article 6(4) provides that " ...the Investor shall further provide its consent in writing for the dispute to be submitted to" the ICSID Centre, an ICSID Additional Facility, or to an arbitration under the UNCITRAL arbitration rules, or the Arbitration Institute of the Stockholm Chamber of Commerce. As far as ICSID is concerned, it has been widely argued that the initiation of ICSID arbitration proceeding will satisfy the condition of consent in writing.[170]

In the *Plama* arbitration, Art.17 of the ECT was invoked by the defendant state in order

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167 Limited v the Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Award, Arbitration No.126/2003, Tribunal: H. Danelius, O. Bring, J. Smets, at 68-73.
168 http://epublications.bond.edu.au/context/theses/article/1045/index/1/type/native/viewcontent/

169 Nykomb Synergetics Technology Holding AB v the Republic of Latvia, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Award, December 16, 2003, Tribunal: B. Haug, R. Schutze, J. Gernandt, at [2.1]-[2.2].

170 Adnan Amkhan ,Consent to submit investment disputes to arbitration under Article 26 of the Energy Charter Treaty Int. A.L.R. 65 2007 .

to challenge the jurisdiction of the arbitral tribunal. Decision on jurisdiction rendered in *Plama* has provided useful guidance.

First, denial of benefits provision requires a host state to exercise its rights to deny benefits under Art.17 and state should needs to indicate that it has exercised its rights under Art.17 as it does not operate automatically.

Secondly, "the existence of a right is distinct from the exercise of that right there should be proper notice to investor and Article 17(1) of ECT is at best only half a notice."[171]

Thirdly, Denial of benefits by pursuant to Art.17 could only operate prospectively, but not retrospectively.[172]

Under energy charter treat , ICSID arbitration has a number of advantages for both the ECT investors and the host states. These advantages are the finality of ICSID decisions, protection of investments against new forms of political risk, the link between economic development and investment in the ICSID Convention, and a public dimension of energy investments. The first advantage of ICSID arbitration is the finality of its decisions, including the decisions on jurisdiction. Unlike Stockholm or UNCITRAL arbitration, ICSID arbitration is not governed by lex arbitri and is therefore isolated from the national courts' review of the arbitral process. Secondly, the ICSID Convention affords better protection to energy investments and investors against new forms of political risk, than commercial arbitration. Thirdly, the more restrictive interpretation of "investment" in ICSID arbitration can ensure a sustained contribution by investors to the economic development of the ECT host states, mostly post-socialist economies in transition. Moreover, the explicit preservation of state sovereignty over natural resources in the text of the ECT may indicate intent to ensure the contribution of investment to economic development.[173]

In ECT mechanism of arbitration without privity is an evolutionary process. Its meaningful survival is essential. The whole process of international investment dispute resolution is fraught with an array of conceptual and practical difficulties. Therefore, a good start to untangling some of these difficulties would be through the proper division or classification of the various elements of this process. It may concluded that

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171 http://ita.law.uvic.ca/documents/plamavbulgaria.pdf accessed on 25/11/09

172 Philippe Pinsolle ,The dispute resolution provisions of the Energy Charter Treaty , Int. A.L.R. 82 2007.

173 Anna Turinov , "Investment" and "Investor" in Energy Charter Treaty Arbitration: Uncertain Jurisdiction, J.I.Ar. 2009 Volume 26 Issue 1 pp. 1 – 23

philosophy of the ECT is based on transparency. The transparency is intended for the benefit of foreign investors, who should be aware of the position expressed by states in relation to their obligations under the treaty. Pakistan is facing energy deficit and Gas pipe line project with Iran and India has not been finalized. To development of energy sector this Treaty may use as model to enhance the chances of investment in this sector and this may work for regional development. The Energy Charter Treaty does not contain a special enforcement regime and at regional level special enforcement regime may be created or may be based on the NYC 1958.

2.5 Issues and Challenges in International Investment.

Investment arbitration is emerging as a new branch of the arbitration where commercial arbitration taken precedence over it. During this era of rapid growth of investment arbitration due to the increase in bilateral investment treaties and multilateral investments agreements we can sense that greatest difference of it to commercial arbitrations which is the source of the tribunal's power. "Commercial arbitrations require an arbitration agreement between the parties. By contrast, in investment disputes arbitration may also be possible without such an arbitration agreement in the ordinary sense."[174] Though , it is clearly cited in Article 25 of the ICSID that consent of the parties is necessary. But it is well known in practice of arbitration that prior consent is valid to invoke the arbitration clause or agreement.. For the avoidance of potential problems arising out of this different source of authority, NAFTA Article 1121 and Energy Charter Treaty Article 26(5) require a special consent by the investor; they further specify that this consent in conjunction with that of the state, as expressed in the treaty provisions, shall be deemed to satisfy the arbitration agreement requirement.[175] There may even be no contractual relationship between the parties at all which has led to labelling investment arbitration "arbitration without privity".[176]

"International investment agreements or investment bilateral treaties may be interpreted as a mechanism for overcoming commitment problems between investor and host state in

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174 Paper Submitted to University of Macau on 2010-06-29

175 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 11-28 .

176 Paulsson, "Arbitration Without Privity", 10 ICSID Rev-FILJ 232 (1995); Werner, "Arbitration of Investment Disputes: The First NAFTA Award – Introductory comments on the Ethyl Corporation case", 16(3) J Int'l Arb 139 (1999)

order to generate mutual benefits. Measures taken by states which may affect the right of inventors be it in normal times or in times of crises, may be lead to words the initiating the investment arbitration . Measures taken, inter alia, under emergency law can lead to state responsibility under international law vis-à-vis foreign investors. When we loot into current financial crisis it evident that such financial and economic crises are not confined to developing countries alone. Changing conditions are a prevalent characteristic in investment law, since most foreign investments are made with a long-term perspective in mind.

Last but not least, almost all investment treaties or agreements provide for international dispute settlement, whereby states waive their immunity from suit. The establishment of a private course of action with the possibility of obtaining damages for an international wrong transforms the context of international investment law by changing the incentive structure of the actors involved.[177] The system of investment arbitration is unique for public international law in that it gives investors *locus standi* to take disputes to international tribunals directly, mostly without exhaustion of local remedies as provided in ICSID. This provision thus gives international investment law immense force, because private (juridical) persons, investors, are much more likely to take up their own cases than to rely on governments to grant them diplomatic protection, as used to be the case. The principal forum chosen for investment arbitration is the International Centre for Settlement of Investment Disputes (ICSID),"[178] but arbitration also takes place under other rules.

"Unforeseen circumstances may cause the cost to one party to complete a promised investment to exceed the value which is expected to generate from the investment agreement. For host state's governments, these costs may be not only economic but also political"[179], "since the non-regulation of prices or the privatization of public services may be met with political unrest. Some investment agreements, which are foundation for investment arbitration, have an explicit escape clause for unforeseen external shocks; so-called essential security clauses or non-precluded measures clauses. Thus, sometimes an escape from substantive investment agreements obligations is possible by taking measures, e.g. for the protection of its own essential security interests. Such clauses can

177 Anne van Aaken. " Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law", Journal of International Economic Law, 12/01/2009 (507) Volume 12/Issue 2
178 A. v. Aaken. "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis", Journal of International Economic Law, 05/18/2009
179 Anne van Aaken. "Perils of Success? The Case of International Investment Protection", European Business Organization Law Review (EBOR), 03/2008

cover circumstances such as exceptional threats to internal and external security, economic crisis, terrorism threats, public health emergencies or natural disasters. Much, though, depends on the wording of the clause as well as on the interpretation by investment tribunals. Public policy measures for public morals, public health, the environment, etc. or statements that certain public policy measures do not constitute a breach of the bilateral investment treaties. Such explicit public policy exceptions render the treaties more flexible and at the same time restrain the interpretational leeway of tribunals, although they still leave room for judicial scrutiny, since they are subject to the usual interpretational rules. Many states tries to avoid the investment arbitration on bases of national public policy and seek the interference of domestic courts against the investment arbitration proceedings.

Most of the international investment agreements contain vague terms most these terms relates to the provisions for protection of investment and investor and this approach delegates discretion to tribunals. Arbitral tribunal's interpretation is vital for a finest equilibrium between commitment and flexibility and eventually for the permanence of the investment arbitration structure. Due to such vagueness in terms of international investment agreements, it becomes complicated to envisage outcomes of investment disputes and also tricky to know how their assurance would be interpreted to be. Tribunals may be on one side by deferring to the regulatory policy decisions of host states giving them a bigger margin of appreciation. Or they may interpret treaties with a narrowly understood object and purpose of the BIT, i.e. for the investor's protection only. In practice, we find rather strict interpretation by ICSID tribunals."[180] "Another aspect of finality relates to enforcement, where courts are endowed with powers to enforce the arbitral award."[181] "In the view of some tribunals, investment agreements are instruments for the maximization of investor protection; accordingly, uncertainties as to how to resolve ambiguous treaty provisions should be resolved in favour of foreign investors. Lately, a few arbitral tribunals or minority arbitrators have dismissed such an approach, calling instead for a more balanced interpretation that considers both the necessity to protect foreign investment and the state's sovereign responsibility to provide for 'an adapted and evolutionary framework for the development of economic activities"[182] and giving more margin of appreciation to states.

"Interpretation of indirect expropriation has been meandering between the so-called sole effects doctrine, i.e. only the effect of the measure on the property is examined, on the

180 A. v. Aaken. "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis", Journal of International Economic Law, 05/18/2009

181 http://www.ejil.org/pdfs/19/1/177.pdf; from internet on 9/2/09

182 http://www.cms.uva.nl/template/downloadAsset.cfm?objectid=BB6F9264-18D0-4292-AB8BB775606A5C3D

one hand, and the inclusion of the regulatory purpose, on the other. The inclusion of the latter allows for the application of the proportionality principle. International investment agreements could be rendered more flexible by being more deferent to the regulatory policies of host states. To comprehend the discriminatory measures taken by the host states, 'aims and effect' test could be considered. This test would take into account whether there was a bona fide regulatory purpose of the measure, aside from protectionist purposes. Still it creates a great challenge for investment tribunals to deal with.

States can cure this by writing complete contracts with clean and plain indeterminate legal terms, such as foreign investor, fair and equitable treatment', 'indirect expropriation' and the scope of the MFN clause. They may, e.g., state that certain environmental or public security measures do not amount to indirect expropriation. Article 139 (2) of the newly signed China-New Zealand FTA as well as Article 4 (3) of Norway's new draft Model BIT clarify that the MFN Clause is not meant to cover procedural provisions. In an other way it can restrict the interpretational supremacy of investment tribunals by including a general saving clause for interpretation of the treaty or by excluding judicial scrutiny for some provisions."[183]

"Ideally, ICSID tribunals arbitrating disputes should follow three steps to ensure the appropriate balance is struck between international investment laws and other norms of international law. **First**, tribunals must set out clearly the rules of law that which would be applicable to the dispute starting with Article 42 of the ICSID Convention and elaborating on the rules of international law. Applicable laws have been discussed under chapter 3.2.3 applicable laws.

Second, tribunals should consider whether the relevant provisions or other applicable investment norms conflict with other applicable norms of international law. If there is a conflict either on their face or in practice. it would be determined on commonly accepted principles .These rules do not produce results in every case , in such situation the tribunal needs to consider which rule should prevail.

Third, ICSID tribunals must apportion liability of parties between them. Host states are given the right of defense to the claims of the investor. If the state should be given opportunity to demonstrate that the measures and steps taken were in compliance with their international responsibility. This obligation may be under a further instrument as multilateral agreements or

183 A. v. Aaken. "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis", Journal of International Economic Law, 05/18/2009

under customary international law. The existence and proof of such further obligations could release them of liability to the investor.

However, this approach raises a number of policy concerns. It may not always be fair for the investor to bear the risk of any international obligations subsequently entered into by the host-state, particularly if these obligations were assumed after the investment was made. Similarly, it is not prudent to create a situation where host-states can enter into international commitments that conflict with prior investment obligations, although in some circumstances this may be necessary. A better approach, rather than a defence against liability, is for other international obligations to be taken into account by tribunals when calculating liability. This is essentially an allocation of risk, and would require tribunals to compare the relative gravity of the international obligations in question with the ramifications of excusing the state from its obligations toward the investor.

There may be no reason that an investor should not have to conduct due diligence on the host-state's international law obligations in the same way that it conducts a due diligence investigation of local conditions. If the tribunal decides that the state was at fault, and was using the international law norm in question simply to escape its investment obligations, the state may have to pay damages."[184]

"When matter on part of the states is looked upon it is no coincidence that minority opinions in investment arbitral awards do issue warnings that the system of investment arbitration could be destroyed if the interpretation is stretched too far. Overprotection by overly strict commitments or overly strict protection by interpretation may lead to state reactions that will weaken international investment protection system of international investment arbitration in the long run--a normatively undesirable outcome. Taking good faith measures of host states out of the extralegal realm would not only grant more legal security to investors but also return credibility to the regime as such." [185]

It has been discussed in this chapter that Nature of dispute when it arises between two nations or national of one state and other state or its corporate body, depends very much upon the international investment agreements. Investment treaty arbitration or international investment arbitration, which is rapidly-growing, is grounded on direct treaty protection rather than diplomatic protection; it is a relatively new phenomenon.

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184 Leeks, Annie. "The relationship between bilateral investment treaty arbitration and the Wider Corpus of Internation", University of Toronto Faculty of Law Rev, Spring 2007 Issue

185 A. van Aaken. " Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law", Journal of International Economic Law, 12/01/2009 (507) Volume 12/Issue 2

International investment is protected by incorporating the umbrella clause in bilateral treaties and international agreements. This umbrella clause generally requires each contracting party to observe all obligations with regard to investments of nationals or companies of the other state. At its highest, the umbrella clause has been held to elevate all breaches of contracts entered into between the state and the investor to the level of breaches of the treaty. Most BITs contain provisions guaranteeing the right of the investor to repatriate capital and profits. Differences exist in the scope of investor protection provided in of these treaties or multilateral investment, therefore, NAFTA and ECT has been discussed briefly. Investment arbitration vary in several respects from commercial arbitration: investment is mostly connected with an infrastructure the completion of which is of significant importance for the national progress and economy, disagreements often concern the objectives of the investment, the repatriation of revenues and the ultimate control and benefit of the investment the outcome of the dispute may also affect the general investment climate in a country. Investment agreements delineate the extent of the state's consent and the jurisdiction of arbitral tribunals in broad terms. For the reason mentioned above it may be deduced that international investment arbitration system needs detaches itself from the other forms of arbitration due to its peculiar nature and ICSID proceedings, rightly, are completely detached from any domestic system of law. It has given the concept of delocalized arbitration.

The several multilateral investment agreements e.g. NAFTA and ECT contain the provision to refer the dispute for arbitration under ICSID Convention. It has been discussed that a dispute settlement mechanism of NAFTA is incorporated in three different chapters and Chapter 11 is most significant among them having broad scope of application, in terms of both parties and subject matter. United States is the only State party member of ICSID Convention, therefore , two options for arbitration remain in tact: arbitration under Additional Facility Rule or ad hoc arbitration.

Investor of member state has been given the choice of three possible avenues to institute his claim: (1) arbitration before the ICSID Convention (2) ad hoc arbitration established under the rules UNCITRAL arbitration, or; (3) arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce and it would be appropriate to mention that investment in energy sector is covered under this treaty. Several advantages of arbitration under ECT are: finality of ICSID decisions,

comprehensive protection of investments, and a public dimension of energy investments. Pakistan is facing energy deficit and Gas pipe line project with Iran and India has not been finalized. To development of energy sector this Treaty may use as model to enhance the chances of investment in this sector and this may work for regional development.

On the other hand "overprotection by overly strict commitments or overly strict protection by interpretation may lead to state reactions that will weaken international investment protection system"[186] i.e Bolivian revocation of its membership of ICSID.

[186] A. v. Aaken. "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis", Journal of International Economic Law, 05/18/2009

CHAPTER 3

ARBITRATION PROCEEDING UNDER ICSID ARBITRATION RULES

3.1 Proceedings under ICSID Convention and Rules

3.1.1 Scope and Jurisdiction of ICSID

3.2 Arbitration Proceeding under ICSID Rules

3.2.1 Constitution of ICSID Arbitration Tribunal

3.2.2 Powers of Arbitration Tribunal

3.2.3 Applicable Laws

3.2.4 Arbitration Award

3.3 Enforcement of Award and Additional Facility Rules

3.1 Proceedings Under ICSID Convention and Rules

In previous chapter, definition of international investment agreements and characteristics of international investment arbitration has been discussed, now in this chapter; focus will be upon the international investment arbitration under ICSID. To solve the dilemma of investment disputes and to remove the impediment to foreign investment in developing countries, World Bank envisaged a special forum for arbitrating investment disagreements. During the period between 1962 and 1964 procedure to establish the International Centre for Settlement of Investment Disputes (ICSID) was discussed , there were private arbitral institutions around the world to facilitate settlement of commercial disputes by arbitration . "Such as the ICC International Court of Arbitration, founded in 1923, had experience in dealing with disputes between states and state entities and foreign nationals."[187] It has been mentioned these arbitration institutions were dealing with disputes of a commercial nature and were involved in commercial arbitration. Ad hoc arbitral tribunals or so-called mixed commissions to settle the disputes between states were common since the Jay Treaty of 1794 and Ghent treaty of 1814 as discussed in chapter 1. Establishment of International Centre for the Settlement of Investment Disputes (ICSID) was envisaged as separate forum for investment disputes under Washington Convention 1965. [188]

In March 1965, the Executive Directors approved the text of the ICSID Convention (Washington Convention), with direction to the president of the World Bank to circulate the convention and executive report to all member States. Aron Broches, was given particular credit for the Convention, who effectively imagined and chased the idea through discussion with legal experts and by organizing conferences for it. [189]

It was made mandatory that twenty states should ratify the Convention to bring it into force and this was on 14 October 1966 when twenty states ratified it .One the most significant success was signing of it by both industrialized and developing countries and total number of its members reached one hundred and thirty eight as on January 2003 and all became members.[190]

Prior to this convention, president of World Bank was called to settle the investment and other disputes between states. therefore, this institution relieved workload. According to Christoph

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187 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006 and Kathigamar V.S.K. Nathan , The role of ICSID the development of rules of international economic law Int. A.L.R. page 90 1999.

189 L.Reed, J. Paulsson & N. Blackaby ; "Guide to ICSID Arbitration" , para 6-18 '.

190 C. Schreuer, The ICSID Convention: A Commentary xi-xiii (Cambridge University Press, 2001).

Schreuer, "the Convention's primary aim is the promotion of economic development." [191] Primary objective of this institution was to facilitate the settlement of investment disputes between governments and investors to promote the international investment. As the Tribunal in Amco v. Indonesia suggested:

> *"The Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries ."*[192]

"Center provide the facilities for conciliation and arbitration of investment disputes between contracting states and national of other contracting states in accordance with the provision of this convention as stated in **Article 2** of the ICSID convention."[193] In this regard it is worthwhile to mention that this Center aimed at resolution of investment disputes. These investment disputes may be between contracting states or between a national of one contracting state and state.

Scope of ICSID covers the provisions of facilities for resolution of disputes through:

i. Conciliation
ii. Arbitration

Different sets of rules and regulations, formulated under this convention, govern the arbitration under ICSID. Some rules and regulations were amended in January 2003 and Apart from main ICSID convention rules of ICSID include:

- "Administrative and **F**inancial **R**egulations" governing meetings of the Administrative Council and Centre's administration of conciliation and arbitration proceedings.
- "Institution **R**ules" regulating the initiation of ICSID conciliation and arbitration proceedings.
- "Arbitration **R**ules" setting out "procedures for the conduct of the various phases of arbitration proceedings, including the constitution of the tribunal, the parties' written and oral presentations of their respective cases, and the preparation of the arbitral award."[194]

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191 See Doc. ICSID/3, List of Contracting States and Other Signatories of the Convention.

192 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf on 5/11/09 Amco Asia v. Indonesia at Para 403.

193 http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf 10/4/08)

194 Parra, Antonio R.. "The development of the regulations and rules of the International Centre for Settlement of Investmen", International Lawyer, Spring 2007 Issue

- "Conciliation Rules" pertaining to the conduct of conciliation proceedings have been provided before Arbitration rules.[195] I have changed the sequence as to focus on arbitration rather on conciliation.

When ICSID Convention was concluded, some of its most important features represented significant new developments, though in the light of subsequent advances in international law they now appear almost commonplace. Based upon the analyzed study of the system it can be said that a system was instituted with some new improvements in legal System of international investment arbitration and international law. Theses new improvements can be summarized as follows:

- "In this system -State entities – corporations or individuals – could sue States directly;
- State immunity was much restricted;
- International law could be applied directly to the relationship between the investor and the host State;
- Operation of the local remedies rule was excluded;
- And the tribunal's award would be directly enforceable within the territories of the States parties."[196]

Some other advantages of ICSID arbitration are Clear and Reasonable Cost Schedules and the "World Bank Factor". ICSID provides a transparent cost structure like other major international arbitral institutions. Administrative costs for support of arbitration under ICSID are also relatively low. Certainty in enforcement of award of ICSID tribunal is higher as failure to comply with an ICSID award would have indirect political consequences in terms of credibility as it is supported by World Bank. This is obvious in practice as most of ICSID awards have been either effectively settled or voluntarily executed by the parties. Connection of ICSID with World Bank makes it popular in contracts involving other multinational lending agencies.

ICSID convention established neutral ad arbitration tribunal to resolve the international investment disputes rather than leaving the investors to rely on diplomatic efforts and on the pity of judges of local courts appointed by host states .Self contained review regime was carefully observed and incorporated by ICSID to challenge the award to avert the fears of discriminatory. Awards under ICSID can not be challenged in local courts of country like other

195 L. Reed, J. Paulsson & Blackaby, "Guide to ICSID Arbitration" , page 6 Kluwer Law International (Edition 2004),

196 Paper Submitted to Kyushu University on 2009-08-16

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195 L. Reed, J. Paulsson & Blackaby, "Guide to ICSID Arbitration" , page 6 Kluwer Law International (Edition 2004),

196 Paper Submitted to Kyushu University on 2009-08-16

awards, finality of award is discussed in chapter four. Awards under ICSID Convention are not subject to "various grounds on which national court can refuse the reorganization and enforcement of the international commercial awards under New York Convention."[197] For these reasons, ICSID convention has become cornerstone for resolution of investment disputes in international community.

3.1.1 Scope and Jurisdiction of ICSID

ICSID emphasizes on the promotion of economic development globally through private international investment. This scheme and idea of partnership and interdependence between industrialized and developing countries, may only be protected by truly self-regulating dispute resolution forum as ICSID. Such forum should have clear jurisdiction to deal with all such disputes.

Study of ICSID Convention reveals that Article 25 has defined the jurisdiction of ICSID Centere:

(1) "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."[198]

In order for an investment dispute between an investor and a State to be eligible for ICSID arbitration:

(a) the dispute must arise out of an investment,

(b) the dispute must involve, on the one hand, either a Contracting State (that is, a State that is a signatory to the ICSID Convention) or one of its subdivisions or agencies specifically designated to ICSID and, on the other hand, a national of another Contracting State and

(c) All parties to the dispute must consent in writing to have the investment dispute submitted to ICSID.

"Some States authorize constituent subdivisions or agencies to deal with foreign investors. The Convention allows these constituent subdivisions or agencies to be parties in ICSID proceedings, provided certain procedural requirements are met."[199] As mentioned above to ensure the independence of the parties before commencement of the arbitration under rules of ICSID, parties must fulfill the three criteria:

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197 Paper submitted to University of Wollongong on 2010-03-12

198 http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

199 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf; accessed on 8/11/08

First, the parties have consented for submission of dispute to ICSID arbitration. The Consent for arbitration must be given in writing. This agreement to arbitrate may refer to either an existing dispute or a defined class of future disputes. In coming section this issue is discussed separately as it is prime obligation for the parties in arbitration proceeding.

Second, the dispute must be between a Contracting State and a national of another Contracting State. Contracting States may authorize constituent subdivisions or agencies. Investor should not be national of contracting state to invoke the jurisdiction of ICSID.

Third, "the dispute must be a ***legal dispute arising directly out of an investment.***" [200] The term "investment" has been given a broad interpretation by ICSID tribunals considering the bilateral treaties and national laws of state party.

In other way it may be observed that "jurisdiction *ratione materiae*, or subject-matter jurisdiction, of the Centre under Article 25(1) is thus defined as "any legal dispute arising directly out of an investment." Therefore, ICSID's subject-matter jurisdiction, as defined in Article 25(1), has three components:

(a) the requirement of a legal dispute;
(b) the requirement that the legal dispute arise directly out of the underlying transaction; and
(c) that such underlying transaction qualify as an investment.

ICSID practice under Article 25 of the Convention derives primarily from the power of an arbitral tribunal to decide on its own jurisdiction (Article 41), and also from the screening function of ICSID's Secretary-General (Article 36)."[201]

In case of dispute between parties, minimum requirements for a request for ICSID arbitration are given in the Rule 2(1) of the ICSID Institution Rules. It says that "a request shall

(a) designate precisely each party to the dispute and state the address of each
(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention
(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the

200 Submitted to Universität des Saarlandes on 2010-06-22
201 http://www.unctad.org/en/docs/edmmisc232add4_en.pdf; accessed on 8/11/08

approval of such consent by that State unless it had notified the Centre that no such approval is required;

(d) indicate with respect to the party that is a national of a Contracting State (I)its nationality on the date of consent; and (II)if the party is a natural person: his nationality on the date of the request; that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or and(III) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;

(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment;

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request" [202]

"Article 25(2) prescribes the nationality requirements for natural and juridical persons following the traditional definitions of nationality acceptable under both international and most domestic laws. In many countries, foreign investments are required to be channeled through locally incorporated companies. This requirement has important implications for foreign investors. If the investment is carried out through a locally incorporated company, a national of the host State, the investor would not normally be eligible to be a party to proceedings before the Centre. The drafters of the Convention recognized this problem and adopted Article 25(2)(b). This provision allows locally incorporated but foreign controlled companies to have access to ICSID provided certain procedural requirements are met.

Under Article 25(2) of the ICSID Convention, an investor is required to be a national of another Contracting State which contains the following definition of this term:"[203]

"(2) "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 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

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202 http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf and , "Guide to ICSID Arbitration" , chapter 2 page 13 Kluwer Law International (Edition 2004),

203 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf; accessed on 8/11/08

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."[204]

"Investors are required to meet a positive and a negative nationality requirement. To satisfy the positive requirement, investors are required to be nationals of a contracting state. To satisfy the negative requirement, investors must not have the nationality of the host State. Juridical persons will qualify as nationals of Contracting States through their place of incorporation or seat of business. A juridical person may, however, possess the host State's nationality and still qualify as a national of another Contracting State under an exception contained in Article 25(2) (b)." [205]

The jurisdictional requirements narrated in article 25 of the ICSID convention are compulsory. The parties to the arbitration have no power or authority to waive these jurisdictional criteria by their mutual agreement or contractual stipulations. In case, the jurisdictional requirements are not fulfilled, ICSID Centre must and will refuse to arbitrate a dispute, though the parties have contracted for arbitration by ICSID.

Role of the State's Consent : Arbitration is always based on a consent agreement between the parties. But it is the fact that ICSID arbitration by necessity, between a host State and a foreign investor leads to some peculiarities in the giving of consent. The most conspicuous peculiarity is that consent agreements need not be based on a document that is signed by both parties. Rather, the host State may make a general offer to foreign investors or to certain categories of foreign investors to submit to arbitration. This offer may be contained in legislation or in a treaty to which the host State is party. To perfect a consent agreement, the investor has to accept this offer in writing. This acceptance can be quite informal and may even be expressed through the act of instituting proceedings. Consent of parties to investment arbitration is an agreement to the compulsory arbitration of future disputes among them. Under 25 of the ICSID Convention, the

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204 http://www.thaifta.com/ser_icsid.pdf

205 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf; accessed on 8/11/08and -Mr. Christoph Schreuer

parties' consent to submit a dispute to ICSID arbitration is a threshold requirement.[206]

Consent is the explicit expression of both parties' acceptance of ICSID arbitration. The investor generally consents to arbitrate disputes under a specific investment. State may consent to arbitration specifically and generally for anticipated classes of disputes.[207]

"A state may specifically consent to investment arbitration as a form of commercial arbitration by entering into a contract with a foreign investor. Contracts between states and foreign investors - variably called investment agreements, economic development agreements, or state contracts - often include arbitration clauses. In such cases, the arbitration is a form of contract-based investment arbitration pursuant to a commercial relationship between the state and an investor, and authorized by the agreement of two parties acting in a private capacity. In contract-based investment arbitration, the principle of party autonomy plays a pivotal role because the dispute is an investment dispute within the private sphere, even though the dispute involves the state.

However, unlike a private party, a state can consent generally to investment arbitration, in one of two ways. First, the state can consent to investment arbitration by enacting a law.[208] Secondly, the state can conclude a treaty that likewise provides for the compulsory arbitration of disputes with foreign investors."[209]

It would be right to say, "in practice, consent is given in one of three ways. **The most obvious** way is a consent clause in a direct agreement between the parties. Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. ICSID has prepared and published a set of Model Clauses to facilitate the drafting of this contracts.

Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The

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206 Report of the Executive Directors on the ICSID and Nationals of Other States (18 March 1965), in 1 ICSID Reports 23-33 (1993).

207 Lucy Reed, Jan Paulsson and Nigel Blackaby, "Guide to ICSID Arbitration" , chapter 2 page 10-16 Kluwer Law International (Edition 2004)

208 SPP (ME) Ltd v Arab Republic of Egypt (Jurisdiction) 3 ICSID Rep 131; e.g. AAPL v Sri Lanka (Merits) (27 June 1990), 4 ICSID Rep 246, 30 ILM (1991) 577.

209 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings."[210] "In *SPP* v. *Egypt* the Request for arbitration was based on Art. 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone."[211] Tribunal assumed the jurisdiction on bases of national and rejected objection of Egypt that it was intended only to inform potential investors that ICSID arbitration was one of a variety of dispute settlement methods that investors may seek to negotiate with Egyptian authorities in appropriate circumstances.[212]

"**The third** method to give consent to ICSID jurisdiction is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty. The same method is employed by a number of regional multilateral treaties such as the NAFTA and the Energy Charter Treaty."[213]

While a host State may express its consent to ICSID's jurisdiction through legislation, the investor must perform some reciprocal act to perfect consent. Even where consent is based on the host State's legislation, it can only come into existence through an agreement between the parties. The provision in the host State's legislation can amount to no more than an offer that may be accepted by the investor. Offers of consent contained in national legislation may prescribe certain conditions, time limits or formalities for their acceptance." [214]

"Contract-based investment arbitration is far more predictable and manageable than other forms of investment arbitration because its subject matter is confined to a specific dispute, investor or project, and because the contracting parties and the disputing parties are the same. The state thus has a relatively clear sense of what it has agreed to arbitrate. In contrast, the general consent potentially engages all of the state's diverse regulatory relationships with foreign investors as a group.

Validity of each party's consent to ICSID arbitration must be carefully verified as the relevant factor to the investment arbitration."[215] It is common for national laws, especially as constitutional requirement, to restrict a State's ability to enter into arbitration agreements unless certain parliamentary approvals or compliance with other legal requirements are met. A party to

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210 http://www.oecd.org/dataoecd/47/25/2758044.pdf; accessed on 8/12/09

211 http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20).PDF

212 Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 140, 147.

213 http://www.oecd.org/dataoecd/47/25/2758044.pdf

214 Mr. Christoph Schreuer , The Course on Dispute Settlement in International Trade, Investment ,UNCTAD/EDM/Misc.232/Add.2

215 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

arbitration must verify the validity of the other party's consent, by demanding certification letters, legal opinions and other appropriate evidence before a dispute arises and avoid unnecessary, extended and unsuccessful litigation. This may be known as due diligence which should be a particularly high priority on the private investor's checklist.

A valid consent establishes an exclusive forum to arbitrate unless the parties agree under Article 26 of ICSID convention:

> *"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."*

An arbitration clause may stipulate that only certain limited categories of disputes are subject to ICSID jurisdiction.[216] To avoid prospective differences over a tribunal's competence broad consent clauses are preferred. In paragraph 4 of Article 25 it is stated 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. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."*

"China, Jamaica, Papua New Guinea, Saudi Arabia and Turkey have used this type of notification for their protection and to restrict their consent."[217]
Under in the ICSID regime, the fundamental protection is irrevocability of valid consent to arbitrate. No withdrawn is permitted. The inability to withdraw a valid consent to ICSID arbitration means that neither party may resort to any other national or international remedy after a dispute arises. Notifications of excepted disputes under Convention Article 25(4) may not be used to withdraw consent indirectly, once consent has been validly given. In three cases

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216 Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration , chapter 2 page 13 Kluwer Law International (Edition 2004),

217 W. Michael Tupman. "Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes", International & Comparative Law Quarterly, 10/1986

involving Jamaica it is confirmed that valid consent is irrevocable notwithstanding Article 25(4).[218]The tribunal held, in each case, that "Jamaica could not withdraw the consent given in the agreements with the investors. Notification to ICSID under Article 25(4) could operate only prospectively, "by way of information to ICSID" [219] The time of consent carries a number of important consequences: these include the irrevocability of consent, the exclusion of other remedies, and the impermissibility of diplomatic protection. Consent must exist at the time of the institution of the proceeding. The time of consent is the date by which both parties have submitted to jurisdiction. If other conditions to ICSID's jurisdiction are not yet fulfilled by the time the parties have expressed their consent agreement, the time of consent will be the date by which these conditions are fulfilled.

In the Tribunal's view, the proper method for the interpretation of the consent agreement was to read it in the spirit of the ICSID Convention and in the light of its objectives. ICSID arbitration was in the interest of both parties, a thought that was expressed in the first paragraph of the Convention's Preamble. The investor's interest in submitting investment disputes to international arbitration was matched by a parallel interest of the host State: to protect investments is to protect the general interest of development and of developing countries. ICSID tribunals have dealt with this question in a number of cases. "These cases suggest that ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties' overall relationship." [220]

3.2Arbitration Proceedings under ICSID Rules

Arbitral institutions were established to provide a dispute resolution service so that international trade can go on unhindered. The economic development of the states of origin of the parties to the dispute is too remote a consideration for the arbitral institutions. However, ICSID is primarily concerned with economic development and was established to provide a dispute

218 Kaiser Bauxite Company v. Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence (6 July 1975), 1 ICSID Reports 296 (1993);.

219 Mr. Christoph Schreuer , http://www.unctad.org/en/docs/edmmisc232add7_en.pdf and cited in paper submitted to Bond University on 2008-04-18

220 the Rules of Procedure for the Institution of Conciliation and. Christoph Schreuer , UNCTAD/EDM/Misc.232/Add.2

resolution service which would encourage foreign nationals to invest in developing countries by structuring the institution in such a way as to insulate the arbitral process from any state influence and to assure enforcement with minimum administrative effort. The power which ICSID enjoys to make rules of international law, which even the International Court of Justice does not possess, suggests that a special role was intended for ICSID in regulating economic relations.[221]

"Recourse to arbitration for settlement of investment disputes has distinct advantages against traditional diplomatic protection claims. A claim may be initiated directly by an investor without regard for the host state and without a need to exhaust local remedies unless the investment treaty expressly requires this." [222]

In addition to the parameters defined in the ICSID Convention itself, "ICSID arbitration procedure is governed by the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the *Institution Rules*), the Rules of Procedure for Arbitration Proceedings (the *Arbitration Rules*) and the Administrative and Financial Regulations (the *Regulations*)."[223] The requirements of the Convention are few in number, but are for the most part mandatory. Articles 41 to 47 of the Convention, as well Arbitration Rules 13 to 38, regulate the conduct of ICSID proceedings from the constitution of the tribunal through issuance of the award. The different aspect on international investment arbitration has been described in the following pages containing the information in respect of constitution of tribunal, powers of arbitration tribunal, applicable law and arbitration award for comprehension of infrastructure and concept of international investment arbitration under ICSID.

3.2.1 Constitution of Arbitration Tribunal

The ICSID Convention facilitates parties to the arbitration with wide latitude to decide how to select their arbitral tribunal as under other institutional arbitration rules. Among other things,

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221 Kathigamar V.S.K. Nathan , The role of the ICSID in the development. Int.A.L.R.1999.

222 Kate Parlett. "International Investment Arbitration: Substantive Principles. By Campbell Mclachlan QC, Laurence Shore and Matthew Weiniger. [Oxford: Oxford University Press, 2007. xlix. 445, (Bibliography) 7 and (Index) 19 pp. Hardback £145.00; Paperback £44.95. ISBN 9780199286645.]", The Cambridge Law Journal, 11/2008 and Campbell McLachlan , Laurence Shore ,Matthew Weiniger, International Investment Arbitration: Substantive Principles C.L.J. 664 2008 and reviewed Kate Parlett

223 http://www.chinainterlaw.org/display_topic_threads.asp?ForumID=23&TopicID=818 ; accessed on 18/10/09

its provisions encourage the parties to establish the tribunal as soon as possible. Constitution of an ICSID tribunal very seldom takes less than three months.

The Secretariat of ICSID , headed by a Secretary-General and a Deputy Secretary-General, provides institutional support for arbitration by, among other things, , adopting rules and regulations for the conduct of arbitrations, and drafting model arbitration clauses for investment agreements. A penal of arbitrators is maintained by under the article 12 and each state party to the convention can designate four arbitrators national of any state to this penal under article 13 of ICSID convention.

Articles 37 to 40 of the Convention and Arbitration Rules 1 to 6 provide the details of constitution of investment arbitration tribunals. ICSID Convention and its Arbitration Rules set few limitations for the parties' liberty to choose their tribunal. First, Article 37(2) (a) of the Convention says that a tribunal "shall consist of a sole arbitrator or any uneven number of arbitrators. " Second, Article 39 and Arbitration Rule 1(3) stipulate that the tribunal may not consist of a majority of arbitrators with the same nationality as either party, unless the parties have appointed the arbitrators by agreement.
Third, a person who previously acted as either a conciliator or an arbitrator in proceedings to settle the same dispute brought to arbitration may not be appointed to the tribunal (Arbitration Rule 1(4)).
"In case of absence of agreement on the number of arbitrators or the method of their appointment, parties may exchange proposals"[224] regarding constitution of the tribunal within 60 days from registration of the request in accordance with Arbitration Rule 2 .

Default formula for a three-member panel set out in Article 37(2)(b) is provided under Arbitration Rule 3, in case parties failed to reach any agreement for constriction of tribunal

As per Rule 5, the parties are obliged to notify the Secretary-General of the name and method of appointment of each arbitrator. Rule 7 gives liberty to replace unilaterally its own appointee and the parties together, by agreement, may replace any arbitrator Until the date of notification by the Secretary-General
In case of failure of the parties to constitute the tribunal within 90 days of the notice of registration, Centre's assistance may be requested by any party under Article 38 of the Convention. Any remaining arbitrators may appointed by Chairman of the Administrative Council from the Panel of Arbitrators having consultation with both parties, within 30 days as

224 "LAW & HUMAN RIGHTS:- Arbitration Before the International Centre For Settlement of Investment Disput", Africa News Service, May 7 2004 Issue 3

per Arbitration Rule 4(4). If no agreement is reached, the formal fallback procedure is used to ensures that constitution of the tribunal is not prevented and frustrated by an uncooperative party.

The Chairman of the Administrative Council will appoint any remaining arbitrators from the Panel of Arbitrators, after consultation with both parties, using his or her "best efforts" to do so within 30 days. Again, none of the arbitrators appointed by the Chairman of the Administrative Council from the Panel may be of the same nationality as either of the parties. This fallback procedure ensures that an uncooperative party cannot prevent the constitution of the tribunal and thereby frustrate the arbitration process. At this stage, the ICSID Secretariat may informally propose certain names outside of the Panel of Arbitrators before appointment can be made. If no agreement is reached, the formal fallback procedure is used.

When arbitration tribunal is constituted to arbitrate the international investment dispute between parties . "The tribunal must hold its first session within 60 days of its official constitution (formal notice) or within such other time period as agreed by the parties to have the preliminary procedural consultation."[225] Unless the parties have agreed otherwise, the session takes place at ICSID headquarters in Washington, DC. It has no impact on the applicable procedural law or on the enforceability of the ultimate award.

3.2.2 Powers of Arbitration Tribunal

In previous pages constitution of arbitration has been discussed considering the aim of arbitral institutions to provide a dispute resolution service so that trade can go on unhindered. It can be inferred from history of development of investment arbitration that the arbitral institution under ICSID was structured in such a way as to insulate the arbitral process from any state influence and to assure enforcement with minimum administrative effort. **The power** which ICSID enjoys to make rules of international law, which even the International Court of Justice does not possess, suggests that a special role was intended for ICSID in regulating economic relations.

Taking into consideration the different nature of economic relation and contractual obligations under trade agreements some rules of law cannot apply to both long-term economic relationships such as concessionary agreements and durable investments as well as to commercial contracts of sales of goods and services where the issues are short term and highly technical. The special role assigned to tribunal under ICSID facilitates the international

225 http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; accessed on 8/10/09

investment and promote the confidence of investor. [226]

As mentioned above , arbitration institution under ICSID was established with the aim of promoting economic development and to provide a dispute resolution service. Arbitral tribunal under ICSID convention is vested with exclusive jurisdiction for determination of cases. Article 41(1) clearly describes that tribunal is sole judge of its own competence. While 41 (2) provide a vide power to the tribunal to decide any objection to its jurisdiction as primary question or join it to the merits of case.

"In the context of the ICSID Convention, domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. In other words, if a court in a contracting state becomes aware that a claim before it may call for adjudication under ICSID, the court ought to stay the proceedings pending proper determination of the issue by ICSID. So long as such determination is not made and the possibility exists that the claim may fall within the jurisdiction of ICSID, the court must refrain from further consideration of the matter and refer the parties to ICSID to seek a ruling on the subject. This "rule of abstention," which is essential to the proper implementation of the Convention, finds its sanction in Article 64 of the Convention"[227], according to which:

> *"Any dispute between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by application of any party to such dispute, unless the States concerned agree to another method of settlement."*

Since this rule of abstention is directly relevant to the "interpretation" or "application" of the Convention, failure by a domestic court to comply with the rule might expose its own state to the type of international claim that is referred to in Article 64.

In the United States, Maritime International Nominees Establishment v The Republic of Guinea (MINE v. Guineal touches upon issues concerning the rule of abstention, but falls short of considering all its implications. In contrast, the French decision in Benvenuti & Bonfant Co. v. The Government of the People's Republic of Congo (B&B v. Congo) neatly implements the provisions of the Convention concerning the recognition and enforcement of ICSID awards.[228]

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226 Kathigamar V.S.K. Nathan , The role of the ICSID in the development. Int.A.L.R.1999.

227 http://www.law.ualberta.ca/alri/ulc/97pro/esiidr.htm; accessed on 8/11/09

228 THE AMERICAN JOURNAL OF INTERNATIONAL LAW [Vol. 77}

With agreement of the parties, tribunal constituted under article 37 of the convention has been power to decide the cases on ex aequo et bono as per article 42 of the ICSID tribunal . International Court of Justice has been provided, under Article 38(2) of the Statute of the International Court of Justice, same power to decide cases ex aequo et bono, but only where the parties agree thereto.

During the arbitration proceedings issues may arise where the tribunal lacks the necessary coercive powers to conduct the arbitration in an appropriate way, protect the rights of the parties or preserve existing evidence. The consensual nature of arbitration and the resulting lack of coercive powers sometimes limit the tribunal's options in taking evidence. In general it cannot force witnesses to appear at a hearing or answer questions, or order third parties to produce documents. For those and comparable measures arbitration tribunals therefore have to rely on court support. These include granting assistance in the taking of evidence, interim relief, extension of time limits, or determining preliminary points of law.[229] Like the model law of arbitration ICSID tribunal has been vested the power to call the parties to provide the evidence and documents for support of their claim and it can visit the site to conduct the inquiries to ensure that justice done as per article 43 of the convention . Arbitration Rule 34 gives the tribunal discretion to decide on both the admissibility and probative value of evidence. An individual tribunal's approach will depend on several factors, not the least of which is the balance of civil and common lawyers on the panel. Strict rules of evidence, such as those developed under national procedural codes, do not apply. **(21.1)(19.1)**

Article 44 of the convention describes the power of tribunal to decide the incidental and additional claims. Recommendation for provisionary measure to safe guard the rights of parties during the arbitral proceeding may be made under article 47. Arbitration Rules 39(2) and (4) put some limits as not to proceed ex parte, it is mandated to give each party the opportunity to comment before recommending provisional measures. A recommendation for provisional measures does not constitute an award. Interestingly, the tribunal in the *Casado and Allende Foundation v. Chile* case expressed the view in dicta that, under general principles of international law, provisional measures under Article 47 should be seen not as mere recommendations in the advisory sense but instead as orders with binding effect on the parties.(22)

A party's uncooperative conduct, as in any international commercial arbitration, may lead the tribunal to draw adverse inferences from that lack of cooperation and may affect the allocation of costs. In *AGIP v. Congo*, for example, the Government of Congo's failure to comply with a

229 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll , "Comparative International Commercial Arbitration", (edit.2003), Chapter 15 para 15-38 & 15-42

provisional measure ordering it to produce documentation was reflected in the tribunal's assessment of damages awarded to AGIP.[230]

Interim protective measures in investment disputes are more likely to be sought before arbitral tribunals. ICSID's special feature lies in its self-contained dimension, neutralizing the effect of the lex arbitri, is given in its Art. 44. It does not mean that the courts of the seat of arbitration are prevented from dealing with such requests provided that the parties have so stipulated in the agreement recording their consent. The general authority for the granting of interim protection in an ICSID arbitration is to be found in Article 47 of the ICSID Convention providing that "except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party," and is complemented by Article 39 of the ICSID Arbitration Rules. Tribunal can only recommend the measures and parties comply with these measures as non compliance with recommended measures may affect the award.

Indeed, recent amendments to the ICSID Arbitration Rules in 2006 provide the possibility for a party of filing a request for interim measures as soon as a dispute is registered with the Centre. Article 39(5) of ICSID Arbitration Rules empowers the ICSID Secretary General to administer the request." A truly innovative solution would have been to establish a mechanism empowering a permanent authority to administer and adjudicate interim measures until the constitution of the arbitral tribunal, therefore neutralizing the potential difficulties in its formation, but such a solution would have required an amendment to the ICSID Convention and therefore the approval of all contracting states.[231]

As it is discussed exclusive jurisdiction to arbitrate the international investment disputes in presence of arbitration agreement under ICSID and to make the rules are such powers which are not available to any other arbitration tribunal for resolution of dispute .Arbitration agreements, which enable the arbitration tribunal to exercise these powers, are interpreted by and construed in accordance with the applicable law. Law applicable to agreement to arbitrate is discussed hereinafter under separate heading.

3.2.3 Applicable Laws

The applicable laws to the various aspects of the arbitration agreement have received considerable attention both in academic discussion and in practice. As long as national laws differ as to the formal and substantive requirements for the validity of the arbitration agreement

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[230] *ICSID.Review.FILJ*567(2001).

[231] Régis Bismuth , "Anatomy of the Law and Practice of Interim Protective Measures", *J.Int. A*, (Kluwer Law International 2009 Volume 26 Issue 6) pp. 773 - 821

it may be a question of the applicable law whether or not a dispute can and must be referred to arbitration.[232] Numerous approaches have been identified in arbitration practice as to how to determine the applicable law.

All major legal systems now recognize that the parties may choose law applicable to the contract. Technically, this would mean that a party anticipating a risk could ensure the application of a system, which would favor him and select that system, if he has the bargaining power to ensure this. As per the doctrine of seprability arbitration agreement may be governed by a different law to the main contract. The considerations relevant for determining the applicable law for the main contract are different from those involved in choosing the law governing the arbitration agreement[233] But, party autonomy is not absolute. It will not be possible for parties to choose a legal system which has no relevance to the contract whatsoever[234]

Strategy was devised in investment agreements lawyers to lift the foreign investment contract out of the scope of the national laws and subject it to an international regime. State responsibility of the host state is engaged in circumstances where the foreigners or their assets are injured.. These external contacts of the foreign investment contract are supposed to justify the application of neutral principles of law to the agreement. These neutral principles are referred to variously as "general principles of law", "transnational law". It *means* that the security of foreign investment contracts can be assured only if there is a body of neutral principles beyond the legislative reach of the host state which can govern such contracts. Several states have sought to device *sui generis* principles of foreign investment protection through the conclusion of bilateral investment treaties[235]

The application of customary international law or general principles of law to investor-state contracts has been a source of some controversy over the past years. Historically, all contracts were grounded in the national law of a particular country. For investment disputes, that law was almost always the law of the host country. In the past years, however, a trend has developed toward the internationalization – or denationalization – of the law applicable to investor-state

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232 ICC case no 6379 of 1990, XVII YBCA 212 (1992); by "The Law Applicable to the Arbitration Clause and Arbitrability", . see Comparative international commercial arbitration

233 Interim Award in ICC case no 4131 of 1982, & ICC case no 4504, 113 Clunet 1118 (1986) 1119; ICC case no 5730 of 1988, 117 Clunet 1029 (1990) 1034; Berger, International Economic Arbitration, 158; van den Berg, New York Arbitration Convention, 293.

234 Vita Foods Inc v. Unus Shipping Co Ltd. [1939] AC 277; for Singapore,

235 M. Sornarajah ,The Settlement of Foreign Investment Disputes, (edition 2000), pp. 1 – 24

contracts. This trend resulted in the application of either international law or "general principles of law to many investor-state agreements based upon the international aspects of the foreign investor-state relationship." [236]

Arbitration agreement faces some complex questions in respect of applicable of arbitration agreement: (a) what law governs the validity of the arbitration agreement? (b) what law governs the arbitration proceedings themselves? (c) what law applies to the substance of the dispute? and (d) in the event of a conflict regarding the substantive law, under what law is the conflict to be resolved?

Articles 25 and 26 of the Convention and the express terms of the parties' agreement govern the validity of an ICSID arbitration agreement in respect of first question i.e. (a) What law governs the validity of the arbitration agreement? There is no need for the parties to select a law governing the validity of that agreement; it is governed by the Convention and therefore by international law.

Article 44 of the Convention addresses applicable procedural law to reply to the question i.e. (b) what law governs the arbitration proceedings themselves?" The parties cannot select a national procedural law or other international arbitration procedural rules to govern their ICSID arbitration, and should not attempt to do so. Nor should the parties try to alter the ICSID procedural regime, as there are mandatory provisions in the ICSID Convention and the various sets of ICSID rules. Parties should not invent procedural variations or "improvements" on the ICSID procedural framework in their arbitration agreement. Applicable procedure is available in Articles 41 to 49 and 25 .

Now question arises what law applies to the substance of the dispute? As in any major international agreement, the parties should strive to select one body of national law as the applicable substantive law and set it out plainly in a separate clause in the agreement. This is the single greatest assurance of certainty in the resolution of legal disputes that may arise. "ICSID convention provides options to agree on the national law of a third State or on rules or principles of international law or to remain silent."[237]

More complex question is that when parties have not agreed on any law what would be the course of action. Article 42(1) of the ICSID Convention anticipates these difficulties, and suggests a default choice-of-law rule and guideline.

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236 http://epublications.bond.edu.au/context/theses/article/1045/index/1/type/native/viewcontent/
And R. Doak Bishop, James Crawford and W. Michael Reisman , "Foreign Investment Disputes Cases, Materials and Commentary, (2005)", pp. 1 – 17)

237 D. Kokkini-Iatridou. "Economic Disputes between States and Private Parties: Some Legal Thoughts on the Institutionalization of their Settlement", Netherlands International Law Review, 12/1986

The dispute shall be decided by a tribunal in accordance with such rules of law as may be agreed by the parties in future , if not agreed at time of agreement . If disagreement prevails, " the tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable."[238] In extremely simplified and practical terms that, in the absence of agreement by the parties on choice of substantive law, the tribunal should accord supremacy to international law in the event of any inconsistency with the host State's domestic law. As the tribunal in the *Santa Elena v. Costa Rica* case explained, "to the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail."[239] According to the tribunal in *Amco v. Indonesia*, "where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as 'supplemental and corrective'. This is a distinction without a difference."[240]

The above formulation has led to a spirited debate over the role of international law in the absence of a choice by the parties. Some critics take the view that international law is limited to a supplementary and corrective role. It is supplementary in that it may fill lacunae in the host country's law, and it is corrective in the sense that it applies if the host law violates international law. Some describes its role more limited, noting that national law often contains rules to fill its own gaps, which would exclude international law from a supplementary role in those instances, and national law violates international law only if the relevant principle of international law rises to the level of *jus cogens*, which is a rule of fundamental importance. Other experts have suggested that international law always applies simply because either national law is consistent with it, or if it is not, then international law supersedes it.[241]

Of course, many nations incorporate international law into their national laws, thus generally avoiding any conflict. Even when the host state's law applies, many countries' legal systems derive from an older and more developed system such as the French or British legal systems, which can often be consulted to fill gaps in the law of the host government. In this way ICSID convention has tried to harmonize the international investment law. Now Pakistan is enacting its laws in accordance with ICSID convention.

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238 http://www2.ohchr.org/english/issues/globalization/business/docs/confederationbritish2.doc.

239 ICSID ,Case No. ARB/96/1, 2000, 15 ICSID Review – FILJ 169, 191 (2000).

240, ICSID Case No. ARB/81/1, Award in Resubmitted Case (31 May 1990), 1 ICSID Reports 569, 580 (1993).

241 R. Doak Bishop, James Crawford and W. Michael Reisman , "Foreign Investment Disputes Cases, Materials and Commentary", (2005), pp. 1 – 17) http://www.dundee.ac.uk/cepmlp/journal/html/Vol17/Vol17_11.pdf

3.2.4 Arbitration Award

The arbitration award is the instrument recording the tribunal's decision provisionally or finally determining claims of the parties. The award may concern legal or factual differences between the parties, may involve interpretation of contract terms or determining the respective rights and obligations of the parties under the contract. It may also deal with preliminary but substantive issues, such as jurisdiction of the tribunal, applicable law and limitation of actions.
Arbitration tribunals make many decisions during the arbitration process. While all awards are decisions of the tribunal not all decisions are awards[242] The term "decision" is generic and refers to the result of any conclusion or resolution reached after consideration [243] while an "award" is a decision affecting the rights between the parties and which is generally capable of being enforced, for instance, under the New York Convention.

There are also many issues where the tribunal will be asked to rule on issues concerning procedure, the conduct of the arbitration and other preliminary and non-substantive matters. There are several legal consequences associated with the rendering of the various types of awards. For example, after the final award is issued, the tribunal's authority expires and the tribunal can do no more in respect of the parties' differences. Further, the award is generally final and binding and has *res judicata* effect between the parties, *i.e.* no claim can be brought in respect of the same matter. While within 45 days of receipt of award a party may request to tribunal to consider the matter which has not been decided under it notified Award .Tribunal may decide the omitted matter with a notice to the other party as per article 49(2).This subsequent decision shall form the part of award.[244]

"ICSID tribunal strictly and solely focuses on solving the dispute while dealing with disputes between investors and states, they may be faced with several issues in relation to different rules for interpretation of multilateral investment treaties, bilateral investment treaties (including separate investment chapters in ' economic integration agreements'), specific agreements or decisions and national legislation."[245] The agreement to arbitrate through ICSID arbitration often determines the rules to be applied. Otherwise, Article 42(1) of the ICSID Convention applies: 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.[246]

Sometimes tribunal sees its role as comparable to that of a legislator (a ' legislator-oriented'

242 UNICITRAL Rules Article 31(1).
243 Concise Oxford Dictionary (10th Ed, Oxford University Press 1999), 371.
244 "Comparative International Commercial Arbitration" page 627.

245 O. K. Fauchald. "The Legal Reasoning of ICSID Tribunals - An Empirical Analysis", European Journal of International Law, 04/01/2008 .
246 Ole Kristian Fauchald , "the legal reasoning of ICSID tribunals: an empirical analysis", E.J.I.L. 301 2008 .

tribunal).While rules concerning the form of ICSID awards do not differ substantially from other international commercial arbitration rules. These rules describes that an award must: "(i) be in writing; (ii) be signed by the members of the tribunal who support it; (iii) deal with every question submitted to the tribunal; and (iv) state the reasons upon which it is based. These provisions contained in Articles 48(2) and 48(3) of the ICSID are mandatory to render the award and so may not be deviated from by the parties or by the tribunal."[247]

To make the arbitration efficient, ICSID tribunal has been given a time limit to render the award within 120 days of the closure of the proceedings as per Arbitration Rule 46. This time may extend for sixty days extension if there is any requirement. A certified copy of authenticated original text of the award is dispatched o each party by the a certified copy to each party by the Secretary-General, in accordance with Article 49(1) of the ICSID Convention and Arbitration Rule 48 without any delay.

Arbitration Rule 47 of ICSID narrates the details of award to be rendered by the tribunal. Firstly, the award shall be in writing and shall contain:

(a) "A precise designation of each party
(b) A statement that the Tribunal was established under the Convention, and a description of the method of its constitution
(c) The name of each member of the Tribunal, and an identification of the appointing authority of each
(d) The names of the agents, counsel and advocates of the parties;
(e) The dates and places of the sittings of the Tribunal
(f) A summary of the proceeding
(g) A statement of the facts as found by the Tribunal
(h) The submissions of the parties
(i) The decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
(j) Any decision of the Tribunal regarding the cost of the proceeding."[248]

Secondly, "the award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated. Thirdly, any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent."[249]

247 http://hukukcu.com/modules/smartsection/makepdf.php?itemid=103 ; accessed on 6/12/09

248 http://www.thaifta.com/ser_icsid.pdf

249 http://www.thaifta.com/ser_icsid.pdf; accessed on 8/11/08

Convention authorizes decisions by a majority vote as per Article 48(1). Individual member of tribunal is allowed to enclose his opinions to the award, in the form of either a dissenting or concurring opinion as per Article 48(4). Separate opinions are unusual in practice.

A wide range of remedies are available to arbitrators under international arbitration. The prevailing view is that every remedy that is available in litigation should be available in arbitration as well[250] Remedies which may be the subject matter of an arbitration award include: Specific performance, Damages / monetary compensation, Declaratory relief,Gap-filling and contract adaptation, Punitive damages and exemplary damages, Restitution , Rectification, Injunctive relief. [251]

3. 3- ENFORCEMENT OF AWARD AND ADDITIONAL FACILITY RULES

ENFORCEMENT OF AWARD: Conventionally, many difficulties are faced for enforcement of awards where "awards against the state are enforced, in domestic courts of a country. Domestic courts usually refuse to rule on the sovereign acts of states , whether for reasons of state immunity, or non-justifiability. Enforcement structure of the ICSID Convention through investment treaties allow individual investors to seek enforcement of an investment arbitration award against assets of the respondent state before the domestic courts of any state. The coercive force of an investment arbitration award is thereby supported by the authority of a large number of states to enforce awards within their territory, in most cases states voluntarily comply.

If a state refuses to comply with an award, the ICSID Convention provides for enforcement structure and "investor can seek enforcement of an award by a domestic court in any state party to the convention. Considering the this fact Chapter 11 of NAFTA refers for purposes of enforcement of the award to the ICSID Convention.

Under ICSID Rules, the Chapter 11 provides that an ICSID award has the force of a final court judgment of a state party under its domestic law and that the award cannot be reviewed by domestic courts. Article 53 of ICSID convention narrated that award is not subject to appeal and it post award remedies available under this convention can only be availed against the award. Thus, an ICSID award is enforceable, independent of the New York Convention." [252]

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250 Schlosser, Common Law Arbitration and German Arbitration Law" by Right and Remedy in, 4(1) Int'l.Arb. 27 (1987).

251 Redfern and Hunter, International Commercial Arbitration by, Para 8-14.

252 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

Under the Convention, the sole role assigned to domestic courts relates to the recognition and enforcement of ICSID awards. This role is one of judicial assistance intended to promote the effectiveness of such awards. Recently, courts in the United States and in France have been given the opportunity to consider these basic features of the Convention. As already mentioned that , in the United States, Maritime International Nominees Establishment v The Republic of Guinea (MINE v. Guineal touches upon issues concerning the rule of abstention, but falls short of considering all its implications. In contrast, the French decision B&B v. Congo neatly implements the provisions of the Convention concerning the recognition and enforcement of ICSID awards. [253]

Award rendered by the ICSID tribunal should be recognized enforced by the national courts of contracting state if it was final judgment of its courts. Contracting state may enforce it through federal constitution of federal court. The court designated to enforce the award shall be provided with certified copy issued by Secretary General of the ICSID Centre by the party seeking the enforcement. It has been made obligatory for the contracting state to inform the Secretary General of ICSID of the designated court or other authority responsible for enforcement of ICISD award under article 54 (2) of the convention. Execution process shall be governed by the laws of state where execution is being sought as provided by article 54(3) of the convention.

"ICSID awards are subject to a special regime for recognition and enforcement contained in Article 54 of the Convention.[254] All Contracting States are required to recognise the award and enforce its pecuniary obligations as if it were a final judgment of the court of the state. This obligation exists independently from whether or not the state in question or its nationals were a party to the proceedings. While the obligation to recognise awards is not limited to any form of award the facilitated enforcement procedure only covers the pecuniary obligations. Orders for specific performance or other non pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement." [255]

Contrary to these systems review is not possible under the special procedure foreseen by the ICSID Convention. Article 54 does not contain any grounds upon which recognition and enforcement can be denied. Those grounds can only be raised within the framework of an annulment procedure. If this is not done, it is sufficient for a party seeking recognition and enforcement to furnish a copy of the award certified by the Secretary General to the competent authority as named by the state. This "internationalized system of award enforcement gives

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253 Campbell McLachlan , Laurence Shore ,Matthew Weiniger, "International Investment Arbitration: Substantive Principles", C.L.J. 664 2008 and reviewed Kate Parlett

254 Schreuer, "Commentary on the ICSID Convention", 14 ICSID Rev-FILJ 46 (1999) 100.

255 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08 and see "Comparative International Commercial Arbitration," Para 28-128 (Edition 2003) Kluwer Law Arbitration.

investment arbitration a coercive force beyond that of other forms of international adjudication in the public sphere. No human rights treaty allowing individual damages claims authorizes the enforcement of awards by domestic courts. Even judgments of the ICJ, although binding on states that consent to the Court's jurisdiction, can be enforced only by the UN Security Council [256] a successful state therefore is dependent on the support of a majority of Security Council members, including the five permanent members, to obtain enforcement. Under investment treaties, by contrast, a successful investor can seek enforcement against assets of the respondent state in the courts of as many as 165 states. Judicial supervision is restricted in investment arbitration under ICSID." [257]

"In practice most awards are performed voluntarily as generally a cost/benefit analysis is in favour of compliance. The damage to the international reputation of the state following from non-compliance and the effect that can have on further investment is, in most cases, greater than the amounts to be paid under the award. In the past the Secretary General of ICSID has officially communicated with recalcitrant parties and reminded them of their obligation."[258]

ADDITIONAL FACILITY RULES: The Additional Facility is not a separate institution or even a physically separate part of ICSID. The same Secretariat serves both. "Under Article 25(1) of the ICSID Convention the host State and the investor's State of nationality must be Contracting States. If either of these States is not a party to the Convention, the requirements *ratione personae* are not fulfilled and there is no jurisdiction. If only one party fulfils the requirements *ratione personae* the Additional Facility offers a method of dispute settlement. The Administrative Council of ICSID adopted the Additional Facility Rules in September 1978. 41 The Additional Facility provides for dispute settlement in certain situations where ICSID's jurisdiction does not exist because some requirements under the Convention have not been met. The conditions for access to the Centre under the Additional Facility are described in Art. 2 of its Rules:

Article 2
Additional Facility

The Secretariat of the Centre is hereby authorized to administer, subject to and in

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256 Charter of the United Nations, 26 June 1945 [1945]. D.J. Harris, Cases and Materials on International Law (5th edn, 1998), at 989.

257 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

258 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08 and "Commentary on the ICSID Convention", (1999) 62.

accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:(a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute it not a Contracting State.

Under the Additional Facility, only one party must fulfill the requirements *ratione personae.* In other words, either the host State or the State of the investor's nationality must be a Contracting Party to the Convention." [259] Arbitrations under the aegis of the ICSID Additional Facility are governed by the Arbitration (Additional Facility) Rules (the *Additional Facility Arbitration Rules*)[260]

Most of the provisions that apply to Additional Facility arbitrations are identical or very similar to those that apply to ICSID Convention arbitrations. Focus will be on the rules under Additional Facility Rules that bear difference with normal arbitration proceeding under ICSID. "A party's access to the ICSID Additional Facility is conditional on the Secretary-General's specific approval."[261] Under Additional Facility Rule 2, the Additional Facility may administer three categories of proceedings:

(A) "conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;

(B) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and

(C) Fact-finding proceedings."[262]

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259 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf and see Broches,A., The 'Additional Facility' ICSI), 4 Yearbook Commercial Arbitration 373 (1979). ; accessed on 8/11/08

260 The Additional Facility Arbitration Rules www.worldbank.org/icsid/amend.htm.

261 http://ita.law.uvic.ca/documents/MetacladAward-English.pdf ; accessed on 8/12/09

262 http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf ; accessed on 8/11/08

Additional Facility Rule 4(3) states where the relevant dispute does not arise directly out of an investment, the Secretary-General's approval depends on whether dispute contains "features which distinguish it from an ordinary commercial transaction".

As per Additional Facility Rule 4(4), Secretary-General's approval may also be made conditional on the parties' undertaking if the Secretary-General deems it "likely" that a tribunal will decide nature of the case.

Pursuant to Additional Facility Arbitration Rule 4, "Secretary-General will register the request if he or she is satisfied"[263] that it "conforms in form and substance to the provisions of Article 3." Article 3 requires that an Additional Facility request:

(a) "Designate precisely each party to the dispute and state the address of each;
(b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration;
(c) Indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility;
(d) Contain information concerning the issues in dispute and an indication of the amount involved, if any; and
(e) State, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request."[264]

"Additional Facility has attained importance in the context of the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States of America as discussed in pervious chapter . The NAFTA contains the consent of the Contracting Parties to submit to ICSID or its Additional Facility."[265] This possibility arbitration under ICSID under additional facility is particularly important in the context of cases brought "under Chapter 11 of the North American Free Trade Agreement (*NAFTA*), because the US is an ICSID Contracting State"[266] but Canada and Mexico are not. Although ordinary ICSID arbitration under the ICSID Convention is thus not available between NAFTA States, Additional Facility arbitration is available, on the one hand, between US investors and Canada or Mexico and, on the other hand,

263 Submitted to University of Melbourne on 2009-12-21

264 http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf

265 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf; accessed on 8/11/08

266 http://www.harvardilj.org/attach.php?id=188 ; accessed on 8/11/08

"between Canadian or Mexican investors and the US. (In disputes between Canadian investors and Mexico or between Canada and Mexican investors,"[267] only UNCITRAL arbitration is available.) Article 26 of the Energy Charter Treaty also provides for Additional Facility arbitration among other dispute resolution methods.

Article 19 of the Arbitration (Additional Facility) Rules provides that arbitral proceedings under the Additional Facility may be held only in countries that are parties to the New York Convention; otherwise, the awards would be unduly vulnerable at the enforcement stage. Insertion of said article 19 clarify that ICSID Convention's special self-contained provisions "on recognition and enforcement of awards are not applicable to Additional Facility awards"[268]. AFR awards should thus be equated with ordinary international commercial arbitration awards such as those rendered under the rules other institutions. Amendments introduce to ICSID convention's rules and regulations which effects the Additional Facility Rules were made effective since 1 January 2003. Article 44 of the Convention clearly states that arbitration "proceedings are governed by the rules in force at the time the parties consent to ICSID arbitration."[269]

As sated above those arbitrators in ICSID Additional Facility proceedings are appointed and challenged through processes largely similar to those in Convention arbitrations. Additional Facility Arbitration Rules 8 and 15 makes it clear that they must meet the same basic personal qualifications; While Rule 13 of AFR requires same declaration as arbitrators selected under the Convention. Identical provisions also govern the procedures for filling vacancies on tribunals under rule 16 to 18 of AFR, with the exception that the Chairman of the Administrative Council is not limited to Panel of Arbitrators if he or she must appoint a replacement arbitrator.

The Additional Facility Rules differ from the Arbitration Rules with respect to applicable law. Additional Facility Arbitration Rule 54 directs the tribunal to apply the substantive law selected by the parties or "to decide the dispute ex aequo et bono if the parties have so decided."[270] In contrast, ICSID Convention awards are subject to the choice of law provisions of Article 42 of ICSID. "The Additional Facility is available if only one of the parties meets the *ratione*

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267 http://www.unctad.org/en/docs/edmmisc232add1_en.pdf; accessed on 8/11/08

268 http://www.unctad.org/en/docs/edmmisc232add1_en.pdf; accessed on 8/11/08

269 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08 and 1 ICSID Reports 157 (1993).The prior Arbitration Rules adopted by the ICSID Administrative Council, which were effective 26 September 1984.

270 http://www.thaifta.com/ser_icsid.pdf; accessed on 8/01/09

personae requirements of the ICSID Convention. If both, the host State and the investor's State of nationality are not parties to ICSID, the Additional Facility will not be available." [271]

It is evident from the discussion that ICSID convention created concept of neutral and delocalized arbitration tribunal to resolve the international investment disputes rather than relying on diplomatic efforts and on judges of local courts. Jurisdiction of ICSID Centere extends to "a legal dispute which: arises out of an investment; involves a Contracting State and a national of another Contracting State and consent of parties in writing to ICSID."[272] It would be right to say, in practice, consent to arbitrate is available : arbitration agreement, or by enacting a national law or through bilateral treaty between states. Arbitral tribunal under ICSID convention is vested with exclusive jurisdiction for determination and tribunal is sole judge of its own competence. Recent amendments to the ICSID Arbitration Rules in 2006 provide a party of filing a request for interim measures. In case of disagreement between parties on issue of applicable law, the tribunal shall apply the law of the host State and applicable rules of international law. ICSID convention has come up with effective approach to enforce the award in any of contracting state. It has been made clear that where ICSID convention can not referred, AFR of ICSID may be availed to arbitrate the investment dispute.

271 http://www.unctad.org/en/docs/edmmisc232add3_en.pdf Lucy Reed, Jan Paulsson and Nigel Blackaby, "Guide to ICSID Arbitration" pp. 96 – 110- Kluwer Law International (Edition 2004).

272 http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_002.pdf; accessed on 8/10/09

CHAPTER 4

REMEDIES AFTER AWARD AND APPLICABLE PROCEDURE

4.1 Supplementation and Rectification

4.2 Interpretation

4.3 Revision

4.4 Annulment

4.4.1 Grounds for Annulment

A) Manifest access of power

B) Corruption of an arbitrator

C) Departure from fundamental rules

D) Failure of Reasoning

E) Improper Constitution of Tribunal

4.5.2 Procedure for Annulment

4: POST AWARD REMEDIES AND APPLICABLE PROCEDURE

In chapter three, the arbitration proceeding and enforcement of the award under ICSID the convention has been discussed. It is well known fact that States have historically emphasized the importance of the finality of arbitral awards. This can be seen in the negotiations during the 1960s leading to the ICSID Convention.[273] "The most characteristic feature of ICSID arbitration and reason for its success is its internal mechanism for reviewing arbitral awards."[274] In contrast with non-ICSID awards that are generally capable of being challenged before domestic courts on the grounds provided by national arbitral law, ICSID awards can only be annulled for a limited number of grounds by "a specific ad hoc committee of three persons, nominated by the Chairman of the Centre."[275] International investment arbitration under ICSID is to promote the settlement of disputes in speedy and most effective way. Right to appeal in domestic courts has been restricted by convention to ensure the finality of award and it reliability in its infrastructure.

"The most distinctive feature of ICSID arbitration is the self-contained and exhaustive nature of its review procedures. Unlike other arbitration regimes, control is exercised by internal procedures rather than by the courts."[276] Before looking into the mechanism of post award remedies it is necessary to understand the historical emphasis on the finality of awards, its definition, and need for consistency and correctness in the context of investor-state arbitrations. Chances of error and mistakes still remains their and non-availability of appeal can be destructive for concept of justice. It is worthwhile to mention that explosion in the number of investor-state arbitrations, and the decisions arising from those arbitrations, has lead to a more concerted analysis by commentators in relation to the fundamental principles underlying the investor-state arbitration process. In particular, commentators have debated whether the

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273 Jason Clapham , Finality of Investor-State Arbitral Awards: *Journal of International Arbitration*, 2009 Volume 26 Issue 3- pp. 437 - 466 .

274 Submitted to University of Melbourne on 2008-03-05 ,W. B. Hamida , "Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control", *Journal of International Arbitration*, 2007 Volume 24 Issue 3) pp. 287 - 306 and Annulment of ICSID Awards (E. Gaillard & Y. Banifatemi eds., 2004).

275 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf

276 http://www.dbpia.co.kr/view/is_view.asp?pid=17&isid=46117&TopMenu=2&TopMenu1=1&viewFlag=3 and "Comparative International Commercial Arbitration", Para 28-88 And

principle of "finality" or "consistency and correctness" should take priority in the event of a conflict.[277]

States have historically emphasized the importance of the finality of arbitral awards. The initiative for the Convention originated in the World Bank. A Working Paper was produced in June 1962 for ISCID convention which contained the first draft of the Convention. This draft was considered by the Executive Directors of the Bank and, on August 9, 1963, the Bank produced the First Preliminary Draft and Annotated First Preliminary Draft. The delegates rejected a proposal to provide for a right of appeal to the ICJ, and also rejected a right to apply to have for annulment as award disclosed a "manifestly incorrect application of the law." [278]

The term "finality" is used in convention as meaning: "if the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award, good, bad or indifferent, is final and binding on the parties." [279] "The decision of the tribunal is the final word on the facts and law of the case before it." "Finality" means a "lack of appeal on the merits of the dispute."[280]

Two important points should be noted about the definition of "finality" adopted in this article, namely:

a. it is submitted that whether or not a domestic court enforces an award does not effect the finality of the award. As noted by Delaume: at the stage of recognition, the scope of judicial review is limited to deciding whether the award should be granted or denied recognition. In other words, "a denial of recognition may affect the effectiveness of the award but has no bearing upon its validity";[281]
b. "Annulment" of an award and an "appeal" from an award are distinct concepts. It is submitted that an annulment process favours finality over consistency and correctness, whereas providing a right of appeal favours consistency and correctness.

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277 Ian Laid & Rebecca Askew, "Finality versus Consistency:" , 7 J. App. Prac. & Process 285, 286 (2005).

278 Christoph H. Schreuer, "The ICSID Convention: A Commentary", 891–94 (Edition2001).Kluwer Law .

279 Alan Redfern & Martin Hunter, "Law and Practice of International Commercial Arbitration" 432, 433 (4th ed. 2004).

280 William H. Knull, III & Noah D. Rubins, "Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?", 11 Am. Rev. Int'l Arb. 531 (2000).

281 Submitted to Kozep-europai Egyetem on 2010-03-29 and Georges R. Delaume, Reflections on the Effectiveness of International Arbitral Awards, 12 J. Int'l Arb. 5 (No. 1, 1995).

"Consistency and Correctness" means "that the law has been applied correctly to the facts"[282] and tribunal has reached the "right" decision on the merits. As noted by Schreuer , in order to obtain consistency and correctness several layers of control (such as by way of appeal), may be required.[283] Convention emphasizes the importance of the finality of awards in preference to concerns about consistency and correctness. The Convention emphasizes the importance of the finality of awards by establishing an autonomous, self-contained dispute resolution system which prevents challenges to ICSID awards in the national courts of Contracting States.[284]

To protect interest of party against which award is rendered, with out sacrificing the finality of the award, ICSID convention its self provide some post award remedies to rectify the defects and errors which are apparent in award. "ICSID convention provides for several possible remedies after an award has been rendered. These are supplementation and rectification (art. 49(2)) interpretation (art. 50), revision (art. 51) and annulment (art. 52). Of these, annulment has turned out to be by far the most important."[285] Considering the importance of annulment as stated above annulment of an award and an appeal from an award are distinct concepts. It is submitted that an annulment process favours finality over consistency and correctness, whereas providing a right of appeal favours consistency and correctness. Annulment changes the rights and liabilities of the parties decided in the award.

Post award available remedies upon the request of one or both parties are of four types;

1. Supplementation and rectification,
2. Interpretation,
3. Revision and
4. Annulment.

"Rectification, interpretation and revision are not remedies in a true sense as they do not require the referr of a dispute to a different decision making body. The ICSID Convention provides that rectification can on be granted from the original tribunal. The two other requests, interpretation and revision, should preferab be handled by the original tribunal which is in the best position to grant those remedies. If that tribunal is f any reason no longer available, then requests for interpretation and revision can be referred to a new tribun constituted in accordance with the procedure adopted for the original tribunal. In both cases enforcement

282 Submitted to University of Melbourne on 2009-12-21

283 Ian Laid & Rebecca Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?", 7 J. App. Prac. & Process 285, 286 (2005).
284 Hans van Houtte, Article 52 of the Washington Convention, in Annulment of ICSID Awards 11 (Emmanuel Gillard & Yas Banifatemi eds., 2004).
285 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

the award can be stayed while a decision is pending and the application for revision leading to an automat preliminary stay."[286][287] These remedies are made subject to time limitation. Wile remedy of interpretation not subject to the time limitation. No further remedies are available against ICSID awards and these a regarded as exclusive remedies under ICSID convention itself are not subject to any other remedy.

4.1 Supplementation and Rectification

Original tribunal has been given the power to rectify the award for minor technical errors and to supplement the award in case inadvertent omissions. This remedy of supplement and rectification in case of minor technical errors and inadvertent omissions has been made available in Art.49(2) as follows;

> *The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may, after notice to the other party, decide any question which it had omitted to decide in the award and shall rectify any clerical, arithmetical or similar error in the award.*[288]

The remedy mentioned in article 49(2) is designed to take care of the inadvertent omissions and minor technical errors. Substantive review of the decision is not aimed under this article. It is to invest the tribunal with a power "to correct mistakes that may have occurred in the award's drafting in a simple way.

Words "*in the award*" makes it clear that rectification and supplementation is available only in respect of awards and this remedy is not applicable to decisions preliminary to awards. In particular, decisions on jurisdiction and on provisional measures are not subject to this procedure.

In case of a clerical, arithmetical or similar error rectification is considered an appropriate remedy. A rectification is made mandatory if such an error is pointed out to the tribunal. Supplementation is regarded as discretionary remedy. It relates to an omission in the award. As stated in Article 48(3) of the Convention the award shall deal with every question submitted to the tribunal. Supplementation will be useful where the omission is due to an oversight on the part of the tribunal which is likely to be corrected by it once this oversight is pointed out. But supplementation is unlikely to be useful where the omission is the result of a considered and

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286 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08

287 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 28-89 (Edition 2003) Kluwer Law Arbitration.

288 ICSID Convention

deliberate decision by the tribunal. In such a situation a request for annulment may be the appropriate course of action."[289]

Rectification of clerical, arithmetical or similar errors, as well as decisions on omitted issues, can be requested from the tribunal by any party within 45 days of the award being rendered. According to Rule 49 the request has to be directed to the Secretary General and must state in detail what error should be rectified or what question has been omitted. Rectification may not be used to modify the award and the other side must be heard before the remedy is granted.[290]

"Supplementation and rectification is dependant upon a request of a party to the case. The tribunal may not issue such a decision on its own initiative. The request must be directed to the secretary-general of ICSID saying what points it wishes to have supplemented or corrected.

There two limitations set for this remedy;

(1) Request should be made with 45 days of the dispatch to the parties of the original award.

(2) It can be awarded by the tribunal that rendered the award (means original tribunal)."[291]
In case original tribunal is not available desired results may be achieved through other available remedies only interpretation, revision or annulment.

An ICSID tribunal corrected two minor clerical errors as well as a mistake in the identification of a witness, when claimant submitted a request for rectification of the award on 30th March 2000. Award was rendered on 17 February 2000 in case of CDSE v. Costa Rica. The "Respondent was given an opportunity to file written observations on the Request. The Tribunal gave its decision on 8 June 2000. But it refused to correct an alleged misstatement of a party's position on a point of law.[292]

"All rules relating to an award, as reflected in Arts. 48, 49, 50, 51, 52, 53 and 54 also apply to the rectification or supplementation. The time limits for a request for revision or annulment do not start to run until a decision on a request for rectification or annulment has been rendered as tribunal's decision on a request for rectification or supplementation has certain substantive and procedural consequences. The rectification or supplementation becomes part of the award."

4.2. INTERPRETATION

In every domestic legal system, superior courts of the country are invested with power to interpret the law and this power to interpretation to clarify the meaning is part of judicial

289 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

290 Broches, "Convention on the Settlement of Investment Disputes", XVIII YBCA 627 (1993) 693;
291 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/12/09

292 CDSE v. Costa Rica, Rectification of Award, 8 June 2000, 15 ICSID Review-Foreign Investment Law Journal 205 (2000).

authority. If there is any ambiguity in language or meaning of the award of ICISD, similar power of interpretation is exercised by the ICSID tribunal to settle the dispute pertaining to such disputed meaning of the award. "Purpose of the procedure for interpretation is to clarify the meaning of the original award. Therefore, it seems logical to try to obtain an explanation from the tribunal that gave the award. If this is not possible, a new tribunal will be constituted for the purpose of the interpretation. When constituting this new tribunal, it may be wise to appoint some or one of the arbitrators who served on the original tribunal. The interpretation settles disputes between the parties concerning the meaning of an award. No time limitation has been set for a request of interpretation. An interpretation is to be treated like an award for purposes of recognition and enforcement."[293] This post award remedy is available under Article 50 of the Convention as follows;

> *(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.*
> *(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.*[294]

Article 50 has set certain requirements for availability of this remedy under auspices of ICSID. One of the requirements is that there must be a specific dispute concerning the meaning or scope of the award. It may be understood that the dispute must have some practical and not merely theoretical relevance. Certain degree of communication between the parties can be taken as evidence of existence of a dispute. General complaints about the award's lack of clarity would not be admissible as dispute subject to interpretation.

Secondly, interpretation sought must relate to an award. Preliminary decisions such as decisions on jurisdiction or on provisional measures are not subject to this procedure or article unless it is eventually incorporated into the award.

Thirdly, only party to the arbitration has been given the right to request for interpretation. Request must come from one of the parties to the arbitration. The tribunal authority to give an interpretation on its own initiative has been restricted and this remedy in available on request of

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293 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08
294 ICSID Convention

party to the arbitration .Precise points on which an interpretation is sought must be stated in request directed to Secretary General of ICSID.

Unlike supplement and rectification, revision and annulment of the award, no time limit is set for an application requesting an interpretation. Therefore, a "request for interpretation may be submitted at any time after the award has been rendered. It also means that successive requests for interpretation may be made at different times without any limitation.
Reading of article 50 suggests that it does not state that the decision on interpretation shall become part of the award. While Article 53(2) provides that for the purposes of the Section on "Recognition and Enforcement of the Award", "award" shall include any decision interpreting (under Arts. 50), revising or annulling the award pursuant to Articles 50, 51 and 52. Therefore, for purposes of recognition and enforcement, the award will be binding as interpreted in accordance with Art. 50. On the other hand, the decision on interpretation cannot itself be the object of supplementation and rectification, interpretation, revision and annulment."[295]

Under Article 50(2) power to stay the enforcement of award submitted for interpretation is available to tribunal. If possible, the interpretation should be given by the original tribunal. If not possible, new arbitrators should remain faithful to the considerations and approach of the original tribunal. Their task is to ascertain the meaning of the original award and not to rewrite it."[296]

4.3. REVISION

In sub-continent High Courts were granted the power of revision under section 115 of Civil Procedure Code 1908 where subordinate court make error in assumption or non assumption of their there jurisdiction. Revision is a remedy against the decision of subordinate courts to rectify the jurisdiction errors. When appeal is not allowed this discretionary power of court may be exercised. As it made clear that award rendered by ICSID tribunal is non appealable in domestic courts of the country, this remedy of revision is provided under the Convention to take account of the newly discovered facts. If possible, the revision should be made by the original tribunal. A revision of the award is only possible if a fact which could decisively affect the award was only discovered after the award was made and the lack of knowledge is not based on negligence. [297]While the new facts on bases of which revision is applied must be decisive and

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295 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08
296 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf ; accessed on 8/11/08

297 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 28-91 (Edition 2003) Kluwer Law Arbitration.

application must be made within three years of the award and within 90 days of the discovery of the new facts.

Article 51 of the ICSID Convention provides for the revision of awards as follows;

> *(1) "Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant' s ignorance of that fact was not due to negligence.*
>
> *(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.*
>
> *(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.*
>
> *(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request."* [298]

Like Interpretation under article 49 of the convention, the request for revision under this article must relate to an award. "Revision involves a substantive alteration of the original award on the basis of newly discovered facts which should be unknown when the award was rendered. Therefore, this remedy of revision is not available in respect of decisions preliminary to awards such as a decision on jurisdiction or on provisional measures unless these are eventually incorporated into the award."[299]

One party or both parties should made request for revision as tribunal may not revise the award on its own initiative. This written request must state the precise points on which a change is sought in the award. Application for revision should specify the new facts which are to affect

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298http://www.unctad.org/en/docs/edmmisc232add7_en.pdf and see Article 51 , ICSID Convention
299 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

the award decisively. In addition, the application must contain evidence that these facts were unknown to the applicant and to the tribunal and that the applicant's ignorance was not due to negligence. It means burden to proof that it did not commit any negligence is upon the applicant.

Revision of the award is contingent upon the discovery of new facts capable of affecting the award decisively. These new facts should be matter of fact and not of law. The new fact is considered as decisive if it would have led to a different decision had it been known to the tribunal. This new fact, that affects the legal position of the parties in an important way, may relate to jurisdiction or to the merits. A fact may be regarded as decisive even if it is not reflected in monetary terms in the award. Sometimes newly discovered "fact could have led to a finding of lawfulness or unlawfulness of the acts of one of the parties. Theses decisive fact or facts must have been unknown (1) to the tribunal and (2) to the party making the application when the award was rendered. A party's failure to draw the tribunal's attention to a decisive fact where it had the opportunity to do so at any time before the award's signature results in the inadmissibility of an application for revision. In addition, the applicant's ignorance of the newly discovered fact must not be due to negligence."[300]

Dual time limit has been imposed by the convention;

(1) A party must make its request within 90 days of the discovery of the new fact.

(2) There is an absolute cut-off for applications after three years from the date on which the award was rendered

Upon the application's registration a request to stay the enforcement of award is granted provisionally where the party submitting an application for revision has requested for it. "Once the tribunal is constituted, the stay of enforcement will be confirmed or denied at the tribunal's discretion.

Original tribunal is in the best position to decide whether the fact adduced by the applicant was unknown to it, therefore, the request for revision to the original tribunal is the better solution. If the original tribunal is no longer available in its entirety, a new tribunal will have to be constituted"[301] as to make this remedy effective when it available to any party or parties.

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300 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

301 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

4.4. ANNULMENT AND GROUNDS FOR ANNULMENT

"Award rendered by the ICSID tribunal is considered as final and"[302] domestic courts can exercise their authority or power to review the awards. Where there no remedy of review is available against this reward, probability of mistakes and errors make the finality of award doubtful. Such doubtfulness is redressed by provision of the remedy of annulment under article 52 of the ICSID convention. Annulment of the award is possible only on the basis of a limited number of serious grounds upon the request of a party. Awards and their parts are subject to annulment. It is purely discretionary remedy. If request for annulment is not made within its time limit it will amount to waiver of annulment. A party may to waive its right explicitly.
"The annulment proceedings under Article 52 are a distinct feature of ICSID arbitrations. Under all other arbitration regimes, the review of an award in challenge proceedings is effected by state courts, in general those of the place of arbitration. Article 52 provides for internal control through a so-called *ad hoc* committee. This internal ICSID control of the award is intended to avoid protracted and long lasting proceedings in state courts. Furthermore, it takes account of the special factual situation in state contracts. The state party would not want to submit to the jurisdiction of a different state and the private party may not trust the courts of the host state."[303]

Annulment under article 52 does not amend or rectify the award but removes it. Concept of annulment is confused when it is tried to understand along with concept of appeal. It has different approach from an appeal. Ultimate result of annulment is the legal destruction of original decision or award rendered by the tribunal without replacing it while previous decision in appeal may be modified. It is worthwhile to mention that "ad hoc committees acting under the ICSID Convention may not amend or replace the award by its own decision on the merits. After annulment, the dispute may be resubmitted to a new tribunal. Recent practice indicates that there is some discretion in a decision on annulment. Annulment is only concerned with the basic legitimacy of the process of decision but not with its substantive correctness. Therefore, annulment is based on a very limited number of fundamental standards."[304]

More than forty years after the conclusion of the Convention on the Settlement of Investments Disputes between States and Nationals of Other States, a number of rules concerning the jurisdiction of ICSID tribunals and the nature of ICSID's internal annulment mechanism control remain controversial.

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302 Submitted to University of Melbourne on 2009-12-21

303 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08.

304 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

Decisions preliminary to awards are not the subject matter of annulment unless they are incorporated into the award .Tribunal had made a decision on jurisdictional in SPP v. Egypt case upholding its competence. Egypt filed an application for annulment of the preliminary decision. The Acting Secretary-General declared that the decision on jurisdiction was not an award in the sense of Art. 52 of the Convention. So request fro annulment was turned down.[305]

It worthwhile to note from practice of the ad hoc committees that when annulment of the award is requested under article 52 , ad hoc committees may annul the award partially without annulment of whole of the award . This power was exercised in case of in MINE v. Guinea. Guinea's request for partial annulment was accepted though no request for annulment of that portion was made by MINE. [306]

While interpreting or revising the award tribunal is not empowered to annul the award .Decision made by tribunal upon the request of annulment is final and can not made subject of further annulment. The strict standards applied by the first *ad hoc* committees in *Klockner v Cameroon* and *Amco v Indonesia* have raised criticism as to whether the annulment proceedings were not turned into a means of reviewing the awards on the merits. "Irrespective of whether the criticism is justified and of the control actually exercised, all *ad hoc* committees have emphasised the fact that the annulment proceedings are not supposed to be an appeal. They are limited to controlling the legitimacy of the decision making process."[307]

Authority of Ad hoc committees to annul the award raised conflicting views among the jurists. Award was annulled "in the case of Klockner v. Cameroon, which was based on the conception that ad hoc committee should annul the award in case of default.[308]

While in Amco v. Indonesia the ad hoc Committee refused to annul where the Tribunal had reached the correct result though on the basis of the wrong legal system. It was based on the flexible approach as minor fault was not made base of annulment."[309] While in case of MINE v.

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[305] Spp v. Egypt, Decision on Jurisdiction 11, 14 April 1988, 3ICSID Reports 131.

[306]) MINE v. Guinea. Decision on Annu/me111, 22 December /989, 4 ICSID Reports 82.
9 At p. 85.

[307] http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08 and Schreuer, 13 *ICSID Rev-FILJ* 478 (1998) 529, paras 36 *et seq*; Arnoldt, *Praxis des Welthandelsübereinkommens*, 225

308 Klockner v. Cameroon. Decision on Annu/ment. 3 May /985. 2 ICS/D Reports /62./4

309 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf ; accessed on 8/11/08

Guinea, the ad hoc Committee restricted its authority to the service of material justice. It means that tribunal may refuse to exercise its authority to remedy procedural .[310]

The ad hoc committee discussed "briefly its role within the annulment system established by Article 52 of the ICSID Convention."[311] It underlined two observations: a general observation concerning the nature of the ICSID annulment system and another relating specifically to the ground for annulment raised by the respondent.

As for the nature of the annulment mechanism, the committee noted "that an annulment proceeding is different from an appeals procedure and that it does not entail the carrying out of a substantive review of an award. The ad hoc committee observed that grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively and that an ad hoc committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule provided by Article 52."[312]

4.4.1 GROUNDS FOR ANNULMENT

Doubtfulness of award due to probability of errors and mistakes has been redressed by provision of the remedy of annulment under article 52. This remedy was restricted by describing the exhaustive list of grounds of annulment. These grounds for annulment are listed in "Art. 52(1) of ICSID Convention:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based."[313]

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310 Mine v. Guinea, , 22/12 /989. 4 Reports 86.

311 http://www.investmentclaims.com/decisions/Mitchell-Congo-Annulment_Decision.pdf; accessed on 8/11/08

312Mitchell v. DRC, Decision on Application for Annulment, & *Journal of International Arbitration*, 2007) pp. 287 – 306 and http://www.investmentclaims.com/decisions/Mitchell-Congo-Annulment_Decision.pdf

313http://typo3.univie.ac.at/fileadmin/user_upload/int_beziehungen/Personal/Publikationen_Reinisch/role_precedents_icsid_arbitrationaayb_2008.pdf and as per Article 52 of ICSID Convention 1965.

In the aforesaid Article 52(1), it is indicated that annulment is only possible on one or more of the following grounds: (a) "improper constitution of tribunal (b) manifest excess of powers, (c) corruption of an arbitrator (d) serious departure from a fundamental rule of procedure (e) failure to state reasons."[314]

The ad hoc committees have to give a specific content to these grounds for annulment. They have already done so in nine cases: *Klöckner v. Cameroon* ; *Amco vIndonesia* ; *MINE v. Guinea* ; *Vivendi v. Argentina* ; *Wena Hotels v. Egypt* ; *Consortium RFC v. Morocco* and *CDC Group plc v. Republic of Seychelles.* Six instances are actually pending before ICSID ad hoc committees: *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*; *CMS Gas Transmission Co. v. Argentine Republic* ; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador)* ; *Hussein Nuaman Soufraki v. United Arab Emirates*; *Azurix Corp. v. Argentine Republic* ; and *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru.* [315]

"Right to have the award controlled in annulment proceedings cannot completely be waived in advance. Not all grounds which justify an annulment primarily protect the interest of the parties. Some of them, for example the impartiality of the arbitrator, also serve to protect the integrity of the arbitration process as such and are therefore not at the disposition of the parties. The parties are still obliged to raise the grounds of challenge as early as possible. A party which knowingly fails to challenge a serious procedural irregularity before the tribunal may be barred by Rule 27 from seeking annulment on that basis."[316] Remedy of "annulment is restricted to the five grounds as narrated in Art. 52(1). The ad hoc committee is not empowered to annul the award on other grounds. Therefore, every request for annulment must contain one or several of these grounds. No party is allowed to present new arguments on fact or law which were not raised during the original proceeding. Party requesting the annulment usually claims the occurrence of more than one ground for justifying annulment. Authority of the ad hoc committee is restricted to the grounds raised by the party in it request for annulment."[317]

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314 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf

315 Walid Ben Hamida , Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control, *Journal of International Arbitration*, (Kluwer Law International 2007 Volume 24 Issue 3) pp. 287 - 306

316 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/08 see "Comparative International Commercial Arbitration", Para 28-88

317 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf ; accessed on 8/11/08

"Most of the grounds mentioned are also found in the provisions for control of awards contained in other arbitration regimes. The grounds mentioned in Article 52 are, however, narrower in that not every excess of power or departure from a rule of procedure is sufficient to annul an award. By contrast the ICSID Convention requires a qualified form, or a manifest excess of powers. Furthermore, violation of public policy is not mentioned as a separate ground for annulment. Proper constitution of the tribunal and corruption of an arbitrator have been of no practical importance to date. The ICSID secretariat manages the appointment process carefully and the arbitrators appointed are usually of such quality that these grounds do not arise."[318]

a) Improper Constitution of Tribunal

Improper constitution of the tribunal has been described as first ground to annul the award under Art. 52(I)(a) of ICSID convention .[319]

Nationality and qualification of arbitrators may create the reason to challenge the ward for annulment under the aforesaid Article. An arbitrator or arbitrator may be disqualified under Chapter five, [320] Article 57 and 58 of the ICSID convention. When this remedy is available to challenge the appointment of arbitrator to the party to the dispute, on later stage same can not be alleged to annul the award. In actual practice, this ground, improper constitution of a tribunal, has never been alleged. Therefore I am unable to provide any case law herein.

b) Manifest Excess of Powers

Manifest excess of powers has been given second place among the grounds for annulment under article 52 (1)(b). This ground for annulment creates two requirements, there must be excess of power and it should be manifest. "It means that excess of power must apparent. An excess of power is apparent when can no be checked with minor effort.

A departure from the terms of the agreement, surpass from the limits of its jurisdiction and non-application of the law agreed by the parties create grounds for annulment. Failure to exercise an existing jurisdiction also constitutes an excess of powers. Failure to apply the proper law must be distinguished from a mere error of law."[321]

Question of jurisdiction is decided "in accordance with article 25 of the convention which says

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318 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/09

319 Article 52(1)a of ICSID Convention

320 Chapter V of ICSID Convention ,Replacement and disqualification of conciliators and arbitrators ,

321 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf; accessed on 8/11/08

as follows:

"(1) 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"."[322]

if any of the requirements described in aforesaid article is not met, it means decision in this case would be regarded as an excess of power .Article 25 requires that dispute should be (1) legal (2) "directly out of an investment.For the parties certain conditions have also been created that one must be a Contracting State and the other a national of another Contracting State. If these requirements are not met there is no jurisdiction and a decision on the merits would be an excess of powers.

Failure to exercise available jurisdiction also constitutes an excess of powers. A decision stating the lack of competence is regarded as an award. Such an award may be the subject of annulment. Where an award is declared on the merits but it declined jurisdiction on certain points, this may also give rise to a claim of excess of powers."[323]

Violation to deal with appliance law agreed by the parties amounts to an excess of powers. Art. 42(1) of the ICSID Convention contains the provision regarding the law applicable to the dispute as follow:

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

The provisions on applicable law are part of the framework for the tribunal's activity. A careful distinction must be made between failure to apply the proper law and an incorrect application of that law. . A mere error in the application of the proper law is not regarded as reason for annulment. Annulment proceedings based on allegations of the non-application of the applicable law are more problematic. The dividing line between non-application and wrong application is thin and easily transgressed

Ad hoc committees have applied strict standards to the application of the proper law and

322 http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_002.pdf accessed on 5/8/09

323 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf accessed on 8/11/08

in Amco *v.* Indonesia *case it* led to annulment for excess of powers [324]

*A*d hoc Committee held in aforesaid case that "Art. 42(3) of the ICSID Convention provides that the tribunal may decide *ex aequo et bono* if the parties so agree. The tribunal's power to decide *ex aequo et bono* is restricted to cases in which the parties have given their explicit permission. A decision based on equity, rather than on law, without an authorization by the parties, constitutes an excess of powers for failure to apply the proper law. The provisions on the applicable law are essential elements of the parties' agreement to arbitrate and constitute important parameters for the tribunal's activity.[325]

c) Corruption of an Arbitrator

Art. 52(1)(c) describes the third ground for annulment that there was corruption on the part of any member of the tribunal. Corruption on part of the judge disqualify him from deciding in almost all national laws, therefore, corruption of an arbitrator is regarded as an obvious ground for annulment But it appears to be extremely rare.

Corruption means an improper conduct by an arbitrator for personal gain.. Mere preconceived notion without improper payment would not amount to corruption. A situation where arbitrator may derive personal benefits from the outcome of the decision would be regarded as a conflict of interests. Almost by definition, corruption will be clandestine. Evidence of corruption may become known after the rendering the award. Therefore, an application for annulment must be made within 120 days of the discovery of the corruption. In any case , no after three years from the date on which the award was rendered. Therefore, it seems right to say that two different time limits have been set .Ultimate cut off date is the last one which begins from date of award.

d) Serious Departure from a Fundamental Rule of Procedure

Serious departure from a fundamental rule of procedure is enlisted as fourth ground under Art. 52(1)(d) of the Convention for annulment. Justice and uprightness are essentials of the arbitration process. The deviation or departure must be serious and it must affect a fundamental rule of procedure. Serious departure means a substantial deviation rather than minimal difference. It should be of material nature having an effect on fairness and uprightness of the

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324 Amco v. Indonesia, "Decision on Annulment, 16 May 1986", 1 ICSID Reports, 534/5.

325 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 28-99 (Edition 2003) Kluwer Law Arbitration.

procedure of arbitration. The history of this provision and the practice under it suggest that a failure to give both parties the opportunity to be heard would constitute a violation of a fundamental rule. To be heard is regarded as natural right of parties in the dispute. It is well established rule of equity that no body should be condemned unheard. This principle is stated as "*audiatur et altera pars" concept of justice and* fairness. Every violation of a procedural rule does not constitute a serious departure from a fundamental rule of procedure."[326]

It may be deduced that double qualification is required for annulments based on the departure from a rule of procedure. "Not only has the departure to be serious but it must also be a "fundamental" rule of procedure, *i.e.* rules of natural justice such as the right to be heard, equal treatment of the parties and impartiality of the arbitrators."[327] If decision of the arbitrators is based upon the argument that was not developed by the parties it does not amount to the serious departure from the fundamental rule of procedure. It means tribunal is not prevented from adopting legal reasoning.
In *Klöckner* v. *Cameroon*, The *ad hoc* Committee observed:

"*arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a serious departure from a fundamental rule of procedure.*" [328]

Immediately reaction to a violation of procedure is made as duty upon the party to arbitration. Failure to object under Arbitration Rule 27 will be construed as a waiver to objection. Where a party has failed to protest, he is precluded from arguing on the later stage that this irregularity constituted a serious departure from a fundamental rule of procedure. Same view was adopted in *Klöckner* v. *Cameroon.*

e) Failure to State Reasons

Failure to state the reason for an award is enlisted as fifth ground for annulment in Art. 52(1) (e). Duty to state reasons in described in Article 48(3) of the ICSID Convention. It is well-

326 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf accessed on 8/11/08

327 http://hukukcu.com/modules/smartsection/makepdf.php?itemid=103 and "Comparative International Commercial Arbitration, Para 28-104.

328 Klöckner v. Cameroon, Decision on Annulment, 3 May 1985, 2 ICSID Reports 127, 129

known fact among jurists that every judgment should contain grounds for its declaration. The same concept and principal is embodied in the ICSID convention to make the award fair and just .The tribunal's obligation to state reasons is absolute and may not be waived. An agreement between the parties to the effect that reasons need not be stated would be invalid. [329]

Some times reasons for certain parts of an award are not narrated in it. "A failure to state the reasons for the award has been invoked by the applicants in all published annulment decisions. Besides the complete absence of reasons it covers cases where the reasons given contradict each other and the award cannot be based on the reasoning of the remaining parts.[330] The alleged failure to state reasons usually only relates to certain questions. *Ad hoc* committees have often adopted a very generous standard and supplied reasons themselves if they considered the result to be correct but not sufficiently reasoned."[331] It has been argued in most cases for annulment.[332] Failure to deal with an essential question also constitutes a failure to state reasons. Reasons stated in the award should not be incomplete, insufficient and contradictory.

In *Klöckner* v. *Cameroon*, the *ad hoc* Committee found that the complaint was well founded on bases of Article 52(1)(e) and application for annulment was accepted due to non availably of reasoning [333] Ad hoc tribunal denied to reconstruct the reasoning .In case of in MINE vs Guinea said

" Tribunal's failure to give reasons for the award of interest at the United States bank rate. In light of the fact that the United States dollar was the currency of thecontract, the justification of that currency and bank rate of interest is apparent. An express statement to that effect is however wanting." [334]

Standards for the adequacy of reasons was required to be set by the regulation or in the decisions .The standard introduced by *MINE* merely requires that the reasons enable the reader to understand what motivated the tribunal.

Contradictory reasons amount to a failure to state reasons as contradictory reasons will not enable the reader to understand since "two *genuinely* contradictory reasons cancel each other

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329 MINE v. Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 88.

330 ICSID, Decision on Annulment, Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais, 1 ICSID Rev-FILJ 90 (1986) 125 para 116

331 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/09

332 Schreuer, "Commentary on the ICSID Convention", 13 ICSID Rev-FILJ 478 (1998) 623 paras 276 et seq.

333 Klockner case.

334 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf: accessed on 8/11/08.

out". This issue was raised in AMCO Vs Indonesia [335] Remedy of supplementation under Art. 49(2) will be useful only in cases of omissions of a technical character and not in case of a failure to address major facts and arguments.

Every question submitted to it can not be addressed as some may be irrelevant, peripheral or obsolete. For constitution of basis for annulment, a must be an essential question and it could have affected the award. An essential question may also be understood in the sense of a crucial or decisive argument.

4.4.2 Procedure for Annulment

Within the realm of ICSID Convention procedures, annulment cannot be decided by state courts but only in a special procedure provided in the Convention. Outside ICSID, an arbitral award can be challenged in an annulment procedure according to the national arbitration law. Annulment is, of course, a necessary remedy against improper conduct of arbitral proceedings, and denying a party to be properly heard.[336] However, annulment may unfortunately be an effective weapon in parts of the world where the state courts are more inclined to serve as instrumentalities of the host government as was the case in the *Himpurna arbitration*.[337]

Art. 52

(1) of the Convention contains the grounds for annulment and rest of the article describes the procedure of annulment on bases of any of the enlisted grounds. Sub clause from (2)-(5) governs the procedure for annulment as follows :

"(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the

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335 Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 536.

336 N.Horn, S. Kröll ,Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects, page 16, (2004),

337)Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia, XXV YBCA 109 201 et seq. (2000); Schwebel, 'Injunction of Arbitral Proceedings and Truncation of the Tribunal', (April 2003) Vol. 18/4 Mealey's Intl Arb Rep, 33 et seq.

authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.
(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request. The application for annulment must state which of the award's features exhibit flaws that constitute grounds for annulment. The information contained in the application may be developed by the requesting party in subsequent phases of the proceeding."
"(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."

"In Art. 52(2) a time limit for all cases has been set, except for the case of alleged corruption under clause c of the preceding clause. The limit duration set 120 days starting from the date on which the award was rendered."[338]
But in case of an alleged corruption, the limit of 120 days will commence from date of its discovery. But it should not be later than three years in any case, as it is an absolute cut-off date.

Applications for annulment must be made in writing to the Secretary General who verifies their *prima facie* admissibility before registering them. An application must be made within 120 days after the award is rendered and must contain the grounds on which it is based.[339] Filing a formal application is not sufficient to comply with conditions set forth in this clause. *In case of Amco* v. *Indonesia*, Amco contended that a number of pleas by Indonesia for the annulment were time-barred The *ad hoc* Committee agreed that it would not be suffice to recite merely the grounds for annulment as contained in Article 52(1).
Unlike an arbitral tribunal, an *ad hoc* committee is not appointed by the parties but by the Chairman of ICSID's Administrative Council. This function is performed *ex officio* by the President of the World Bank. Appointments must be made from the Panel of Arbitrators. The Panel of Arbitrators is composed of persons designated by Contracting States and the chairman in accordance with Arts. 12-16. The three member *ad hoc* committee is appointed by the Chairman of the Administrative Council and the parties. None of its members should have the "same nationality as the parties or the arbitrators of the original tribunal or should have been appointed to the panel of arbitrators by either the state party or the home state of the private

338 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf accessed on 8/11/08

339 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 28-104 (Edition 2003) Kluwer Law Arbitration.

party."[340]These requirements are stricter than those for the original tribunal and should safeguard maximum objectivity. Upon application by either party the enforcement of the award shall be provisionally stayed until the committee has ruled on a stay of enforcement pending its decision.

Certain categories of persons have been precluded from serving in ad hoc committees under Art. 52(3) of the Convention . These rules of exclusionary nature are designed to safeguard maximum objectivity and to avoid even the remote semblance of partisanship. In Article 52(4) it has been made clear that which of the Convention's provisions apply *mutatis mutandis* to annulment.

Ad hoc committee is vested with the discretionary power to stay enforcement of award under Art. 52(5). Some *ad hoc* committees order the judgment debtor to provide some security in the form of a bank guarantee or a similar arrangement to ensure final enforcement and counter balance. It will only operate if application for annulment is refused and the award is unchanged.

When an award is annulled, it required to re submitted for decision and **Article 52(6)** of the Convention describes the procedure as follows:

A decision for annulment neither amends the award nor replaces it with a new decision. Parties are, at liberty, to opt for "ICSID arbitration proceedings before a new tribunal. This resubmission must be from one or both parties. Unless the parties agree otherwise, A person acted as arbitrator or in ad hoc committee may not be appointed in the new tribunal.. In case of partial annulment, the unannulled portion of the original award remains res judicata and has binding force for the new tribunal."

In Amco v. Indonesia, original Award was annulled subject to some qualifications by the ad hoc committee . Ad Hoc committee identified specific findings of the original award l to which the annulment did or did not apply. Findings of the first Tribunal that had not been challenged in the annulment proceedings under 52 article before ad hoc committee and on which the ad hoc Committee made no pronouncement were held to be res judicata." [341]

When a dispute is resubmitted under Article 52(6), parties may reintroduce claims or arguments those had been used before, but new claims can not be submitted or introduced . It should be borne in mind that ad hoc committee for annulment neither works as appellant authority nor as reversionary authority. It can not reconstitute or replace the award; its powers are limited to annulment of the award. Annulment may be partial or in whole. Upon annulment of the award the dispute will be submitted to a new tribunal constituted in the same way as the original one. It is not bound by the reasoning of the *ad hoc* committee[342] and its award may be subject to

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340 http://www.londonexternal.ac.uk/prospective_students/postgraduate/laws/study_guides/regulation_infrastructure.pdf -on 11/26/09 and 136 ICSID Convention Article 52(3).

341 http://www.unctad.org/en/docs/edmmisc232add7_en.pdf d

342 Schreuer, "Commentary on the ICSID Convention", 13 ICSID Rev-FILJ 478 (1998) 518 et seq.

annulment proceedings, as has happened in both cases where a second award was rendered.[343]

It is may be concluded that the self-contained and exhaustive nature review procedures through internal control is more effective to resolve the dispute finally as ICSID awards can only be annulled for specified grounds by ad hoc committee. Keeping in view the chances or error and mistakes four types of post award remedies; supplementation and rectification, interpretation, revision and annulment have incorporated in ICSID Convention. Remedy of annulment contradicts with concept of finality, therefore, limited grounds for annulment has been provided under the ISCID Convention. It evident from study of post award remedies that implementation of ICSID convention is devised to boost the confidence of investor and protect the investment by avoiding chances of challenge the award in local courts.

343 Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, "Comparative International Commercial Arbitration", Para 28-110 (Edition 2003) Kluwer Law Arbitration.

CHAPTER 5

INTERNATIONAL INVESTMENT ARBITRATION IN PAKISTAN

5.1 Concept of Arbitration in Pakistan

5.2 International Investment Disputes and Arbitration in Pakistan

5.3 Recent Development in this Scenario.

5.1 Concept of Arbitration in Pakistan

The field of law is neglected in our society. This derelict state of the law is particularly acute in specialized branches, of which arbitration laws are just one example. And this slackness with regard to arbitration laws is understandably more pronounced in questions pertaining to foreign arbitration.

Arbitration is practiced commonly in most of the trading activities and arbitration as method of resolution is agreed upon in international trade agreements and most arbitral clauses refer to the Rules of Arbitration and Conciliation of the International Chamber of Commerce (ICC) in Paris. Contracts in the specialized trades refer to the rules of their own specialized bodies, e.g., for cotton the Arbitration Rules of the Liverpool Cotton Exchange.

When domestic arbitration institution or their rules are discussed, Chamber of Commerce & Industry of Karachi[344] is regarded as important permanent arbitration institution. Its arbitration Rules are contained in the bye-laws appended to the Chamber's Articles of Association. "Federation of Pakistan Chambers of Commerce & Industry is another well known arbitration " [345] institution having its rules which establish a Commercial Arbitration Tribunal to regulate disputes between local parties as well as foreign and local parties. On the average two cases a year have been referred to the Federation since its inception in 1960. The Federation has entered into bilateral agreements for arbitration with the American Arbitration Association and the Japan Commercial Arbitration Association, which operate by means of so-called 'joint arbitration clauses.[346] Historically, the concept of arbitration in the Indian sub-continent dates back to mediaeval times. Some describe the panch of old village "panchayat", chief of a community, as the progenitors of the modern arbitrators.

Arbitration is considered as a striking feature of the sub-continent, which prevails in all its ranks of life. [347] Nevertheless, the present form of law relating to arbitration in India and Pakistan is not indigenous but a product of the British, introduced some time in the mid-nineteenth century. "This was codified and consolidated for the first time with the enactment of the Arbitration Act 1899. Even this Act,"[348] however, did not apply to the whole of British India and it was applied

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344 Aiwan-i-Tijarut, Nicol Road, Karachi

345 http://ec.europa.eu/europeaid/projects/asia-invest/download2002/pakistanguidebook.pdf , Lalji Lakshmidas Building, Belasis Street, Karachi

346 Mahomed J. Jaffer and Mr. Sarmad J. Osmany , National Report - Pakistan in Pieter Sanders (ed), Yearbook Commercial Arbitration Volume V - 1980, Volume V (Kluwer Law International 1980) pp. 114 – 140

347 . D. Agarwal. S.C. Das's The Arbitration Act (5th edn. 1984).

348 http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf accessed on 5/10/09)

to Karachi, Pakistan's largest city, in 1899. The arbitration proceedings in the rest of British India were governed by the Second Schedule to the Code of Civil Procedure 1908 which, in other words, dealt with arbitrations which were outside the operation and scope of the 1899 Act. The basic principles of both these laws were derived from the English law of arbitration. Both laws, however, apart from the confusion relating to their jurisdiction, were fragmentary, timorously tentative and often bewildering.[349]

The Arbitration Act 1899 and the relevant provisions of the Code of Civil Procedure 1908 were eventually repealed by the Arbitration Act 1940 Arbitration Act.[350] This new Act extended to the whole of British India .Its main features are based on the English Acts of 1889 and 1934.

Arbitration in Pakistan is governed by the Arbitration Act 1940. After the partition of the Indo-Pakistan subcontinent in 1947, the Arbitration Act 1940 became part of the law of Pakistan, like it did in India.[351] The Arbitration Act 1940 was amended by the Arbitration Amendment Ordinance 1977, which involved a minor amendment concerning Sect. 33.of Arbitration Act 1940. Arbitration proceedings are further governed and controlled by the rules made by the Provincial High Courts under Sect. 44 of the Arbitration Act 1940. These rules pertain generally to proceedings in court under the Arbitration Act 1940 Act.

On May 11, 1981, the Arbitration (Amendment) Ordinance, 1981, was promulgated in Pakistan. This Ordinance amended the Arbitration Act, 1940, by adding to it a new Section 26A in its Chapter V, which contains general provisions applying to all types of arbitration regulated under the Arbitration Act 1940.

Arbitration Act 1940, despite being the main legislation on arbitration, is completely silent on the question of international arbitrations. Therefore, what in the eyes of the law is a foreign or international arbitration is not very clear in Pakistan. In the absence of legislative guidance or aid, the courts conjure up their own interpretations regarding the foreign arbitration.

The Arbitration (Protocol and Convention) Act 1937, aimed to give effect to the Geneva Protocol on Arbitration Clauses and Geneva Convention on the Execution of Foreign Arbitral Awards, is looked upon by the courts as the legislation dealing with foreign arbitrations.

It may be inferred from the preceding summary of development of arbitration laws that it is rightly said by Gordon Jeans that arbitration laws of Pakistan are outdated and there is no institutional support provided to the process of arbitration in Pakistan.[352]

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349 Anees Jillani , The International and Comparative Law Quarterly, Vol. 37, No. 4 (Oct., 1988), pp. 926935 Published by: Cambridge University Press

350 It came into operation on 1 July 1940. Gaz. of India. July 1939, Part V. p.142.

351 N. Krishnamurthi, 'National Report India', in Yearbook Vol. II (1977) pp. 31-46.

352 Gordon Jaynes , International Arbitration in Pakistan, Journal of International Arbitration, (Kluwer Law International 2004 Volume 21 Issue 1)

Analytical study of the Arbitration Act 1940 and Arbitration (Protocol and Convention) Act 1937, in brief, would be right approach to know the realistic structure of arbitration laws.

Analytical study of Arbitration Act 1940:

Arbitration Agreement which is main focus of arbitration process is defined in section 2 of the Arbitration Act 1940 requireing the agreement for arbitration to be in writing but it need not be contained in a formal document. It is clearly mentioned that naming of arbitrators is not essential for arbitration agreement [353] as long as its terms and conditions are readily ascertainable and freely agreed to between the parties. While Stamp Act requires the agreement is to be stamped.

Provisions set out in the Schedule I, by virtue of section 3, shall become operative unless expressly excluded by way of agreement on their alternatives. These implied conditions of the arbitration agreement concern the number and appointment of arbitrators, the time limit for making the award, the administration of evidence by the arbitrator the costs of the arbitration, and the finality of the award.

Parties to Arbitration: It is a general principle that the parties must have the legal capacity and a partner cannot refer a matter to arbitration without the explicit written permission of all the partners.[354]

Generally speaking all commercial and civil matters may be referred to arbitration. "Arbitration 1940 Act provides for three forms of arbitration:–

(a) arbitration without court intervention (Chapter II, sections 3-19);

(b) arbitration with court intervention where no suit is pending, (Chapter III, section 20) and

(c) arbitration with court intervention where suits are pending (Chapter IV, sections 21-25)."[355]

There are certain matters over which the courts have been given exclusive jurisdiction and which therefore, cannot be referred to arbitration. Case of guardianship over a minor is regulated by the Guardians and Wards Act 1890 and case of dissolution of marriages in the Dissolution of Muslim Marriages Act 1939 can not be refused. An interesting development in this regard is the Capital Development Authority (Abatement of Arbitration Proceedings) Act

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354 Partnership Act 1932 Section 19 (2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to -
(a) submit a dispute relating to the business of the firm to arbitration
355 http://www.bisnetworld.net/icanet/Saarcbook.pdf visited on 5/10/09)

1975 which renders invalid arbitration proceedings between the Authority and other persons. Section 7 entitles a party to arbitration agreement or receiver to apply to the court to refer for arbitration where became a party to an arbitration agreement before the commencement of the insolvency proceedings. The court which has jurisdiction on insolvency issue may, if it is of the opinion that, having regard to all circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Parties are given freedom to opt for arbitration during court proceedings before judgment is pronounced and they may apply in writing to the court for an order to arbitrate (Sect. 21).

Court is granted wide discretionary powers to grant stay of proceedings under Section 34 considering the following conditions: i)the arbitration agreement must be in existence and be valid ,ii) the court proceedings must have been started, iii) the court proceedings must be in respect of the matter agreed to be referred to arbitration, iv)the application for a stay must have been filed before filing a written statement or taking any other step in the proceedings and vi)the party asking for a stay must be ready and willing to do all things necessary for the proper conduct of the arbitration. It is open to the court to exercise judicial discretion against the defendant if the nature of the dispute is such as can more satisfactorily be disposed by the court than by the arbitrators.

A party to an arbitration agreement desiring to challenge the existence of an arbitration agreement or to have the effect thereof determined may apply to the court under Section 33

Court is also given very wide power to strike down the clause ousting the court's jurisdiction under section 36. Most Insurance policies contains a clause called the Scott v. Avery clause [356] that no right of action shall arise unless and until an award has been made. "However, court may further order that the said clause shall also cease to have effect as regards the difference.
When a notice of commencement of court proceedings upon the whole of the subject matter of the arbitration has been given to the arbitrators or umpire, all further proceedings in a pending arbitration shall be invalid unless a stay of court proceedings is granted under Section 34."[357]

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356 Justice Campbell in Scott v Avery: "where it is expressly, directly and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration."

357 http://www.bisnetworld.net/icanet/Saarcbook.pdf

This provision used for dilatory purposes to halt and frustrate the arbitration proceeding. This provision is against essence to arbitration agreement.

Appointment and Removal of Arbitrators: The number of arbitrators can be one, two, three or even more. In recent time, most arbitration laws introduced the provision that number of arbitration should be odd. The arbitrators cannot be compelled to proceed with the arbitration without their fees and costs being deposited in advance. Section 11 empowers the Court with discretion to remove an arbitrator or umpire on the application of a party to the arbitration: "who fails to use all reasonable dispatch in entering on and proceeding with the arbitration and making the award and who has misconducted himself or the proceedings."[358]

An arbitrator or umpire who has either misconducted himself or who fails to use all reasonable dispatch in entering on or proceeding with the arbitration and making an award, he shall not be entitled to any remuneration. Court has an overall authority and discretion to remove an arbitrator if it is satisfied that the situation demands it on a number of other grounds. Some of the commonly invoked grounds for revocation of the arbitrator's authority are:

a) where an arbitrator is exceeding or refusing jurisdiction,
b) partiality or bias of an arbitrator;
c) indebtedness of the arbitrator to either party;
d) where the arbitrator's interest relates to decision;
e) Non disclosure of previous relationship with one party;
f) improper appointment of the umpire;
g) where the reference to arbitration is incomplete;
h) where the arbitration agreement is obtained by fraud;
i) where the existence of the arbitration agreement itself is denied by a party;

Courts are given power to appoint persons to fill in the vacancies due revocation or removal of arbitrator under section 12. Provisions of the Act are binding on the Government. Accordingly, it follows that the Federal and Provincial Governments can resort to arbitration and so too State agencies, other Government departments and public sector undertakings. They can enter into arbitration with national private parties as well as with foreigners.

Arbitral Procedure: In general the arbitral proceedings are regulated by the agreement itself or by the Arbitration Rules of an arbitral institution if the agreement of the parties refers to them. This is principally because, arbitration being a quasi judicial process, the parties are free to settle any rules or procedures amongst themselves which are to apply to the proceedings.

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358 http://www.herbertsmith.com/uploads/HSpdfs/Asia-guides-2006/dispute-resolution/11_Pakistan.PDF

Sect. 13 of the Act provides that, unless a different intention is expressed in the agreement, the arbitrator has the power to administer oath to the parties and witnesses and administer such interrogatories as may, in the opinion of the arbitrator, be necessary. Schedule I, Para. 6, empowers the arbitrator to require a party to produce all books, deeds, papers, accounts, writings and documents within their possession, unless a different intention is expressed in the arbitration agreement. Assistance of the court can be called for in case a party fails to comply with a request of the arbitrator in this respect.

As per Section 41 court has power of making orders for the purposes of arbitral proceedings in respect of the matters set out in Schedule II appended to the Arbitration Act as it has in relation to regular court proceedings before it. Schedule II concerns, inter alia, the powers of the court in respect of:

- the detention, preservation, inspection, interim custody or sale of any goods which are the subject matter of the arbitration;

- the securing of the amount in dispute.

If a party fails to participate in the arbitral proceedings, the arbitrator may proceed in his absence after due notice by the arbitrator and render award.

Extension of the time limit without the consent of the parties under Para 2 of Section 28 is declared invalid.

Provision pertaining to Award: Arbitrators must decide the dispute in accordance with the rules of law and principles of natural justice.

Sect. 13 under of the Act provides that the arbitrators have power to correct any clerical mistake or error arising from any accidental slip or omission in the award, unless the parties have provided otherwise. Once arbitrators have given their decision they become funtus officio However, the court has power under Section 16 "to remit the award to the arbitrator for reconsideration . In practice usually all awards are filed with the court.

Enforcement of the Award: There is distinction between domestic and foreign awards and now foreign awards are enforced under Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2007.

When domestic awards are filed with the court, the court shall proceed to pronounce judgment according to the award:

a. where the court sees no cause to remit the award to the arbitrator for reconsideration,"[359]
b. where upon application of a party to set aside the award, the court sees no cause to set it aside or
c. where no application for setting aside having been made, the time for making the application has expired (i.e. 30 days after filing of the award).

Decree is issued to give effect to the Award will follow.

Setting Aside the Award: An award can be set aside according to Sect. 30 on one of the following grounds:

(1) Where the arbitrator or umpire has misconducted himself .The term misconduct means on the one hand bribery and corruption and on the other a mere mistake as to the authority conferred by the submission without complying with the elementary principles of natural justice;

(2) Where the award is made after the issue of an order by the court superseding the arbitration;

(3) Where arbitration proceedings have become invalid because court proceedings have commenced upon the subject matter of the arbitration (see II.5 *b*);

(4) Where the award is improperly procured by unfair means or an arbitration agreement which is invalid because of misrepresentation, mistake or fraud, and violation of rules of law;

(5) Where the award is otherwise invalid. This is a very wide ground in respect of which it has been held that it includes any legal objection which can be taken to an award. It has also been held that this ground goes to the root of the award and that procedural matters are not covered by it. Accordingly, it includes, for instance, the ground that the subject matter was not capable of being referred to arbitration and was a violation of the rules of public policy.

Under section 33, court on the application for setting aside may require statement by party on affidavits.. Previously, Section 33 required the applicant to deposit in court the amount he was required to pay under the award, or to give security therefor. This condition has been removed by the Arbitration Amendment Ordinance of 1977. This was meant to avoid unnecessary challenges for dilatory purposes. It could make difficult to apply to challenge the award where

[359] http://www.herbertsmith.com/NR/rdonlyres/324A0773-6A2E-4EC1-A5A3-A920605D2677/7628/GDRAsiafinal.PDF

award is unjust and objectionable on justified grounds. Court is given the discretion to remit the award under Section16 on the limited grounds.

Now in light of preceding paragraphs, it necessary to analyze **Arbitration (Protocol and Convention) Act 1937** which was applicable to a class of foreign awards before promulgation of "Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance 2007. The Protocol on Arbitration Clauses, signed at Geneva on September 24, 1923, and the Convention for the Execution of Foreign Arbitral Awards, signed at Geneva on September 26, 1927 were implemented in the Arbitration (Protocol and Convention) Act 1937. After the independence of Pakistan in 1947, the Geneva Treaties continued to be in force by virtue of the Pakistan (Adaptation of Existing Laws) Order dated 14 August 1947. The applicability of the Geneva Treaties was expressly confirmed by the Pakistan Supreme Court. [360]

This Arbitration (Protocol and Convention) Act 1937 defines the foreign awards narrowly in its section 2 .This definition of foreign awards requires that the award must relate to: (1) commercial matters; (2) arbitration agreements to which the Geneva Protocol applies; (3) differences between persons who are subjects of powers declared by notification to be parties to the Geneva Convention; and (4) must relate to such territory as is declared by a notification to be a territory to which the Geneva Convention applies.

Curiously enough, the courts in Pakistan have tried to apply the Arbitration (Protocol and Convention) Act 1937 to all kinds of foreign awards one court interpreted this along with the term "foreign arbitration" to mean arbitration in a foreign land, by foreign arbitrators, to which foreign laws are applied and in which a foreign national is involved. No award, thus, can be considered a "foreign award for the purposes of the Act unless it fulfils the conditions mentioned therein.

As a result, many foreign arbitral awards other than those given under the Geneva Convention remained legally unenforceable in Pakistan. This enigma crystallised in the case of Yangtze (London) Limited v. Bar/as Brothers (Karachi) P.LD. 1961 S.c. 573. [361] Where the Supreme Court of Pakistan refused to enforce an award of the London Court of Arbitration because England till that time was not notified by the government of Pakistan to be a party to the Geneva Convention,"[362] and its territory was not notified as one where the Convention applied. The Court thus held that the award made by the London Court of Arbitration was not a foreign award in terms of the Act and consequently could not be filed in any court or enforced by any

360 Yangtze (London) Ltd. v. Barlas' Brothers (Karachi) and Co., PLD 1961 SC 373.

361 Yangtze (London) Limited v. Bar/as Brothers (Karachi) P.LD. 1961 S.c. 573

362 http://www.zaoerv.de/22_1962/22_1962_1_2_b_779_2_796.pdf

court of Pakistan. England had actually ratified both Protocol & Convention, [363] and the government of British India had also notified Great Britain and Northern Ireland in the Official Gazette [364]. But the Supreme Court refused to recognize notifications issued prior to Pakistan's independence on the grounds that the "Indian Independence (International Arrangements) Order 1947 did not and indeed could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of country which is severed from the parent State and is established as an independent sovereign power according to the practice of States."[365]

Procedural Rules; Sect. 10 of the 1937 Act gives power to the High Courts of the country to make Rules for the filing, evidentiary and other procedures under the Act. Accordingly Rules 293-300 of the Sindh High Court provide for the same.[366]These Rules deal with required documents which must be produced.

Grounds for Refusal: Refusal of enforcement of foreign award was possible under Section 7, if the award has been annulled in the country in which it was made or party was not properly represented due failure notice with sufficient time or due to legal incapacity or the award is not dealing with all the questions referred to the decision of the arbitrator, or contains decisions on matters beyond the scope of the agreement for arbitration.

The court is also given the discretion to refuse enforcement of the award dealing with matter which may not lawfully be referred to arbitration under the laws of Pakistan or it is contrary to the public policy of Pakistan. This discretion is always available under English laws for refusal of enforcement of the foreign awards. Section 68 (g) of Arbitration Act 1996 of UK contains the same provision.

The 1937 Act gives the defendant considerable opportunities of delaying implementation of the award through its procedural intricacies.

Right to apply for stay of court proceedings could be is availed under Section 3 of the Arbitration (Protocol and Convention) Act 1937. The Section provides that where there is an arbitration agreement to which the Geneva Protocol on Arbitration Clauses of 1923 applies (which is appended to the Act as the First Schedule) and "any party to the agreement or any person claiming through or under him starts court proceedings against any other party or person claiming through or under him, then any party to such proceedings may at any time after appearance and before filing a written statement or taking any other steps apply to the court to

363 Great Britain and Northern Ireland ratified the Geneva Protocol on 27 Sept. 1924. and the Geneva Convention on 2 July 1930.

364 Govt. of India Notification No.103(4)/II-Tr. dated 8 Jan. 1938.

365 http://www.zaoerv.de/22_1962/22_1962_1_2_b_779_2_796.pdf

366 Published in the Government of Sind Gazette of May 23, 1940, and republished in 1979 by Law Book Sellers, Karachi.

stay the proceedings.The court shall, unless it is satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is no dispute between the parties with regard to the matter agreed to be referred, stay the proceedings." [367]

Keeping in mind the arbitration laws of Pakistan as discussed above it is manifest that several courts have reluctantly but repeatedly held that the Arbitration Act 1940 is inapplicable to foreign arbitration and foreign awards. The vast powers given to the courts under the Arbitration Act 1940 such as appointment and removal of arbitrators in certain circumstances; modification or correction of awards; remission of award to the arbitrator for reconsideration, and in certain cases even to supersede reference to arbitration-have been taken note and the courts have concluded that they cannot have control over foreign arbitration as a reasonable and fair construction of the Arbitration Act 1940 would not support such an extraterritorial operation of the Act 1940.

The High Court of Sindh held in case of Avari Hotels Limited v. Hilton International Company. Hilton, [368] after reviewing the ICC rules arbitration Act 1940 is inapplicable and concluded that these rules of ICC departed from the Arbitration Act in several striking matters.Anti-arbitration injunctions have been compared to "nightmare scenarios in international arbitration. Law feels that there can be no justification for national courts to intercede in the arbitral process and national courts which do so for parochial local law reasons ignore the basic expectation of the parties and hinder the autonomy of international arbitrations. [369]
Decisions of the Supreme Court of Pakistan in *The Hub Power Co. v. WAPDA* ("*Hubco*") and in *Société Générale de Surveillance SA* v. *Pakistan* have attracted considerable attention in the international arbitration community primarily because the Supreme Court of Pakistan issued an order against foreign arbitrations.

Supreme Court judgments can be cited as examples of the difficulties experienced by investors in initiating international arbitration proceedings whether under ICC or ICSID. The order in SGS case was made by the Supreme Court of Pakistan even though it did not have any supervisory jurisdiction over the ICSID arbitration.

In cases like *Hubco* and *SGS*, it was clear that the national courts were only exercising their powers to serve the interests of their government. Article 2 of the New York Convention

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367 http://www.acts.ie/print/zza7y1980.1.html and Mahomed J. Jaffer and With the assistance of Mr. Sarmad J. Osmany , National Report - Pakistan in Pieter Sanders (ed), Yearbook Commercial Arbitration Volume V - 1980, Volume V (Kluwer Law International 1980) pp. 114 – 140

368 P.L.D. 1985 Karachi 425.

369 Sameer Sattar , National Courts and International Arbitration: J. Int. A, (Kluwer Law International 2010 Volume 27 Issue 1) pp. 51 – 73

provides for the obligation of states to give effect to arbitration agreements. These actions of the national courts sabotaged the arbitral process, it had the effect of depriving the arbitration agreement of any practical effect. They thereby they were regarded as a violation of the state's obligation under the New York Convention to give effect to arbitration agreements.Whenever a national court unduly issues an anti-suit injunction to block an international arbitration,it is regarded as violation of New York Convention. This is so equally where the national courts try to prevent or immobilize an international arbitration.[370]

Aforesaid principle was confirmed by the award of an ICC tribunal in *Salini v. Ethiopia*, where it was held that there is no difference between a state unilaterally repudiating an international arbitration agreement and a state going before its national courts to have the arbitral proceedings suspended or terminated (whether on the basis of alleged nullity of the arbitration agreement, alleged bias on the part of the arbitral tribunal, or some other ground).[371]

In the ICSID context, this principle finds support in *SGS v. Pakistan*, where it was held that a state would be acting illegally if it "materially impeded" the ability of an investor to prosecute its claims before an international arbitral tribunal.[372]

Foreign awards relating to more than 100 countries remained unenforceable in Pakistan because these countries are not parties to the Geneva Convention. The Indian government perceived this predicament, and in 1961 substituted for the 1937 Act a new Act entitled the "Foreign Awards (Recognition and Enforcement) Act 1961.While Pakistan ratified it in 2005 to give effect to the New York Convention."[373]

Our case law had begun to deviate , as courts were exercising excessive judicial activism to secure a protectionist bias against international obligation as a particularly startling example of this parochial overreaching, the Supreme Court in *Eckhardt & Company Marine GMBH, West Germany v Mohammad Hanif* refused to enforce a foreign arbitration agreement on the grounds that it would be too inconvenient and expensive for the Pakistani

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370 S. Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview, in Anti-Suit Injunctions in International Arbitrations 3–4 (E. Gaillard ed., 2005).

371 Salini v. Ethiopia, Award Regarding the Suspension of Proceedings and Jurisdiction of December 7, 2001, 42 I.L.M. 609 (2003) and 21 ASA Bull. 82, para. 166 (2003); see also Himpurna v. Indonesia, Interim Award of September 26, 1999, 15 Y.B. Com. Arb. 13, paras. 184–87 (2000)

372 SGS v. Pakistan, Decision on Jurisdiction of August 6, 2003, 8 ICSID Rep. 406, para. 172 (2005).

373 "Recognition and enforcement of 'foreign arbitral awards': a comparative study", International Journal of Liability and Scientific Enquiry, 2009

party to bear the cost of adducing evidence at a foreign . The reasoning of the court was focused squarely on considerations of natural justice rather than on laying down any test for a *forum conveniens* for a particular dispute. Supreme Court in *Eckhardt* did not clearly lay down a test for the enforceability of arbitral agreements, merely stating that "No hard and fast rule can be laid down or fine of demarcation can be drawn to say in what cases refusal can be made. [374]

Litigation in Pakistan is a slow and cumbersome process. The purpose of arbitration, on the other hand, is speedy settlement of disputes, and the enactment of the Arbitration Act was thus an attempt to achieve this aim. The 1937 Act was an effort to remove the constraints to which foreign arbitral awards, in turn, are subjected by the provisions of the Arbitration Act and it was also presumably an endeavor to serve the cause of facilitating international trade.
Applying the 1937 Act to a foreign arbitral award, which is not covered by it, is to avoid facing the question squarely and to attempt to distort law. The ratification of the New York Convention and subsequent legislation to give effect to its purposes was beyond the power of the judiciary. Corrective action was always required from legislature or executive. [375]

5.2 International Investment Disputes and Arbitration in Pakistan

"Globalization is not some autonomous process that occurs as an inevitable outcome of technological change or the unfolding logic of capitalist development. States needs to create incentives to integrate their economies and open their markets to competition; meantime they may opt for available choices. In developing countries specially in case of Pakistan, major infrastructure projects , the exploitation of natural resources as coal, gas, petrol and energy sector often require financing by and technical know-how of private foreign investors."[376]

Many states have adopted investment protection laws to encourage and promote international / foreign investment which is an integral part of the world economy. In every legal system, these protections pertaining to international investment faces a trade-off; on the one hand, its legal norms are meant to create legal security and stability and on the other hand, laws try to

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374 Eckhardt & Company Marine GMBH, West Germany v Mohammad Hanif, P L D 1993 Supreme Court

375 Anees Jillani , The International and Comparative Law Quarterly, Vol. 37, No. 4 (Oct., 1988), pp. 926935 Published by: Cambridge University Press

376 G. Van Harten. "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 02/01/2006

accommodate unforeseen and special circumstances in individual cases as a requirement of justice. In Pakistan "Legal framework for foreign investment was provided through the Foreign Private Investment (Promotion and Protection) Act 1976. The said Act provided for security against expropriation and adequate compensation for acquisition. This FPIA 1976 also guaranteed the remittance of profit and capital, remittance of appreciation of capital investment, and relief from double taxation for countries with which Pakistan had agreement on avoidance of double taxation. Foreign investment was also encouraged in industrial projects involving advanced technology and heavy capital outlay like engineering, basic chemicals, petrochemicals, electronics, and other capital goods industries."[377] Despite these incentives, foreign investment was discouraged by: (a) significant public ownership, strict industrial licensing, and price controls (b) a noncompetitive and distorting trade regime with import licensing, bans, and high tariffs (c) avoidance of international arbitration agreement and meek infrastructure for protection of arbitration agreement relating to investment disputes. [378]

As discussed earlier namely, the **Arbitration (Protocol and Convention) Act 1937** and **Arbitration Act 1940** were the arbitration laws available to foreign investors in Pakistan . The 1937 Protocol and Convention Act gives effect to the Geneva Protocol on Arbitration Clauses [379]and the Geneva Convention on the Execution of Foreign Arbitral Awards [380]and is limited to the enforcement of foreign awards only. The 1940 Arbitration Act deals with commercial arbitration at the national level only. It does not contain any provision either dealing with international commercial arbitration or intentional investment arbitration. Both of these instruments appear to be outdated. Mostly international investors seek international arbitration mechanisms as a means of settling their disputes. Therefore, they applied for the settlement of disputes between foreign investors and host states. In the absence of an international or multilateral regime available in Pakistan, these are generally being included in bilateral investment treaties between states. [381]

Pakistan signed the ICSID Convention on July 6, 1965 and deposited its instrument of ratification in September 1966. However, it did not promulgate the Convention into domestic legislation as required in order to give effect to international obligations and international investment disputes were being challenged in domestic courts. A legislative Bill No. 4 of 1995

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377 http://jang.com.pk/thenews/dec2008-weekly/busrev-22-12-2008/p7.htm

378 Ashfaque H. Khan and Yun-hwan Kim , foreign direct investment in Pakistan, EDRC REPORT SERIES NO 66 JULY 1999,

379 September 24, 1923, 27 U.N.T.S. 157.

380 September 26, 1927, 92 U.N.T.S. 301.

381 Tariq Hassan , International Arbitration in Pakistan - A Developing Country Perspective, *Journal of International Arbitration*, (Kluwer Law International 2002 Volume 19 Issue 6) pp. 591 - 600

regarding the ICSID Convention was introduced in, but not passed by, the Parliament of Pakistan.[382] Despite the fact that Pakistan has not legislated the ICSID Convention, Pakistan remains bound to observe the Convention in view of the Vienna Convention on the Law of Treaties, which in relevant part provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This rule is well recognized, without prejudice to Article 46, of the Vienna Convention, which deals with provisions of internal law regarding competence to conclude treaties. [383]

Further in matter of international investment and commercial arbitration and incorporation of international laws into domestic laws , the Supreme Court of Pakistan in case of Shehla Zia v. WAPDA, PLD 1994 Supreme Court 693, at 710 held:

"An international agreement between nations if signed by any country is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party." [384]

Reportedly, for investment arbitration three cases were filed against Pakistan in ICSID: [385]

A. Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan was registered with ICSID on October 7, 1987. The Arbitral Tribunal, constituted on May 6, 1988, was composed of the President: Ian Brownlie (British), and arbitrators: Anthony Colman (British) and Ashraf Ullah Khan (British). The case involved a petroleum concession. The proceeding was discontinued at the request of the claimant pursuant to a settlement agreed by the parties.
B. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, the second case, was registered on November 21, 2001.[386]
C. Impregilo S.p.A. v. Islamic Republic of Pakistan is the most recent case. It was registered with ICSID on February 12, 2002 and involved a construction agreement. It has been withdrawn pursuant to a Settlement Agreement between the parties, facilitated by the Government of Pakistan.[387]

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382 See Bill No. 4 of 1995 , NA, Gazette of Pakistan Extraordinary, February 19, 1995
383 U.S. Department of State, Investment Climate: Pakistan (2007), available at www.state.gov/e/eeb/ifd/2007/82596.htm
384 Shehla Zia v. WAPDA, PLD 1994 Supreme Court 693, at 710
385 Tariq Hassan , International Arbitration in Pakistan - A Developing Country Perspective, *Journal of International Arbitration*, (Kluwer Law International 2002 Volume 19 Issue 6) pp. 591 - 600
386 Case No. ARB/01/13 at ICSID
387 Case No. ARB/02/2. at ICSID

The two recent cases registered with ICSID appear, prima facie, to be outside the domain of ICSID insofar as they deal with a service agreement and a construction agreement rather than an investment agreement. The cases submitted to ICSID by Société Générale de Surveillance S.A. and Impregilo S.p.A. against Pakistan, whereby both the "non-investing" companies are seeking to bypass contractual dispute settlement provisions regarding local and international arbitration by going directly to ICSID. As per article 25 of the ICSID convention it necessary that dispute should be directly related to investment. Investment in national laws in respect of foreign investors may be defined and one uniform definition may be incorporated in every BIT to maintain the confidence of investors.

The case which has caused serious controversy was the decision of the Supreme Court of Pakistan in *The Hub Power Co. v. WAPDA* ("*Hubco*").[388] The case concerned a foreign investment vehicle in relation to a power project. A dispute arose regarding the price of electricity ,during the course of the ICC arbitration, allegations were raised in relation to fraud and corruption against the foreign party. The Government of Pakistan made an application to the Lahore High Court for an *ex parte* injunction preventing the claimant from proceeding with the international arbitration. The case went before the Supreme Court of Pakistan which promptly decided in favor of the Government of Pakistan.

On an analysis of *Hubco*, this decision of the Supreme Court, which was based on spurious grounds of public policy and arbitrability, has raised serious concerns in the international community and has dealt a severe blow to the international investor's confidence . It demonstrates a clear abuse of the national court's supervisory powers.

ON 3 JULY 2002, the Supreme Court of Pakistan delivered its judgment in the case of *SG S* v. *Pakistan,* [389] *filed through Secretary, Ministry of Finance*. The case has attracted considerable attention in the international arbitration community primarily because the Supreme Court of Pakistan issued an order against Société Générale de Surveillance SA (SGS) restraining it 'from taking any step, action or measure to pursue or to participate or to continue to pursue or participate in the ICSID arbitration. Supreme Court judgment can be cited as examples of the difficulties experienced by investors in initiating ICSID arbitration proceedings. [390]The order

388 Hub Power Co. v. WAPDA, Supreme Court of Pakistan, June 20, 2000, 16 Arb. Int'l 439 (2000)
389 SGS v. Pakistan, Procedural Order No. 2, October 16, 2002, 8 ICSID Rep. 388 (2005).

390 Martin Lau , "Note – Supreme Court of Pakistan (Appellate Jurisdiction), 3 July 2002", *Arbitration International*, 2003 Vol. 19 pp. 179 - 182

was made by the Supreme Court of Pakistan even though it did not have any supervisory jurisdiction over the ICSID arbitration.[391]

In these cases like Hubco and SGS, it was clear that the national courts were only exercising their powers to serve the interests of their government and not for any genuine purpose for which the powers had been entrusted to them. 392 Government of Pakistan did not promulgate the ICSID and New York Conventions and international investment disputes were being challenged in domestic courts. Serious concerns raised in the international community and has dealt a severe blow to the arbitration regime in Pakistan and investment protection measures. It may be concluded that international investment disputes has not been dealt considering the international obligations and international investment concerns. Courts were favoring the national claims without respect to international conventions and Government did take necessary action for incorporation of international convention in domestic legislation.

5.3 Recent Development in this Scenario.

Investment related Laws and Agreements: "As part of the protective investment regime, international investors seek arbitration as a means of settling their disputes. International arbitration mechanisms are, therefore, being increasingly applied for the settlement of disputes between foreign investors and host states."[393] In the absence of an international or multilateral regime, these are generally being included in bilateral investment treaties (BITs) between states. Pakistan has so far entered into BITs with different. These, inter alia, provide for settlement of disputes between (1) investors and the contracting party, and (2) the contracting parties.

Before the study of problems faced in investment arbitration, some aspects of definition of investment need to be looked upon; how can investment arbitration be limited? Definition of investment has been discussed in chapter two. The definition of investment has always been a controversial issue and countries have debated whether the definition of investment should be broad or narrow. Pakistan had signed forty-five BITs at the end of 2006. [394] Twenty-six BITs signed by

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391) A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration para. 7.38 (2004).

392 Sameer Sattar , National Courts and International Arbitration: *J. Int. A*, (Kluwer Law International 2010 Volume 27 Issue 1) pp. 51 – 73

393 http://www.aspenpublishers.com/PDF/02558106.pdf; accessed on 24/11/09

Pakistan contain the following five investment categories:"movable and immovable property as well as other rights such as mortgages, liens or pledges;

a) shares in and stock and debentures of a company and any other similar forms of interest in a company;
b) rightful claims to money or to any performance under contract having a financial value;
c) intellectual property rights, goodwill, technical processes, and know how in accordance with the relevant laws of the respective contracting party; and
d) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals."[395]

The five BITs of Pakistan that do not have these five categories are with Germany, Kuwait, Tunisia, Romania and Turkmenistan. Two of the Pakistani BITs (Australia and Yemen) is having more broader definition and include more than five categories mentioned above in the definition of investment. This again raises the question what is meant by activities associated with investments?

Definition of investment is a very important aspect of a BIT because it defines the content of the substantive rights that the investor and host country enjoy. A broad asset based definition may restrict the regulatory ability of host country. Most BITs contain a broad asset based definition of investment, without many safeguards or exceptions.

The agreement with Italy (the "Italian Agreement") [396] is typical. It defines the term "investment" to mean "any kind of *property* invested after September 1, 1954 by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter."

"This definition Italian Agreement is much wider than the definition of "foreign private investment" provided in the Foreign Private Investment (Promotion and Protection) Act 1976 (FPIA)." . In light of the increasing number of investor-state investment disputes, it is extremely important for Pakistan to be more cautious while negotiating their BITs . Assets not bringing substantive and long-term economic benefits should not be included in definition of investment and adequate safeguards be added to deviate from their treaty obligations. [397]

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395 http://www.business.gov.in/doing_business/bipa.php; accessed on 18/12/08

396 Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, July 19, 1997

397 Prabhash Ranjan , Definition of Investment in Bilateral Investment Treaties of South Asian Countries, *J. Int. A.* (Kluwer Law International 2009 Volume 26 Issue 2) pp. 217 - 235 .

ARBITRATION LEGISLATION On May 11, 1981, the Arbitration (Amendment) Ordinance, 1981, was to amend the Arbitration Act, 1940, by adding to it a new Section 26A in its Chapter V, which contains general provisions applying to all types of arbitration regulated under the 1940 Act.

Section 26A of1981 Ordinance introduced the requirement that all awards should be reasoned in sufficient detail. If this requirement is not complied with, the Courts shall remit the award to the arbitrators for recording of the reasons. This requirement also applies to those awards in relation to which proceedings were pending, in any court, at the time of promulgation of the 1981 Ordinance. In these cases, however, the Ordinance uses the words "*may* remit", instead of "*shall* remit" thus giving the Court a discretion in the matter.

Section 3 of the Ordinance contains provisions for these cases along the same lines as in Section 26A, thus creating a transitory regulation. The general rule that an arbitrator is not bound to give reasons for the award, was superseded by the new Section 26A in the 1940 Act. Section 26A specified under (1):

> *"The arbitrators or umpire shall state in the award the reasons for the award in sufficient detail to enable the Court to consider any question of law arising out of the award."*

This provision has bearings on the Articles 16 and 30 of the 1940 Arbitration Act, and on several Chapters and subchapters they are to be read with the text of Section 26A in mind.

Before this remedy of remittal was only provided for by Section 16 of the 1940 Arbitration Act. Section 16 lists three grounds for remittal of an award to the arbitrators:

(i) "where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(ii) where the award is indefinite and therefore incapable of being executed; or

(iii) where there appears to be an objection as to the legality of the award on the face of it."[398]

Courts were given discretionary power and a new ground for remittal was created . Litigation in Pakistan is a slow and cumbersome process. The purpose of arbitration, on the other hand, is

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398 http://www.jamilandjamil.com/publications/pub_arbitration/act1940.html ; accessed on 8/11/09

speedy settlement of disputes, and the enactment of the Arbitration Act is regarded as outdated law to coup with international arbitration requirements .Many countries has adopted the UNCITRAL Model law of arbitration was thus an attempt to achieve this aim.

Substantially revised arbitration legislation is currently under discussion in the National Assembly of Pakistan. The draft of consolidated arbitration was presented in the National Assembly, on 27 April 2009 which closely follows the Indian Arbitration and Conciliation Act, 1996 and English Arbitration 1996 with certain additions.

In this draft of proposed Act of Arbitration, there is a degree of supervision of arbitrators and some interim measures are also available.

Two Type of reference to the court are possible if desired by the tribunal.

1) The tribunal may refer questions of law to the court but is not bound by the court's advice on questions of law.
2) The tribunal may refer the draft award to the court and is bound by the court's review. The parties are given choice to, in their arbitration agreement; exclude the right of the tribunal to refer the draft award to the court for review.

Appeals are allowed only where a procedural irregularity has occurred meet the requirement of inherent justice. No provision regarding the confidentiality of arbitration proceeding or its award are incorporated in the act.

On the other hand 14 ,on July 2005, after forty-seven years of being an original signatory to the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the NY Convention), the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005 (REAO), Ordinance No. VIII of 2005 was promulgated and finally NY Convention ratified and implemented .

This replaced the Arbitration (Protocol and Convention) Act 1937 (APC Act) which previously applied the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention) to the enforcement of foreign arbitral awards in Pakistan. The same was replaced by India in 1961. NY Convention legislation, is expected to enhance the image of Pakistan's investment climate in the eyes of the global community; something that has been severely tarnished after many debacles with major investment giants including among others, Societe Generale de Surveillance , National Power , Seimens Westinghouse.

This ordinance has left a lacuna in the law by not fully defining or giving a clear criterion to determine what would constitute a 'foreign award' under law of Pakistan. Ordinance as a special law designed to increase the efficiency of the arbitral process would impliedly repeal the previous case law and hopefully provide the 'hard and fast rule' or, at the very least, the clear criteria that the Supreme Court was seeking in *Eckhardt.*

The problem is contained in the said ordinance relates s to 'foreign arbitral awards' ~~made~~ after the commencement. Unfortunately, it does not clearly define what constitutes a 'foreign arbitral award'. Foreign awards are defined in Section 2(d)

> "(d) Foreign arbitral award" means a **foreign arbitral award** made in a Contracting State to the Convention, or a State notified by the Federal Government, by notification in the Official Gazette."

This tautological definition does not clearly define what character determining factors would make an award a 'foreign' award. There can be many factors that determine the character of an award: For example, would it be the nationalities of the parties?; the venue of the arbitration?; the substantive law of the contract?; the substantive law of the arbitral agreement?; the law governing the procedure of the arbitration?; the location of the salient factors of the dispute?

All these factors can provide clues to determining the character of an award. The question that is left open which one of these factors is the most important? Thus it seems that it has left it to case law to develop a test of character determination for an award being considered foreign or domestic. [399] Section 7 of Ordinance lays down the same grounds, as under article 5 of NYC, under which a foreign award may be challenged.

International Investment Arbitration proceedings where Washington (ICSID) Convention applies, and the enforcement of awards is required issued by ICSID tribunal , are governed by the provisions of the Arbitration (International Investment Disputes) Ordinance, 2007(Ordinance No. XXXVIII of 2007) (AIID Ordinance).

This ordinance pertaining to international investment came into force on July 2007. Like the NYC Ordinance, section 4 of the ordinance obliges courts of Pakistan to execute an award issued by ICSID in the same manner as if it were a judgment of the High Court. It has been pointed out by the Mansoor Khan[400] that provisions of the Arbitration Act 1940 do not apply to arbitration proceedings initiated under the Washington (ICSID) Convention (section 7, AIID

399 M/s. Jamil & Jamil Barristers-at-Law, Advocates, High Courts and Supreme Court of Pakistan, 2005
400 www.khanassociates.com.pk (Mansoor Khan contributed in report Norton Rose Group

Ordinance). [401]

The Supreme Court in its July 31, 2009 verdict set a 120-day deadline (which is Nov 28 2009) for the government to decide the fate of 37 ordinances including the promulgated Arbitration (International Investment Dispute) Ordinance and Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Ordinance , the government managed to lay 31 ordinances before the National Assembly, but failed to get even one of them approved despite the fact that the assembly remained in session for 46 days between Aug 3 and Nov 16.[402] The President re-promulgated Arbitration (International Investment Dispute) Ordinance and Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Ordinance along with other ordinances. [403]

Arbitration (International Investment Disputes) Ordinance 2009 contains 10 Sections and one schedule. Schedule in containing the ICSID convention and under Section 10 or the ordinance federal government has been vested with power to amen the ordinance in accordance with amendments made in the ICISD Convention.

Section 2 provides the definition of for specific word incorporated in this ordinance. Section 3 makes a registration of award compulsory while Section 9 contains obligation regarding the notice to other party regarding the before registration of award.

Federal Government has been given a power to make the rules of procedure, though high court may granted the power to make the rules of proceeding as high court were given power to execute to award and it is to be treated as judgment of High Court .
Registration of Award is made only for the purpose of recognition and enforcement under Section 3 (2) . While Section sub Section 4 of Section 3 states that if award is satisfied in respect of pecuniary obligation then it would not be registered with High Court. It means award can only be registered for pecuniary obligations where it left uninformed.

Effect of registration has been described under Section 4 where;

- Proceeding can be initiated
- High court control over execution
- Commencement of interest.

401 Norton Rose Group Arbitration in Asia Pacific January 2010 Pakistan 09
402 Dawn News, Monday, 23 Nov, 2009 reported by Amir Wasim
403 Dawn News, Saturday, 28 Nov, 2009 reported by Syed Irfan Raza

It has not been made clear that interest shall commence from date of rending the award or from date of completion of registration or from date of application for registration award .
Under Section 7 Arbitration Act 1940 has been made inapplicable for the proceeding pursuant to the award .It ,interesting to know that this act contain the same provisions as Arbitration (International Investments Dispute) Act – 1966 of UK, even name has not been changed as done in New Zealand in 1979. While in UK now Arbitration Act 1996 is applicable and some of its provision may be applied to the proceedings with notification. As said earlier, we have an outdated arbitration act and under Section 7 of the said Ordinance whole of Arbitration Act 1940 has been made inapplicable.

If Section 4 of the ordinance is read it makes clear that proceeding will start after registration but will during the application of registration or registration process Arbitration Act 1940 is applicable or not ?
Under Section 8, ICSID convention has been given force of law with certain exception relating to license to import and tax provision.

CONCLUSION

International law and its application in international community form its bases on principle of reciprocity and international investment protection law are established on the concept of trade-off which is supporting the principal of reciprocity in international community. It has been discussed in chapter two that legal principles and norms should be well structured to provide legal security and stability for international investment for a balance between rights of investor and host state. Laws and regulations are meant to deal with the common cases but they also accommodate unforeseen and special circumstances in individual cases as a requirement of justice and equity.

It has been discussed in chapter two that that the issues and challenges which are faced in international investment arbitration, mostly relates to vague terms and these terms relates to the provisions for protection of investment and investor and this approach delegates discretion to tribunals. Due to such vagueness in terms of international investment agreements, it becomes complicated to envisage outcomes of investment disputes and also hard to know how words would be interpreted. General rule so interpretation always suggest to cure this by writing contracts or investment agreements with clean and plain legal terms, such as terms of "foreign investor" , "fair and equitable treatment" and "indirect expropriation" should defined plainly and simply to avoid any ambiguity. Arbitral tribunal tribunals become involved in interpretation of these vague terms.

It is evident from the discussion in chapter three that ICSID convention created concept of neutral and delocalized arbitration tribunal to resolve the international investment disputes rather than relying on diplomatic efforts and on judges of local courts. International investment is protected by incorporating the umbrella clause in bilateral treaties and international agreements. ICSID arbitral tribunals are to ensure the protection as per the terms of relevant treaties and national laws. ICSID arbitral tribunal needs to take effective steps, to maintain the appropriate balance between international investment laws and other norms of international law, which may be summarized as follows.

First, tribunals must set out clearly the rules of law which would be applicable to the dispute starting with Article 42 of the ICSID Convention and elaborating on the rules of international law. Decision on applicable laws to the arbitration and to agreement between parties is of core importance as it discussed in chapter three.

Second, tribunals need to judge whether the relevant provisions or other applicable investment norms conflict with other applicable norms of international law. In case of conflict either on their face or in practice, commonly accepted principles should be given preference to determine the matter. Some rules do not produce results in every case, where rules become redundant, in such situation the tribunal needs to consider which rule should prevail.

Third, ICSID tribunals must create balanced approach to deal with liability of parties; host state and investor. States reserve the right of defense to the claims of the investor. State should be given opportunity to demonstrate that the measures and steps taken were in compliance with their international responsibility. This obligation may be under any other instrument as multilateral agreements or under customary international law. The existence and proof of such further obligations could release them of liability to the investor.

Many ICSID arbitral awards have been discussed in preceding chapters particularly in chapter four and it is appropriate to mention that warnings were issued in minority opinions in such investment arbitral awards that the structure of investment arbitration at international could be shattered, if the interpretation is expanded too far. Overprotection or strict shield by interpretation may lead to vicious reactions of states as Bolivia has revoked his membership of ICSID convention. Such reaction or harsh attitude of states could result to weaken international investment arbitration scheme as unwanted outcome. Good faith measures and fair and equitable protection provided by host will return reliability to infrastructure developed for international investment arbitration.

It is well known fact that certain problems and hardships exist in approach of developing countries to settle the matter by investment arbitration. In Pakistan, the confidence of investors in arbitral system of Pakistan is shaken as discussed in chapter five. Keeping in view the international investment arbitration infrastructure under ICSID and considering the arbitral systems of Pakistan following points, apart form security measures , needs some serious consideration to be worked up to create and boost the confidence of foreign investors:-

- Starting from the vary famous cases pertaining to international investment arbitration , judgments of Supreme Court in cases of ; Société Générale de Surveillance SA (SGS) and HUBCO vs. WAPDA are well known examples of the difficulties experienced by foreign investor for arbitration proceedings in Pakistan. In the first cited case of SGS, ICSID convention was applicable and this convention restricts the authority of domestic courts due to international commitment to the ISCID convention.

- ICSID Convention was signed and ratified by Pakistan in 1966 and afterwards no heed was paid to issue and regrettably it was not implemented into domestic law of Pakistan. In perspective of international law this attitude portrays the lack of dedication to international responsibilities. It is worthwhile to mention that in countries like Pakistan , India ,USA , UK, Canada and Singapore where legal system is based on common law international legal obligations under convention or international agreements become binding when they are ratified. National parliaments or constituent assemblies or legislature may set up specific constraints to honor the international commitments. These restrains will reduce the negotiating discretion of future governments to include specific provisions in every investment treaty. It well established principal of legal liability that retrospective commitments can not be dishonored or retrospective restraints can not be incorporated.
- While coming back to difficulties faced in context of international investment arbitration, it manifests the need to devise system to incorporate the international law and obligations into domestic system. Constitutional mechanism may be created to facilitate such international commitments until there is clear denial at international level of any signed convention or agreement by the executive or parliament.
- When fate and worth of decision of our domestic courts against the arbitration agreements and international commitments is considered; it should be noted that in the above cited case of Société Générale de Surveillance SA (SGS), ICSID tribunal disregarded the Supreme Court's injunction and assumed the jurisdiction to decide matter including the objections to the Jurisdiction . Through a procedural order from the tribunal Supreme Court was asked not to take up the matter .Therefore, to avoid such situation, domestic courts should act wisely and actively in accordance with international commitments and any decision or order which will become inoperative and will bring disregard should not be delivered.
- It has been discussed that many of problems in investment disputes relates to the vague terms in the international investment agreements. In light of the increasing number of investment disputes, it is extremely important for Pakistan to be more cautious while negotiating its investment treaties or agreements to adopt well defined definitions in its treaties instead of relying on domestic court's support or interpretation in favor of government. It is always advised that a restrictive definition of investment should be adopted to avoid any ambiguity and ensure the proper treatment for international investors only. One of the approaches is to exclude the word "assets" from the definition of investment that do not bring substantive and long-term economic benefits. On the other hand adequate safeguards which provide way to need to deviate from their treaty obligations in case a situation so arises or permits thereby.

- It has been a dilemma in investment arbitration that national laws or provision of constitutional law were put forward by the developing countries in defense to the claim of investor. From an international law perspective, a state may not invoke its internal laws, even constitutional; to invoke the invalidity of an international treaty. Neither Constitutional provision nor domestic laws can operate retrospectively to protect the national interests. Adoption of UNCITRAL Model Law may enhance the confidence of international investors which will govern both their international and domestic arbitrations. It may bring greater clarity to the law and not set up dual regimes for international and domestic commercial arbitrations. Such dual regime may create difficult to apply the proper interpretation to cases before courts. This absurd situation is clear in application of arbitration law in Pakistan.

- There is need for positive move to overhaul arbitration laws dealing with international arbitration and to approve a consistent national policy with modern arbitration laws.

- Pakistan is facing energy deficit and Gas pipe line project with Iran and India has not been finalized. To development of energy sector ECT may be used as model to enhance the chances of investment in this sector and this may work for regional development.
- Where vital steps are to be taken to discuss the draft of Arbitration Act in line with international investment and commercial arbitration regime, UNCITRAL Model Law may adopted as national arbitration law to enable and support the arbitral process.
- National legislature should play active role to incorporate the international laws and convention ratified by Pakistan into its domestic laws. Adopting an Ordinance is a timely solution as it lapse after expiry of constitutional life period.
- There is already a demand to improve the arbitral encouraging environment in Pakistan. National arbitral institution should be established with support of legal and business community of Pakistan. Pakistan's arbitration laws should definitely be reviewed and modernized to make them attractive to foreign investors with feeling of security and justice by giving institutional support for arbitration.
- Pakistan may introduce an exhaustion of domestic remedies rule as a policy matter to provide a encouragement to national arbitration framework.
- By developing the national arbitration institution in support of the international investment arbitral process, Pakistan has the opportunity of becoming a competitive arbitral venue. Consequently, a broadminded framework in Pakistan will make Pakistan more attractive as avenue for dispute settlement for investors dealing in the region.

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