CRITICAL EVALUATION OF INSTITUTIONAL ARBITRATION FOR THE SETTLEMENT OF INVESTOR STATE INTERNATIONAL INVESTMENT DISPUTES: A CASE STUDY OF PAKISTAN

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رَبِّ اشْرَحْ لِي صَدْرِي وَيَسِّرْ لِي أَمْرِي وَاحْلُلْ عُقْدَةً مِنْ لِسَانِي يَفْقَهُوا قَوْلِي

O my Lord! Open for me my chest (grant me self-confidence, contentment, and boldness); Ease my task for me; And remove the impediment from my speech, so they may understand what I say.

[Surah Ta-Ha; 20:25-28]

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FINAL APPROVAL CERTIFICATE

It is certify that we have evaluated the thesis "**Critical Evaluation of Institutional Arbitration for the Settlement of Investor State International Investment Disputes: A case study of Pakistan**" submitted by Mr. Ali Nawaz Khan, Registration No.21-SF/PHDLAW/F12, in partial fulfillment of the requirements of the degree of Ph.D Law at the International Islamic University, Islamabad. The thesis fulfills the requirements in its core and quality for the award of the degree of Ph.D Law.

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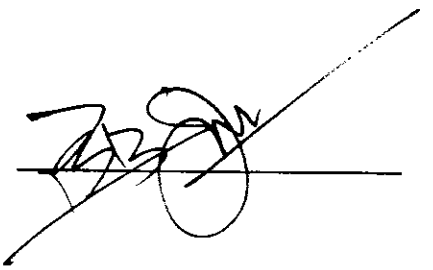

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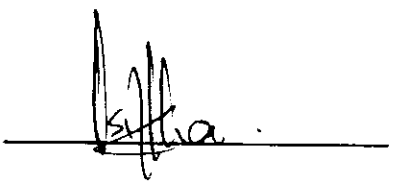

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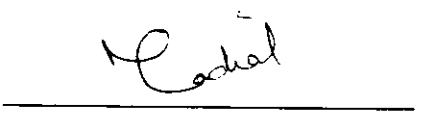

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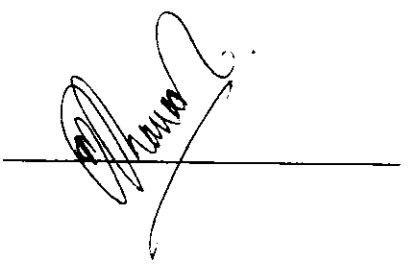

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ABSTRACT

Dispute settlement mechanism of ICSID under the auspicious of World Bank has gained legitimacy through its compliance pull and adherent response of sovereign states. This project highlights the characteristic of normative legitimacy as enunciated by Thomas Franck and evaluated the mechanism of ISDS under ICSID on the touchstone of his theory of legitimacy of international law. The inherent fault lines of ICSID jurisdiction has impacted to engender a legitimacy crisis of the exercise of ICSID jurisdiction by the ICSID arbitration tribunals.

The vulnerability of member states to regulate their vital public interests and over-empowerment of elite establishment of private judges has created challenges of ICSID jurisdiction. At the same time, unpredictability in the exercise of jurisdiction by the tribunals has contributed to weaken the compliance pull and adherence due to lack of determinacy, fairness and coherence which, resulted crisis of normative legitimacy of ISDS under ICSID. Sovereign states have responded to this unpredictable system of adjudication through their reluctant and deviated responses.

The project examines the nuances of responses of sovereign states to the decreasing legitimacy of international law of investment dispute settlement. One of the aggravated responses appeared in the disputes against Pakistan when the executive organ of the state has demonstrated his reluctance and avoidance to accept further obligations for their future foreign investments under ICSID mechanism. Likewise, the judicial organ of the state has exercised its constitutional authority in investment disputes to the extent of causing jurisdictional conflict with ICSID tribunals. Finally, the thesis proposes suggestions how to plug the loopholes in the existing mechanism for the enhancement of normative legitimacy so as to ensure compliance and adherence by the sovereign states.

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Countless praises to Allah, the Almighty, the "Lord of the lords", the Creator of all Universe, the worthy of all praises, who blessed me with courage and power to complete this dissertation. May the Lord's blessings, peace and greetings be upon the Prophet (SAWW), the mercy for all the beings, the revealer and the interpreter of Allah's will.

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ALI NAWAZ KHAN

LIST OF ABBREVIATIONS

ASEAN	Association of South East Asian Nations
BDA	Balochistan Development Authority
BITs	Bilateral Investment Treaties
BMR	Balochistan Mineral Concession Rule 2002
BOI	Board of Investment
CCOI	Cabinet Committee on Investment
CETA	Comprehensive Economic and Trade Agreements
CHEJVA	Chaghi Hills Exploration Joint Venture Agreement
CJEU	Court of Justice of European Union
DSU	Dispute Settlement Understanding
EC	European Commission
ECC	Economic Coordination Committee of the government of Pakistan
ECL	Exist Control List
ECO	Economic Cooperation Organization
ECT	Energy Charter Treaty
EctHR	European Court of Human Rights
EL	Exploration License
EUSFTA	EU-Singapore Free Trade agreement
FBR	Federal Board of Revenue
FCN	Friendship, Commerce and Navigation Treaty
FDI	Foreign Direct Investment
FET	Fair and Equitable clause
FPIA 1976	Foreign Private Investment (Promotion and Protection) Act 1976
FTAs	Free Trade Agreements
GATS	General Agreement of Trade in Services
GATT	General Agreement on Trade and Tariff
GBC	Ghazi Brotha Contractors
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber Of Commerce
ICJ	International Court of Justice

ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IIAs	International Investment Agreements
IMF	International Monetary Funds
ISDS	Investor-state Dispute Settlement
KICT	Karachi International Container Terminal
LCIA	London court of international arbitration
LDCs	Least Developing Countries
MCC	Metallurgical Corporation China
MFN	Most Favor Nations
MIGA	Multilateral Investment Guarantee Agency
MIT	Multilateral Investment Treaty
MNCs	Multinational Corporations
MOU	Memorandum of Understandings
NAB	National Accountability Bureau
NAFTA	North America Free Trade Agreement
NHA	National Highway Authority of Pakistan
NIEO	New International Economic Order
NPM	Non-precluding Measures
OECD	Organization for Economic Cooperation and Development
OIC	Organization of Islamic Countries
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PPIB	Private Power Infrastructure Board
PPRA	Public procurements Regulatory Authority
PSI	Pre-Shipment Inspection Service Contract
QICT	Qasim international container terminal
RPP	Rental Power project
RSC	Rental Service Contract
RTAs	Regional Trade Agreements
SAARC	South Asian Association for Regional Cooperation
SAFTA	South Asian Regional Free Trade Agreement
SALs	Structural Adjustment Loan

SAPs	Structural Adjustment Programs
SCC	Stockholm chamber of commerce
SCEs	State Control Enterprises
SEZs	Special Economic Zones
SOEs	State Owned Enterprises
TCCA	Tethyan Copper Company Australia
TCCP	Tethyan Copper Company Pakistan
TFEU	Treaty of Functioning of the European Union
TPP	Trans-Pacific Partnership treaty
TRIMs	Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UNASUR	Unión de Naciones Suramericanas, i.e Union of South American Nations,
UNCITRAL.	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNO	United Nations Organization
USTR	US trade representative
VCLT	Vienna Convention on Law of Treaties
WAPDA	Water and Power Development Authority
WTO	World Trade Organization
WWII	World War 2nd

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20. DSG Yapi Sanayi Ticaret Anonim Sirketi v. Kingdom of Saudi Arabia, ICSID Case No. ARB/19/32.

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25. Human Rights cases regarding 'Alleged corruption in rental power plants' 2012 SCMR 773.

26. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID CASE No. ARB/02/2

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28. International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21.

29. Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20.

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34. Lawless v. Ireland, App. No. 332/57, Report of the Commission, I Eur. Ct. H.R.

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36. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/1.

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39. Maulana Abdul Haq Baloch and Others vs. Government of Balochistan (The "Tethyan Copper Company Case"), 2012 SCMR 402.

40. Metalclad Cotporation v The Mexican United States, ICSID Case No ARB (AF)/97/1.

41. Methanex Corporation v United States of America, NAFTA, UNCITRAL, http://www.state.gov/documents/organization/51052.pdf.

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43. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB (AF)/99/2.

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56. Saluka Investments B.V. v. The Czech Republic, UNCITRAL Partial Award, ICGJ, 2006.

57. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16.

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62. Société Générale de Surveillance S.A. v. Philippines, ICSID ARB/02/6.

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71. Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6.

72. Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27.

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4. The Arbitration (International Investment Disputes) Act, 2011
5. The Foreign Private Investment (Promotion and Protection) Act 1976.
6. The Special Economic Zones Act, 2012
7. United Nations (1959). "Convention on the Recognition and Enforcement of Foreign Arbitral Awards",

DECLARATION

I declare that, except where otherwise indicated, this thesis is entirely my original work. It is being submitted for the degree of Ph.D. at International Islamic University Islamabad.

It has not been submitted before for any degree or examination in any other University.

Name of the Candidate: Ali Nawaz Khan

Signature:

SUMMARY OF CHAPTERS

Chapter No. 1 provides an account of development of protectionist approach of foreign investment. The protectionist approach provides mechanism for the settlement of investment disputes through transnational forums of private judges. This chapter illuminates the efforts for the institutionalization of investor-state dispute resolution by the global organizations for international peace and economic stability. This introductory chapter established the niche to analyze the ISDS on the touchstone of theory of legitimacy as enunciated by Thomas Franck. The adherence response of sovereign states, including Pakistan, has acknowledged the legitimacy rhetoric of ICSID jurisdiction under the auspices of World Bank.

Chapter No. 2 explains how legitimacy of international law engenders compliance and examines adherent response of sovereign states. This chapter analyzes attributes of Thomas Franck's Theory of legitimacy, which was revealed in his work '*The Power of Legitimacy among Nations*' published in 1990. The author has explained the normative characteristic of rule-making institution to provide basis for the validation and adherence of international legal framework for ISDS.

Chapter No. 3 discusses emergence of ICSID as most appreciated institution of ISDS under the auspices of World Bank. The chapter highlights the efforts made by the World Bank for the establishment of ICSID and explains structure of ICSID and attributes of its jurisdiction. This Chapter provides an appraisal of assumption and exercise of jurisdiction by ICSID tribunals. A comprehensive analysis has been provided to discuss the legitimacy evaluation of the ICSID regime. This chapter argues that legitimacy rhetoric of ICSID forum has engendered compliance and adherence response of sovereign states.

Chapter No. 4 identifies inherent vulnerabilities of ICSID jurisdiction and consent for its obligations. This chapter explores fault lines of assumption and exercise of jurisdiction exercised by ICSID tribunals. These fault lines introduced unpredictability for the settlement of investment disputes. This Chapter provides that unpredictability contributed to create legitimacy crisis for the validation and adherence of ICSID jurisdiction.

Chapter No. 5 explains general and specific factors which have affected the compliance or adherence derives of the sovereign states. These contributory factors shape responses of the states. This chapter illuminates the nuances of deviated responses of sovereign states under the effect of growing legitimacy crisis of ICSID jurisdiction. One of aggravated form of response appeared in form of denial of ICSID jurisdiction rather conflict of jurisdiction with the domestic courts in Pakistan.

Chapter No. 6 examines conformable approach by Pakistan more specifically through its organs of the states. The chapter identifies affirmative measures taken by Pakistan in line with the contemporary obligations under ICSID jurisprudence since adoption of ICSID Convention. Later on, unconformable and deviating approach appeared under the declining rhetoric of normative legitimacy of ICSID jurisdiction. This chapter analyzes response of Pakistan to deal with the disputes filed to invoke ICSID jurisdiction against Pakistan. The chapter evaluates jurisdictional conflict of ICSID with the domestic courts in Pakistan which resulted in the hefty ICSID awards.

Chapter No. 7 concludes that legitimacy standards of ICSID jurisdiction impacted compliance pull and adherence responses of the sovereign states. This chapter suggests measures to enhance legitimacy standards of ICSID jurisdiction to engender compliance pull thus, affirmative response of sovereign states.

CHAPTER NO- 1

INTRODUCTION

In the history of modern civilizations, trade and investment has never been restricted to national borders. Foreign investment is an important contributory factor for economic growth in the cotemporary globalized world of liberal economies.[1] The trends of flow of capital show that international investment regime is responsible for US$1.3 trillion in a single year of 2018 which include US 816 billion dollars.[2] The states whose financial structures are based on liberal economic policies would desire to attract capital from capital exporting nations of the world. Those economies need such capital inflow for the sake of economic growth, employment and transfer of technology.

Foreign investment transactions are expected to bring specialized skills, trained human capital and infrastructural development. As a result, the stakeholders aim to achieve better social and economic conditions for the citizens of the capital importing host-states[3] and the production of wealth from the foreign investor. Despite its maturity and being oldest phenomenon, the regulation of foreign investment is

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[1] Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty," *American Journal of International Law* 92, no. 4 (1998): 621-641. Liberal economy means the economy base on and with the objective to produce more wealth by free movement of capital across the borders with minimum state intervention in the market mechanisms and individual liberties regarding trade, business and property. And the state should permit the market to determine the direction of international investment flow. See also, Kenneth J. Vandevelde, "The political economy of a bilateral investment treaty." in *Globalization and International Investment*, (Routledge, 2017).

[2] *UNCTAD, "World Investment Report 2019: Special economic zones," accessed August 19, 2019. https://unctad.org/en/PublicationsLibrary/wir2019.*

[3] OECD "*Foreign direct investment for development maximizing benefits, minimizing costs, overview*", (OECD, 2002). Accessed June 29, 2014. www.oecd.org .

relatively considered underdeveloped in international law. International law of foreign investment evolved gradually to regulate investment activities.[4]

Being an integral part of international law, foreign investment law inhere the characteristic of legitimacy. Legitimacy rhetoric of international investment law has been recognized for predictability and compliance of international practices. Sovereign nations have been interested in the greater legitimacy of international rules for its validation, compliance and adherence. In recent past, Thomas Franck introduced theory of legitimacy to identify the attributes of legitimacy of international rules or rule making institutions. In 1990, the author published his work 'The Power of Legitimacy among Nations' to explain the need and characteristics of legitimacy in international law. Thomas Franck has asserted that normative quality of determinacy, coherence and fairness of international rule of practice or rule making institution attracts its compliance from stakeholders including sovereign states. The adherent responses of sovereign states have impacted on the normative standard of international rule on the touchstone of legitimacy.

The research analyzed the jurisdictional aspects of ICSID on the touchstone of legitimacy of international laws. The study has been to identify the fault lines of the ICSID jurisdiction which has affected to reduce the compliance pull of rules for ISDS and ICSID as rule-making institution. The deviated responses of sovereign states have been the direct impact of unpredictability of exercise of ICSID jurisdiction by ICSID tribunals and its consequent reduced legitimacy. The project is to appraise the exercise ICSID jurisdiction for settlement of investment disputes on the touchstone of theory of legitimacy enunciated by Thomas Franck.

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[4] Surya P. Subedi, *International investment law: reconciling policy and principle* (Oxford: Hart Publishing, 2008), 7.

Pakistan actively participated to validate the contemporary framework of international law on foreign investment. Pakistan being a capital importing nation participated for the establishment of ICSID jurisdiction. After its incorporation, Pakistan accepted obligations of foreign investment protection under the contemporary regime of ISDS so as to satisfy the protectionist approach of foreign investment in host state. In last two decades, the emergence of declining normative standards of legitimacy of ICSID jurisdiction has witnessed deviated approach of compliance and adherence of ICSID jurisdiction. The unconformity attitude of judicial organ of the state given rise jurisdictional conflict with the ICSID tribunals in its aggravated form of non-compliance of international obligation.

The urge of foreign investors to protect their assets in foreign territories has provided basis for the development of international of foreign investment. In post-World War II (WWII) era of World's economic revival, capital exporting nations have encouraged global organizations of peace and economic to establish a system of international practice for the economic stability of international trade and investment. Capital importing nations participated so as establish a balance between economic interest of the stakeholders and vital national interests of the states. The UNO and Breton Wood Organizations played its decisive role for the development of international law on foreign trade and investment.

The UNO and World Bank recognized the protectionist approach for the foreign investment in the host states. International law of foreign investment acknowledged right of fair treatment and impartial dispute resolution of foreign investors. In this regard, leading contributions have been to build an international consensus for the establishment of a transnational forum i.e. ICSID for the resolution of investment disputes. International Center for the Settlement of Investment Disputes

(ICSID) was established through its International Convention on the Settlement of Investment Disputes between States and Nationals of other States in 1965 which is known as ICSID Convention.

1.1 Historical Perspective of International Investment Law

Historical records refer to the fact that earlier political communities barely recognized the legal capacity and the rights of 'outsiders'. These outsiders of the communities are often denied any protection of their properties as foreign nationals and were known as 'aliens'.[5] The 'legal position' of the aliens were an outlawry in the time of Roman and Germanic tribes. The status of the aliens had been improved in the middle ages and still in the process of assimilation in the present time.[6]

In 17th and 18th century, the trading powers of the world decided to maintain a restrain rule to protect the property of their nationals from the interference of the host state in peacetime. In case of confiscation of the aliens' property compensation was required to pay to the nationals of other contracting state. The Friendship, Commerce and Navigation (FCN) Treaties incorporated the provisions for the protection of economic interests of their nationals.[7] The injury to the citizen of the state is considered as an injury to that state and the host state could be held responsible for such injury. Thus, the home state has the legitimate interest in protecting its citizens[8]. The early scholars such as Grotius and Vattel supported the

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[5]Andrew Paul Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (The Netherlands: Kluwer Law International BV, 2009), 3. "These 'outsiders', often known as aliens, derived from the Latin word *alius*, meaning 'other'.

[6]Edwin M. Borchard, "Basic Elements of Diplomatic Protection of Citizens Abroad." *The American Journal of International Law* 7, no. 3 (1913): 498.

[7] Lauge N. Skovgaard Poulsen, "Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality," PhD diss., The London School of Economics and Political Science, LSE, (2011):29-38.

[8] Ian Brownlie, *Principles of Public International Law*, 7th Ed. (London: Oxford University Press, 2008), 519.

principle that a foreign investor is already subject to the law of the home country, so the law of the host country is not to apply on them.[9] This opinion implies that the host state could not expropriate the assets of the foreign investors. The disagreement sometime had resulted in full scale arms conflicts between states. Despite of the dominated standards of treatment with the alien traders the diplomatic intervention and use of force were invoked in certain incidents for the enforcement of their economic interests of capital exporting nations.

In the 19th century, the protection of alien property under customary international law invoke incidents of diplomatic intervention by the home state to provide relief to their investor. This diplomacy ranged from diplomatic efforts and sometime aggravated to gunboat diplomatic intervention by the use of arm force. The USA and France resorted to Gunboat Diplomacy against Venezuela and Mexico in 1860s.[10] The capital exporting nations exercised the option of Gunboat Diplomacy for the enforcement of 'Responsibility of States' under customary international law.[11] This diplomatic intervention and gunboat diplomacy had been exercised as recognized principle of international customary law. The international obligations for the home state principle to protect the aliens' property was justified in number of incidents.[12] In 18th and 19th centuries, the colonial powers were not much interested to develop any transnational protection mechanism for the settlement of investment disputes as per their expansionist designs.[13]

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[9] Ibid., 519.
[10] Felix O. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States." *Rich. J. Global L. & Bus.* 13 (2014): 227,228.
[11] Ibid., 228.
[12] Ibid., 228.
[13] M. Sornarajah, *The international law on foreign investment* (Cambridge: Cambridge University Press, 2017), 19.

The last decades of nineteenth century is considered to be an era of the beginning of decolonization. The decolonized nations emerged with the rhetoric of sovereignty and complete independence. These newly established states rejected the home state principle and shifted their reliance on the sovereignty and sovereign equality. This implies that the host state has supreme authority to legislate and even expropriate the assets of foreign investor even by ignoring international minimum standard treatment[14]. In 1868, an Argentinian jurist Carlos Calvo led a campaign to oppose the home state principle for expropriation. He supported the assertion that foreign investor should be treated in the same manner as his own nationals. And in case of dispute between foreign investor and host state the 'Local Remedy' to exhaust first before invoking international arbitration.[15] 'Calvo Doctrine' provided to protect economic and political self-determination by applying domestic law by the national judges.[16] Many newly established developing countries, particularly Latin American incorporated this doctrine in their constitutions. After Russian[17] and Mexican revolution[18], these governments expropriated assets of foreign investors even without compensation by availing Calvo doctrine. After a rigorous diplomatic campaign a 'Claim Commission' was set up between the USA and Mexico to resolve the disputes of American foreign investors' victim of Calvo doctrine in Mexico. During diplomatic efforts, American secretary of state Cordell Hull articulated his position by asserting that such taking of property without prompt, adequate and just compensation is not expropriation but 'confiscations' and against the norms of international justice.[19]The

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[14] E M. Borchard, "The minimum International Standard in the protection of aliens," In *American Society of International Law Proceedings*, vol. 33 (1939).
[15] Newcombe and Paradell, *Law and practice,* 13.
[16] Ari Afilalo, "Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11," *Nw. J. Int'l L. & Bus.* 25 (2004): 290.
[17] In 1917
[18] in 1920
[19] Andreas F. Lowenfeld, "*International economic law.*" (New York: Oxford University Press, USA, 2008): 475.

doctrine is known as Hull formula. In the period of decolonization, the newly independent states accepted the settlements of investment disputes according to Hull doctrine. That means the point of view of international customary law propagated by their colonial masters.

After WWII, when these independent states grew in majority they started questioning the rule of international law which affected the sovereignty of their states including Hull Rule.[20] These states nationalized and expropriated the assets of investors by exercising their sovereign authority. The Hull Rule was objected for its application for the obligatory payment of adequate and effective compensation for the expropriation of foreign property. The capital exporting nations pointed the evidences of practice and writings form international law in favour of Hull Rule for "prompt, adequate and effective compensation" as oppose to "appropriate compensation" for taking over foreign property by the Host state in accordance to the local laws.[21] After WWII, the newly independent states culminated an assertion of sovereignty by the developing states after the long suppressed period of colonization. This had motivated the sizeable number of states to assert a control and preserve the natural resources for the indigenous population of the states. In 1950s, this rhetoric provoked the wave of nationalization and expropriation of the assets of their colonial era. There was a wide spread wave of control of the investments of the foreign controllers mostly in African and south American nations. The massive nationalizations and expropriations occurred in Iran, Libya, Egypt, Chile, Venezuela and Cuba. These states took measures to recapture their natural resources and industrial potentials under the

[20] Andrew T. Guzman, "Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties," *Va. j. Int'l L.* 38 (1997): 646.
For example, in a note dated August 3, 1938, the Mexican Minister of Foreign Affairs stated that "[m]y Government maintains that there is in international law no rule universally .accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character.,
[21] Ibid., 648.

perceived inequality of economic rights of foreign investors and the host states.[22] These nationalization experiences motivated the capital exporting nations to build a protection and confidence for their foreign investor while in the host states. The efforts of the capital exporting nations remain ineffective to implement the Hull Rule due to the growing opposition by these capital importing states. These decolonized states adopted rather less stringent principle of prompt, adequate, and effective standards of compensation for expropriations.[23] The investment disputes had been in dead lock in the absence of a specialized mechanism for ISDS between capital exporting nations and the Host states in the backdrop of decolonization. The Rule of "appropriate compensation" remained dominant against the Hull Rule until the emergence of Bilateral Investment Treaties (BITs).[24] This pattern of instrument was first signed between Germany and Pakistan in 1959. Foreign investment rights were treated by the customary international law before the emergence of international investment agreements.[25] The global trend emerged to establish a balanced control to the sovereign rights of the host states and rights of private property of foreign investors recalibrated through international instruments of investment treaties.[26] The foreign investment treaties introduced transnational institutional arbitration mechanism for the settlement of investment disputes. The emergence of this new instrumentality has established the ISDS as specialized forum wherein the matter is resolved by the independent, impartial and skilled professionals of the relevant fields.

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[22] Asha Kaushal, "Revisiting history: how the past matters for the present backlash against the foreign investment regime," *Harv. Int'l LJ* 50 (2009): 499.
[23] Guzman, "Why LDCs" 646,647
[24] Ibid., 651
[25] Dr. Ahmad Ghouri, "The evolution of bilateral investment treaties, investment treaty arbitration and international investment law," *International Arbitration Law Review* 14, no. 6 (2011): 189-204.
[26] Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, (Oxford: Oxford University Press, 2016), 5.

The introduction of BITs proved to be a paradigm shift in the history of disputes resolution of foreign investment.

The phenomenon of settlement of investment disputes by transnational arbitration started with Jay Treaty of 1794 between UK and USA. The Hague conference of 1899 and 1907 provided bases for the establishment of Permanent Court of Arbitration (PCA). The objective of the PCA was to facilitate the mechanism of arbitration between the states for the resolution of their mutual disputes. These developments proved to be the precursor of some other courts system particularly Permanent Court of International Justice (PCIJ) in 1922 and International Court of Justice (ICJ) in 1946.[27] These resolves of international community are the assent for the recognition of disputes settlement mechanism before international forum.

1.2 Developments for International Investment Protection

In the history of international investment law, the foreign investment protection evolved through its much dependence on the dispute settlement mechanism. In majority of investment promotion agreements, states provide guidance to resolve investment disputes. The trading nations were even conscious in their early contracts of trade and investment promotion to incorporate such provisions to that effect. The era started after WWII can be termed as institutional efforts for the institutionalization for protection of foreign investment through dispute settlement mechanisms. The effort of global organizations failed to build broad base consensus for multilateral investment treaty to provide a dependable investment protections of foreign investment. The ideological and politico-economic rift of the two super powers i.e. USA and USSR contributed for the establishment of Multilateral

[27]Charles N. Brower and Stephen W. Schill, "Is arbitration a threat or a boom to the legitimacy of international investment law," *Chi. J. Int'l L.* 9 (2008): 493.

Investment Treaty (MIT). This failure of world community paved its way to build a protection through Bilateral Investment Treaty (BIT) between the contracting states for their foreign investors. These state to state agreements have provided with the mechanism to protect the investment of foreign investors from other contracting party while working in the other contracting host state. At the same time, a large majority of such BITs have referred for ISDS mechanism before transnational institutional arbitration of investment disputes including International Centre for the Settlement of Investment Disputes (ICSID). The existing international legal framework for the protection of foreign investment has been emerged from the creation of related international instruments. These instruments include international investment contracts, multilateral investment treaties (MITs), bilateral investment treaties (BIT), multilateral regional agreements and international Conventions.

1.2.1 Early Investment Contracts of States

The early protections of foreign investment can be referred back to merchant concession contracts of 10th century and FCN of the 18th century.[28] In 1796, President John Adams negotiated first ever FCN for USA with the objective to secure guarantee for the trading related investment interests of the country.[29] These FCN were provided with the provisions for the free entry, admission and the Most Favor Nations (MFN) treatment clause in the contracting host states.[30] The main focus of the earlier contracts was promotion and regulation of trade and investment among the state parties to the agreement. Thus, the investment related treaties between states provided the theoretical and structural basis for investment protection. These contractual

[28] Andrea K. Bjorklund and August Reinisch, eds. *International investment law and soft law,* (Northampton: Edward Elgar Publishing, 2012), 192.
[29] Rudolf Dolzer and Christoph Schreuer. *Principles of international investment law*, (Oxford: Oxford University Press, 2012), 1.
[30] Sornarajah, *International law,* 209,210.

instruments between states have established the mechanism for the enforcement of economic rights of the states and their citizens against any expropriation in the host states. These contractual instrumentality provided to insulate the economic interests of contracting states.[31]

The treaties of Friendship, Commerce and Navigation (FCN) of UK, France, Germany, and Japan had been devised mainly to gain commercial benefits including from trade and investments.[32] The FCN treaties were established to promote trade relationships of these trading nations. These changed their role to investment protection even after WWII.[33] The majority of FCN were provided with the charter of rights for their traders and investors of contracting parties to protect their investment. These FCN of capital exporting nations remained the subject of jurisdiction for the state to state resolution of investment disputes.[34] The FCN treaties have been proved to be the progenitors of the modern investment treaty regime.[35]

1.2.2 MIT: An Effort for Multilateral Approach for Investment Protection

After world war-II, some international institutions played a proactive role for the development of international investment law and its dispute settlement mechanism. The efforts undertook by the international organizations such as UNO, OECD, WTO and World Bank have contributed to establish the existing legal framework for foreign investment protections through MIT.

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[31] M. Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge: Cambridge University Press, 2015), 78.
[32] Michael Nolan, "Challenges to the credibility of the investor-state arbitration system" Am. U. Bus. L. Rev. 5 (2015): 437.
[33] Newcombe and Paradell, *Law and practice,* 12.
[34] Sornarajah, *International law,* 210.
[35] Ibid., 209,210.

UN General Assembly passed a resolution for maintaining the flow of private investments from developed countries to under-developed countries for the social and economic development of these states. The resolution requested the UN Secretary General to conduct a study for the increase of capital flow in the under-developing states.[36] The UNESCO was given the task to conduct a study for the promotion of investment flow for economic development of the developing states. The UNESCO in its report on the flow of private capital suggested measures for the capital importing countries to undertake for the promotion of international investments. The report further suggested measure for the protection of foreign investments to build an environment for the enhancement of foreign investments for these states. The memorandum of report identified expropriation and influence of capital receiving countries for their legal institutions to control the businesses as the deterring factors for the flow of private capital. The capital supplying countries and their investors had been reluctant to rely upon the individual guarantees provided by the capital receiving states due to their unpredictable political policies. The report suggested that international arbitration body through arbitral agreement by governments for the effective enforcement of respective obligations. The neutral forum for the settlement of dispute is important for the enhancement of private investment for under-developing countries.[37] The findings of this report appeared in the UN resolution of 1962.[38] The resolution declared that the international economic cooperation to be extended to protect the assets of foreign investments in the sovereign states.[39] In case of expropriation or nationalization the appropriate compensation to be determined by

[36] General Assembly Resolution (A/Res/622c (VII). Accessed February 22, 2018. https://digitallibrary.un.org/record/666180?ln=en.
[37] Secretary General Report, "promotion of international flow of private capital" UNESCO (E/3325) 26th February 1960. Accessed February 22, 2018. https://digitallibrary.un.org/ (para170, 200-202)
[38] UN Resolution (1803(XVIII) of 1962. Accessed February23, 2018. https://digitallibrary.un.org/record/204587?ln=en.
[39] Ibid.

the national courts or international arbitral adjudication.[40] The world community under the auspices of the UNO started its efforts for the formalization and regulation of international investment law. In 1962, UNGA passed the Resolution 1803 to recognize the permanent sovereignty over the natural resources. The resolution passed to establish a fine balance of the assertion between developed and the developing hosts with consensus with the western states. This resolution protects permanent sovereignty of the states over their natural resources with the need to protect the interest of the foreign investors by providing compulsory compensation in case of any nationalization or expropriation.[41] The UNGA Resolution 1803 was passed on the lobbying of the developing nations in pursuance of their efforts to preserve its sovereignty over their natural resources.[42] In 1962, the UN resolution 1803 has recognized that the state has permanent sovereignty over their national resources. The foreign investment must not be subject to condition which conflict with the interests of the states. The foreign investment agreements are to be freely enter by the sovereign states. These agreements to respect the sovereignty of states and their natural resources.[43]The resolution was an effort to ensure the protection of sovereign rights while encouraging international cooperation in the field of economic development. In 1973, some oil producing developing nations use the oil price by asserting it as the New International Economic Order (NIEO). In 1974 UN adopted a general assembly resolution 3201 for the establishment of new international economic order. The new economic order was founded on the principles of equalities of all countries to accelerate economic growth of developing countries for the sustainable

[40] Ibid.
[41] Kaushal, "Revisiting history" 500.
[42]Surya P. Subedi,. *International Investment Law: Reconciling Policy and Principle* (London: Bloomsbury Publishing, 2012), 21-25. See also, Kaushal, "Revisiting history" 500.
[43] United Nations, "General Assembly Resolution 1803 (XVII): Permanent sovereignty over natural resources", Seventeenth Session, Supplement No. 17 (A/5217) (New York: United Nations, 1963): 15-16.

growth of world economy.[44] The Resolution 3281 adopted for the establishment of New International Economic Order codified the Charter of Economic Rights and Duties of State. The charter demanded to compensate the foreign investor in case of nationalization and expropriation according to the domestic law of the state. Most of developed countries voted against the resolution or otherwise abstained from the voting.[45]

The role of organization of economic cooperation and development (OECD) is very important for the development of international investment law and its dispute resolution mechanism. In 1959 after the rejection of Draft Convention of Abs-Shawcross conference, the OECD made another attempt for the adoption of a Draft Convention for the protection of foreign property. Both Conventions were rejected due to the strong opposition from capital importing country. These countries objected because of their imbalance investors' tilted approach. In 1976, OECD, after several fail attempts, introduced declaration guidelines for multilateral enterprises in some diluted form. The OECD in its ongoing efforts to build a broad base consensus in the form of multilateral investment treaty started its negotiations which remained continued from 1995 to 1998. This treaty of Multilateral Agreement on Investment (MAI) was also abandoned due to heavy criticisms from developing capital importing countries that treaty had very few imbalance provisions regarding the protection of their interests. Consequently, new Guidelines for Multinationals Enterprises were adopted in the year 2000.[46]

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[44] United Nations, "General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order", and "General Assembly Resolution 3202 (S-VI): Program of Action on the Establishment of a New International Economic Order", Sixth Special Session, Supplement No. 1 (A/9559) (New York: United Nations, 1974): 3-12.
[45] Kaushal, "Revisiting history" 501.
[46] Subedi, International investment law, (Bloomsbury, 2012), 39.

International trade and investment are two important components for international economic law regime. The policies of investment law have their impact for the flow of international trade or vice versa. The emergence of WTO system under the GATT realized to put their efforts for the promotion and protection of international investments. WTO facilitated a policy which has its impact on the encouragement of foreign investment among member states. The specialized agreements of WTO countries have been the measures to promote international investment which has consequential impact on international trade. Pakistan remain the part of these effort as WTO member state. The WTO also undertook some trade related investment measures. In the form of TRIMS and GATS during Uruguay Round from1985 to 1995 which was signed in 1995. Both instruments contain provisions relating to foreign investment but with its limited scope. However, these prohibit member states from applying any trade related investment measures inconsistent with the principle of national treatment. The developing countries objected because it is not a forum to discuss investment related matters and USA termed these agreements much restrictive.

The WTO made further efforts to regulate foreign investment. The issue was made the part of agenda. In 2001, Doha Ministerial Conference mandated to start a fresh negotiation for establishing a Multilateral Investment Treaty. The developing capital importing countries and developed capital exporting country remained fail again to reach upon an agreement even for its basic framework. As a result, the negotiations were dropped from the WTO agenda in 2004.[47] WTO members' states committed for the schedule of exemption from Art II of General Agreement of Trade in Services (GATS) and covers facilitation for investment in telecommunication

[47] Ibid., 37.

sector.[48] The fifth protocol to GATS among the WTO countries covers the exemption from Art II relating to financial services.[49] The fourth and fifth protocol agreements of GATS are the part of the facilitation efforts for the promotion of trade and investment among the host members states of WTO. A framework agreements entered to protect the interests of foreign investors by protecting the intellectual rights of the goods. The protection of the intellectual property rights was a step forward to protect and enhance the flow of foreign products in the host country.[50]

The WTO members' agreed for an Agreement on Trade-Related Investment Measures (TRIMs) in its Uruguay Round. The agreement worked for the liberalization of investment for the economic growth with its special focus on developing countries. A committee is referred to monitor the implementation of the objectives relating to the TRIMs.[51] The ministerial committee adopted measures for transparency for the economic growth of the member states.[52] The WTO members in Doha Ministerial Declaration 2001 recognized the framework for secure, transparent, predictable conditions for the foreign investment. The members emphasized the need to enhance the technical assistance and capacity building for transparency and dispute

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[48] World Trade Organization, "Fourth Protocol to the General Agreement on Trade in Services", S/L/20, (Geneva; World Trade Organization, 1997). http://wto.org/wto/services/4-prote.htm .

[49] World Trade Organization (1998). "Fifth Protocol to the General Agreement on Trade in Services", S/L/45, (Geneva; World Trade Organization, 1998). http://www.wto.org/services/s145.htm.

[50] World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: World Trade Organization, 1995), 365-403

[51] World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods - Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: World Trade Organization, 1995), 163-167

[52] World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1B: General Agreement on Trade in Services" and "Ministerial Decisions and Declarations adopted by the Trade Negotiations Committee on 15 December 1993". The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: World Trade Organization, 1995), 325-364 and 456-463

settlement procedures. The long term foreign investments are contributory factors for the expansion of trade.[53]

Another institution, International Bank for Reconstruction and Development[54] (the World Bank) associated with the promotion of economic development in less developed countries. In 1965, the World Bank undertook a successful effort for the establishment of dependable mechanism for foreign investment protection in the shape of a multilateral treaty i.e. International Convention for the Settlement of Investment Disputes (ICSID). This Convention has introduced a fair, independent and reliable institutional arbitration mechanism for the settlement of foreign investment disputes between foreign investor and the host state i.e. ISDS.[55]

The priorities of the states change from the preservation of their sovereignty over natural resources to encashment of sovereignty in consideration of credible protection of the foreign investment. Thus, the Charter of 1974 was replaced by the instrument of Bilateral Investment Treaties (BIT), which reached far beyond the protection of foreign investment to control the regulatory mechanism of the host state.[56] The diametrically opposite political and economic ideologies among nations to regulate foreign investments can be considered as the reasons for the deadlock position over MIT. The long standing deadlock position over the multilateral approach persuaded the capital exporting nations to pursue a bilateral approach for foreign investment protection.

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[53] World Trade Organization, "Doha Ministerial declaration", World Trade Organization, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, WT/MIN (01)/DEC/1, (Geneva: World Trade Organization, 2001), http://www.wto.org.

[54] Established under Brighton wood Agreement in 1949 for the reconstruction of Europe after WWII.

[55] Ibrahim Shihata, *The World Bank in a Changing World: Selected Essays and Lectures* Vol. 2. (Hague: Martinus Nijhoff Publishers, 1991), 30.

[56] Kaushal, "Revisiting history" 501.

1.2.3 BIT: Prolific Emergence of Bilateral Approach for Investment Protection

A significant development took place in the field of foreign investment protection was the introduction of Bilateral Investment Treaty (BIT). The introduction of BITs has shifted the paradigm for investment protection despite of the conflicting economic ideology of the world community. This 'state to state' contractual assurance has provided to secure foreign investments in general and ISDS in particular for the investors of the contracting states.

In 1959, Pakistan and Germany signed first ever BIT to regulate matters related to foreign investment relationship between the states. The opposing behavior of the capital importing nations underwent a shift for the acceptance of international obligations for institutional resolution foreign investment disputes through bilateral treaty. BITs are considered to promote, protect and attract foreign investment by establishing a stable and confident environment for the foreign investors of those countries. The BITs usually contain provisions relating to basic concepts, admission of foreign investor, standard of treatment, repatriation, expropriation, and dispute settlement mechanism between investor and host state. These rights include substantive rights to compensate and procedural right to directly bring its claim before supranational arbitral tribunals.[57] A typical BIT includes regulations relating to entry, admission, treatment standards, transfer of capital, compensation for damage and dispute resolution mechanism. Some recent trend of BITs shows the inclusion of provision regarding human rights, health, environment, safety and labour rights for example USA-URAGUAY BIT 2005.[58] BIT as a crucial instrument underwriting

[57] Ahmad Ali Ghouri, "Positing for balancing: investment treaty rights and the rights of citizens,"*Contemp. Asia Arb. J.*4 (2011): 95.
[58] UNCTAD, "Bilateral Investment Treaties 1995-2006; Trends in Investment Rulemaking", (United Nations, 2007), 3.

economic globalization by providing wide range of investment protections.[59] BITs are written agreements between the states which are governed by international law to regulate the rights relating to foreign investments in the host states.[60]These agreements have been created to protect the beneficial interests of the foreign investors and their investments in some foreign territory. The foreign investors despite the stranger to the contracts are preferred beneficiaries through their substantive and procedural right to access the ISDS jurisdictions without the interference of the contracting parties. BITs being the sovereign decree are treated to have overriding effect over constitutional and domestic laws of the contracting state. BIT instrumentalities have created contractual liabilities of sovereign states in favour of third party even have no privy to the agreement.[61] The BITs have created the obligations for the host states without having any enforceable right against the foreign investors.[62]

The recognition of BITs legitimacy can be realized from the adherence trends by the nations of the world. The first ever BIT was signed by Pakistan and Germany in 1959.[63] The number of BITs from 1959 to 1991 grew around 400 from the ninety developing or Least Developing Countries (LDCs) of the world. The proliferation of this instrument grows dramatically in post-cold war era. This number rose to over one thousand in 1996 almost covering major economies of the world. In 2017, the number of BITs rise to 2946 BITs out of 3322 of total international investment agreements (IIAs). According to World Investment Report out of 2946 concluded BITs, 2638

[59] Michael Waibel, and Yanhui Wu, "Are Arbitrators Political? Evidence from International Investment Arbitration," Working Paper (2017), 2.
[60] VCLT Art 2(1)(a)
[61] Ghouri, "Positing", 95
[62] Tarcisio Gazzini, "Bilateral investment treaties," in *International Investment Law*, 99-132 (Leiden: Brill Nijhoff, 2012), 8.
[63] Pakistan-Germany Bilateral Investment Treaty 1959.

have been in forced.[64] Susan D. Frank has identified two contributory factors for the proliferation of investment treaties. These factors include the incorporation of substantive rights and direct access to remedies for the foreign investors in violation of these substantive obligations of the investment treaty.[65]

A large majority of these BITs have referred institutional arbitration as the dispute settlement mechanism for the settlement of investment disputes. These instruments i.e. BITs mostly have recognized the rights of foreign investor to approach directly ICSID institutional arbitration for ISDS.[66] Thus, the foreign investors in case of investment disputes can bypass the national courts of host states and its remedies. The foreign investors can approach this institutional arbitration directly without having recourse to national court and its remedies.[67]

The LDCs signed these BITs to collect more benefits from open market economic patterns of the world rather than commitment for their legal obligations. These countries adopted these binding agreements to attract investments for the economic self-interests.[68] The countries which sign BITs protection have been able to secure more foreign investment than those not adopted this system of investor protection. This contracting regime protection system proved to be the incentive for the foreign investors to invest in and for LDCs to promote well-being in those states.[69]

In 1990s, with the collapse of cold war the proliferation of BITs attributed for some major factors. These factors include the abandonment of controlled economy.

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[64] *UNCTAD*, "World Investment Report 2018: Investment and New Industrial Policies," accessed September 24, 2019. https://unctad.org/en/PublicationsLibrary/wir2018.
[65] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham L. Rev.* 73 (2004): 1530.
[66] Guzman, "Why LDCs" 639
[67] M. Sornarajah, *The international law on foreign investment* (Cambridge: Cambridge University Press, 2010): 180-210; for a thorough discussion of the history and purpose of BITs.
[68] Guzman, "Why LDCs" 639.
[69] Ibid., 670-673.

The controlled economies were discouraged when the regime of official assistance withheld after the collapse of USSR after a long cold war with USA. This generated a demand of foreign money to fulfill the needs or to run the affairs of the states. The demand of foreign money shifted the proprieties of states. The states shift their economic policies from dependent to free market economy. The non-availability of financial assistance from the major players of cold war is mainly responsible for the emergence of free competition to attract foreign money and new technology for further job creation and social development. This dire need of the foreign capital dragged the capital importing countries on low profile in the bargaining for the commitment for the protection of the existing and future interests of foreign investors.[70]

The discussion generates a question that whether it is only a BIT which is responsible for the inflow of foreign investment in a state in the competition to attract foreign investment.[71] The question can barely be answered in affirmation without the recourse of other components of international legal framework regulating the foreign investment.

The competing interests of investors and host states were emerged from the legal framework of international investment. The rights recognized by the existing regulatory legal framework for foreign investors are right of fair and equitable treatment, right of legitimate expectation, and protection from unfair expropriation of any form. The investors' stake is to ensure maximum protection for their irreversible but vulnerable investments in host states.[72]

[70] Kaushal, "Revisiting history" 503.
[71] Guzman, "Why LDCs" 674
[72] Ibid., 677.

On the other hand, a state comprises the elements such territory, inhabitants or citizens, government, and sovereignty. The principles of international law recognize the right to respect territorial integrity and the rights to exploit their natural resources for the benefits of inhabitants of the state. International law has reinforced political and economic rights of the citizens of the states along with their government's right to run the affairs of the state. At the same time, the states have the inherent capacity to exercise its sovereign without any outside interference. A state is the custodian of these internationally recognized rights.

The historical developments in the said field have raised a tension in the literature of international investment law. The two stakeholders with different rather conflicting ideologies when come together, dispute is logical in consequence. [73] Traditionally, the international investment disputes are settled through local courts and by diplomatic means. In twentieth century, a popular investment dispute resolution mechanism appeared for the settlement of investor-state disputes in international investment context is institutional arbitration.[74]

1.2.4 Investor- State Investment Contracts

Investment contracts are another additional legal instruments than investment treaties i.e. MIT or BIT between the investor and the state or state's entity to create further protection of the foreign investment. The distinction lies for difference of

[73] Patrick C. Osode, "State contracts, state interests and international commercial arbitration: a Third World perspective," *Comparative and International Law Journal of Southern Africa* 30, no. 1 (1997): 39-59. The foreign investor as private party is interested in maximizing its profit and growth of their business. They are not satisfied nothing short of stability and certainty. On the other hand, host states as party for urgency of development and resisting their trends of poverty

[74] Walter Mattli, "Private Justice in a global economy: from litigation to arbitration," *International Organization* 55, no. 4 (2001): 920. The arbitration is a binding, non-judicial, private means of settling disputes based on an explicit agreement by the parties. Arbitration process derive its authority from the agreement in writing unlike judges of public court who follow fix rules of procedure and apply law of the land. In contrast, the arbitrator can adopt any flexible procedural rules which are best suited to the parties and can dispense with the legal formalities accordingly.

parties to the contract, creation of rights and application of laws. The treaties are dealt under the normative standards of international law as the obligation of states are involved to ensure guarantees. The investment contracts establish under the domestic laws of the states and are within the local jurisdiction of the courts. These contracts declare certain specific additional protections for the foreign investors under national and international investment law regime.[75] The investment contracts add clarity to the terms of the investment for the mutual interests of the investors and host states. These terms normally cover the specific concessions, restrictions and terms of implementation of the foreign investment. The subjects relating to investment protection and the investor state dispute settlement (ISDS) mechanism for investment disputes are also covers the investment contract. The stakeholders have adopted arbitration as preferred mechanism for the resolution of such disputes.

The dominant jurisprudence of international law advocates that the breach of contractual rights is not to be treated as the breach of treaty obligations.[76] The jurisdiction of tribunals for the violation of treaty obligations are independent of the breach of contractual rights of the parties under investment contracts of the foreign investors and Host state or its entities. At the same time there are incidents when the investment tribunals recognized the contractual claim to assume its jurisdiction for ISDS.[77] There are decisions of investment tribunals which analyzed the claim for the breach of the contractual rights to treated as violative of treaty obligations when the contract attributes to the states or its entities and the contractual obligations relate to

[75] Guzman, "Why LDCs" 639.
[76] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Re)
[77] SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

the foreign investment.[78] There are treaties which refer umbrella clauses to imply the breach contractual rights as violation of treaty rights to refer the jurisdiction of the investment tribunals.[79] The question of assumption of jurisdiction for contractual claim by treating it a treaty violation under BIT remain inconsistently settled part of investment law jurisprudence.[80] In the case of CMS Gas Transmission vs Argentina the tribunal held that the parties cannot transform their obligations from contractual to treaty under the effect of Umbrella Clause.[81] Contrarily, a contradictory view was adopted by the tribunal in L.E.S.I vs Argentina case that the breach of contract may be treated as violative of the treaty obligations under the Umbrella Clause of the BIT.[82] At the same time, in the case of SGS vs Pakistan the violation of contractual provisions were relied upon to invoke the institutional settlement of foreign investment dispute between investor and the host state.[83]

1.3 ISDS: An Institutional Approach of Foreign Investment Protection

The existing international legal framework for the protection of foreign investment has been emerged from the creation of related international instruments. These instruments include international Conventions, multilateral regional agreements, Multilateral Investment Treaties (MIT), Bilateral Investment Treaties (BIT), and investor-state investment contracts. The main objectives of these instruments is the promotion and protection of the free flow of international

[78] SGS Société Générale de Surveillance S.A. v Republic of the Philippines, Award on Jurisdiction, ICSID Case No ARB/02/6.
[79] Article 7 BIT between Italy and Lebanon. Article 8 BIT between France and Argentina reads in the relevant part "tout différend relatif aux investissements". Article 9 (1) BIT between China and Switzerland. Article 9 (1) BIT between Italy and Pakistan.
[80] SGS v Pakistan, ICSID Case No. ARB/01/13; SGS v Philippines, ICSID Case No ARB/02/6.
[81] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8.
[82] Consorzio Groupement L.E.S.I. v. Algeria, ICSID Case ARB/03/08.
[83] SGS v Pakistan, ICSID Case No. ARB/01/13

investment. This legal framework of foreign investment protection has devised mechanism for the settlement of foreign investment disputes. The historical analysis of investment disputes suggests that the foreign investors remain dissatisfied with the domestic settlement of investment disputes for the politically influenced court system of national judiciary of host states. The capital exporting nations advocated for the transnational institutional disputes settlement mechanism for investment disputes. After WWII, some important institutions emerged for the settlement of investment disputes. These institutions promoted the arbitration mechanism for the settlement of investment disputes.

1.3.1 Institutional Protection for Foreign Investment

The process of international arbitration can be classified into two main categories firstly ad hoc arbitration and secondly institutional arbitration. The ad hoc arbitration does not rely on formal administration or supervision. On the other hand, institutional arbitration is done under the aegis of an arbitration institution. The important international forums of institutional arbitration include: International court of arbitration of international chamber of commerce (ICC), London court of international arbitration (LCIA), the arbitration institution of Stockholm chamber of commerce (SCC), and other regional arbitration centers that have been set up in Asia, Middle East, Africa, and North America.

The capital exporting nations and their investors prefer to submit their claims in case of disputes to these institutional tribunals at some neutral place before impartial judges rather than domestic court.[84] These tribunals are considered

[84]Harvard Law Review Association. "Protection of Foreign Direct Investment in a New World Order: Vietnam. A Case Study." *Harvard Law Review* 107: 1995-2012.

depoliticized[85]and beyond the dominant influence of host country's authorities.[86] Other reasons for adopting this institutional arbitration approach for the settlement of foreign investment disputes are risk of abuse of the legal procedures and transparency under local procedural laws. The domestic laws and procedure are evaluated as below minimum standard of justice and equity.[87] The inconsistent government policies and commitments, along with instances of expropriations without adequate compensations can be cited as justification for the transnational arbitrations. [88] The trend of supranational institutional arbitration for ISDS was on the rise since 1979 and increasingly providing a substitution for the domestic litigation for the purpose.[89] The perceived partiality of host state court system is another factor for shift of paradigm from national to transnational adjudications. The reluctance and handicaps of domestic courts to scrutinize fully the affair of a sovereign state action for constitutional or legal reasons of act of the state in its sovereign capacity has justify to redress the disputes in some international forums by independent adjudicators.[90]And the most important one is World Bank's international Centre for the settlement of investment disputes ICSID. The trend towards granting jurisdiction for institutional arbitration to the ICSID is on the rise[91].

The international Centre for the settlement of investment disputes (ICSID) is one of the leading arbitration institutions. ICSID has been emerged as a preferred

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[85] Shihata, *World Bank*, 30.
[86] Mansour Al-Saeed, "Legal protection of economic development agreements," *Arab LQ* 17(2002): 150-176.
[87] Subedi, International investment law (Hart, 2008), 10.
[88] Al-Saeed,"Legal protection."
[89] C. N. Brower and J. K. Sharpe, "The coming crisis in the global adjudication system," *Arbitration International*, 19, no. 4, (2003): 416.
[90] Brower and Schill, " Is arbitration a threat," 479.
[91]UNCTAD, "Recent Development in Investor- State Dispute Settlement" Issue No. I (2014). Accessed www.unctad.org. The working paper concluded that out of 568 total treaty base investment known claims filled by the end of 2013, 353 (62%) were brought before ICSID , 158(28%) with UNCITRAL , 28 (5%) with SCC, and 6 with ICC.

forum for the settlement of investor state disputes settlement between contracting states and the nationals of other contracting states.[92]The Centre was established by a multilateral treaty[93] commonly known as ICSID Convention or Washington Convention[94]. The Centre established under ICSID Convention is one of the five international organizations that make up the World Bank Group. The Centre was created 'to fill a gap' in the mechanism for settling international investment disputes[95]. A gap deems difficult for the governments and foreign investors to find a mutually accepted choice of forum and law for the settlement of their investment disputes.[96]

The ICSID jurisdiction exclusively deals with the 'Legal Disputes' arising out of an international investment between foreign investor and host state.[97] The ICSID jurisdiction tacitly excludes local remedies and diplomatic protection unless otherwise agreed by the parties.[98] To invoke the jurisdiction of ICSID one of the parties must be a contracting state (or a constituent sub division or agency of a contracting state) and other party must be a national of another contracting state[99]. The distinctive feature of ICSID mechanism is the recognition of foreign investors as the subject of international law with the status not less than a state. Thus, the foreign investors can approach international dispute settlement forum without interference and recourse from the home state against the host state as party to the foreign investment dispute.

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[92] Preamble of ICSID Convention, 1965.
[93] The Convention on the settlement of investment disputes between states and nationals of other states, 1965, under the auspices of World Bank
[94]ICSID Convention1965., See also, Antonio R. Parra, "ICSID and the rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st century?" *In Proceedings of the Annual Meeting (American Society of International Law,* Vol. 94, (2000, April): 41-43.
[95] Preamble ICSID Convention, 1965.
[96] Osode,"State contracts," 39-59.
[97] Art. 25 of ICSID Convention
[98] Art 26, 27 of ICSID Convention, 1965.
[99] Art. 25 of ICSID Convention, the contracting states mean which have signed ICSID Convection, 1965.

The dispute must relate to the existence or scope of a legal right or obligation. Meaning thereby reparation to be made for the breach of a legal obligation[100]. The Centre arbitrates foreign investment disputes by voluntary irrevocable consent of the parties.[101] The dispute can be arbitrated through ICSID when clauses of consent to submit the dispute is mentioned in the agreement between investor and the state.[102] The logical result of the clause is that a state as contracting party cannot frustrate arbitration as agreed by effecting changes in its municipal law.[103] The host states have assumed international obligations under ICSID jurisdiction sometime by domestic legislation or investment treaties or investor-state contracts. However, the majority of BITs are provided with dispute settlement clauses which confer for ICSID jurisdiction. [104]

In its first decade of its establishment ICSID was not the attractive mechanism for investment protection. The difference of political and economic approach in the bipolar world can be referred as one of the underlying reason for such avoidance. But the introduction of BITs to recognize the ICSID arbitration made it an attractive mechanism for ISDS. The proliferation of BITs have contributed rising trend to accept arbitration jurisdictions of transnational dispute settlement forum for ISDS. The end of cold war and establishment of unipolar politico-economic regime has facilitated to make it a popular destination for ISDS in last three decades since 1990s.

Even at the time of negotiation of NAFTA, United States lobbied for incorporation of supranational forum for the ISDS in NAFTA Chapter 11, which refers ICSID jurisdiction. This resulted in the abandonment of adherence of 'Calvo

[100] Report of executive directors World Bank, 1965.
[101] Art 25 of ICSID Convention, 1965. See also, Parra, "ICSID," 41-43.
[102] Parra, "ICSID," 41-43.
[103] Osode,"State contracts," 39-59.
[104] Parra, "ICSID," 41-43.

Clause' by Mexico in NAFTA deal.[105] Stephan W. Schill has referred an explanation by Gary Born for the establishment of the ICSID base institutional dispute resolution mechanism:

"Businesses perceive international arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally enforceable dispute resolution agreements and decisions. While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts and as offering more workable opportunities for remedying or avoiding those ills which do exist".[106]

1.4 ICSID Arbitration: A New Global Institutional Choice for ISDS

The capital importing nations on the other hand are reluctant to submit their investment disputes to these institutions of arbitration for foreign investment disputes because they perceive it as biased and untrustworthy.[107] The less developed and developing countries insistence on retaining their sovereignty and to have an effective control over admission and activities of foreign investment by exercising their sovereign rights. These countries exercised this control through Calvo clause in Constitutions, by laws for screening mechanism for the inflow and outflow of capital, performance requirements, nationalizations, and state monopolies.[108] These states want these laws to resist the encroachment of foreign influence and distribution of gains of their economic development more evenly across socio-economic spectrum

[105] Afilalo, "Meaning", 289.
[106] Stephan W. Schill, "Conceptions of legitimacy of international arbitration." published in David D Caron, ed. 106, no. 124 (Oxford: Oxford University Press, 2015): 70.
[107] Review Association, "Protection," 1995.
[108] David Schneiderman, "Investing in democracy? Political process and international investment law" *University of Toronto Law Journal* 60, no. 4 (2010): 909-940.

within the nation state.[109] These transnational institutional rules of arbitration are placing limitations on the legislative capacity of sovereign governments.[110] Scheuer has pointed out that the disputes between states can be solved by ICJ or Permanent court of arbitration PCA and commercial disputes between corporations by the domestic courts or transnational arbitrational forums such as ICC, SCC. But the purpose of the ICSID convention is to establish a transnational independent forum to resolve investment disputes between foreign investor and the host state.[111]

1.4.1 Institutional Approach of ICSID

ICSID mechanism differS from national court system from hierarchy, and legitimacy. The consistent body of jurisprudence and public acceptance has established the legitimacy for domestic court system.[112] On the other hand, ICSID mechanism is the product of global contractual regime among the capital exporting nations and capital importing nations of the world. In international law regime 'legitimacy' is desired element for the applicability and compliance of a regime for the stakeholder states.

The ISDS system is built on the justification of seeking durable and credible commitments to keep the promise on behalf of host states. The international obligations of host states for independent and presumptively neutral mechanism of ISDS has contributed for the adherence to the system for their national interests.[113] At the same time, the acceptance of jurisdiction and rising trend for ICSID arbitration has strengthen legitimacy rhetoric in favour of the mechanism. On the contrary, the

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[109] Ibid.
[110] Ibid.
[111] Christoph H. Schreuer, *The ICSID Convention: a commentary* ((Cambridge: Cambridge University Press, 2009), 160.
[112] Brower and Sharpe "The coming crisis," 418.
[113] Brower and Schill, " Is arbitration a threat," 478.

otherwise negative response of host states might impact the trust of existing and deter potential foreign investors to proceed for their dealings with the state thus, the legitimacy of the system.[114]

1.4.2 Legitimacy Discourse of Institutional ISDS

The host states as party for urgency of development and resisting their trends of poverty are inclined to accept global contractual obligations under international legal framework for foreign investment. The contracting states choose to adopt dispute settlement clauses on realizing the comparative advantage of adoption than reluctance.[115] The rising trends of signing investment treaties shows that these can help to attract foreign direct investments which prima facie express an intention by a host state of its commitments of non-interference with investor's rights and their investments.[116] ICSID emerged as a most significant and preferred forum for ISDS are due to its wide acceptance, specialization, strong institutional structure, affiliation with World Bank and effectiveness against states.[117] The studies show that the flow of foreign investment is directly proportional to the host country's response towards the adoption of those standards, to provide those protections and the adoption of dispute settlement mechanism as devised on the desires and motivations of capital exporting nations.[118]

Deviated trends have been shown with the start of the new millennium, as was emerged in the last decade of 20th century. ICSID as a choice of ISDS is on the

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[114] Ibid.
[115] Andrew T. Guzman, "The cost of credibility: Explaining resistance to interstate dispute resolution mechanisms," *The Journal of Legal Studies* 31, no. 2 (2002): 303-326.
[116] Rashmi Banga, "Do investment agreements matter?," *Journal of Economic Integration* (2006): 40-63.
[117] Todd Allee and Clint Peinhardt. "Delegating differences: Bilateral investment treaties and bargaining over dispute resolution provisions," *International Studies Quarterly* 54, no. 1 (2010): 1-26.
[118] Banga, "Investment," 40-63.

decline with substantial reduction of the trends of adopting International investment agreements (IIAs) including BITs program of the developing countries.[119] ISDS system is shrinking in its scope in the backdrop of high number of ISDS[120] and termination trends[121] of IIAs along with the 'any time' expiry[122] of majority of existing BITs.[123] The increased ISDS litigation trends and abandonment wave among developing countries has its correlation to the legitimacy rhetoric of ICSID base ISDS system. Many of the commentators have term ICSID as hard by commenting substantive and procedural aspects affecting the legitimacy discourse of the ICSID jurisdiction. At the same time, the attributes of legitimacy are directly and indirectly affecting the responses of the states towards ICSID mechanism. The inherent deficiencies of icsid mechanism and exercise of jurisdiction thereunder has exposed the determinacy and fairness of the system. These fault lines has contributed for the deviated response of the host state.

The number of capital importing nations adopted revulsive attitude towards the ICSID base ISDS. These states expressed their distaste for the system by their resistance, reluctance and backlash towards the legal framework for ISDS. This backlash appeared in its most aggravated form when the superior judiciary of Pakistan assumed and exercise its jurisdiction to the extent of the settlement of foreign

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[119] *UNCTAD,* "World Investment Report 2018." The new IIAs concluded in the year 2017 are 18 (9 BITs and 9 TIPs) which is lowest number since 1983.

[120] Ibid. The year 2017 has recorded 65 new treaty base ISDS including 49 (treaty base 46) ICSID litigations. This trend has accumulated a total number of ISDS to 855 of which foreign investors have invoked ICSID jurisdiction in 605 cases till June 2018 and contributed to the stock of 665ICSID cases (including additional facility arbitration rules cases).

[121] Ibid. In the year 2017 has witnessed 22 BITs was termination including 17 from India. Ecuador has sent 16 termination notices of its BITs to the other contracting parties as well. This trend of termination (22) has outpaced the number of concluding new investment treaties for the first time since its beginning in 1959. A total of 243 terminated IIAs 100 has been done since 2012.

[122] Ibid. By the end of 2018 at least 1598 BITs would be available for renegotiation or any time expiry due to the completion of their term of agreement. The existing 90% i.e. more than 3000 IIAs of existing old generation stock of 1990s relating to over 150 nations is on the verge of their expiry which require renegotiation for their new life.

[123] Ibid.

investment disputes by denying ICSID jurisdiction for the matters. On the contrary, the ICSID tribunals rejected this overstepping by the superior courts of Pakistan. This conflict of jurisdiction has generated a controversy in international investment law.

1.5 Pakistan Response towards Institutional Foreign Investment Protection

Pakistan as a part of international community has been following liberal economic policies since its independence in 1947. Pakistan had been needed foreign capital to overcome its difficulties faced to the newly born state. Pakistan invited foreign capital by pronouncing investment policy statements. In 1948, then commerce minister I.I. Chundrigar expressed the investment policy of the government that "Pakistan would welcome foreign capital seeking investment from purely industrial and economic objectives."[124]

Pakistan has adopted an international as well as a comprehensive national legal framework for the promotion and protection of foreign investment. In the pursuit of foreign investment reassured its commitment to the foreign investors for their investment by signing Taxation Treaty in 1957 and Treaty of Friendship in 1959 with USA government. In 1957, then Prime Minister Mr. Suharwardhi speaking in New York outlined repatriation, profit, tax and other ancillary concessions for the American investors.[125] The first ever bilateral investment treaty was signed between Pakistan and Germany in 1959.[126] The policy for the promotion of foreign investment remained the important feature of all Five Years Plans in Pakistan[127]. The legal

[124] Mustufa Ali Khan, "Pakistan and Foreign Private Investment," Pakistan Horizon 13(1960): 227-239
[125] Ibid.
[126] Ahmad Ali Ghouri and Nida Mahmood, "Deciphering Pakistan's Foreign Investment Policy: A Review of Pakistani BITs," *The Journal of World Investment & Trade* 13, no. 5 (2012): 812–873.
[127] First plan in 1955-59/60 and last was in 1985-89/90

history of Pakistan shows the commitments of different governments regarding the openness of investment environment and its protection. The enactments are providing security against expropriation, repatriation of original capital as well as profits, remittances and relief from double taxation or tax concessions[128], holding and transfer of foreign currency accounts with privileged immunities attached thereto[129].

The national legal framework for international investment is reflective of strong commitments by the various political regimes to reassure to international investors. The commitments for promotion and protection recognized that the state will not interfere with foreign investment interests but to facilitate them to pursue their objectives. Pakistan has signed 53 BITs and number of international and regional Convention to pursue its policy for the promotion and protection of foreign private investment. The majority of Pakistan BITs refer ICSID jurisdiction for the settlement of foreign investment disputes.

Pakistan remained the part of negotiation and consultative process of formation of ICSID convention during 1961-1965. After its establishment, Pakistan adopted the convention in 1966 and ratified the same in 1966 in the persuasion of its liberal economic policy for the promotion and protection of foreign investment

1.5.1 Problem Statement

This study has signified numerous problems, issues and consequential tension that exist in ICSID based dispute resolution mechanism for investment disputes between investor and state. These issues include no democratic participation in treaty

[128] The Foreign private investment (promotion and protection) Act,1976
[129] The protection of economic reforms Act, 1992.

making process[130] and irrevocability of consent not in any circumstances even in serious financial crisis and emergency.[131] The other matters of conflict are many such as conflict of jurisdiction for justiciability from local court or from ICSID, rejection of host state law as governing law by declaring it deficient,[132] inconsistency of approaches of interpretation of the same text rather pro investor interpretation, inconsistency for rules of evidence[133], lack of receptivity of grounds of corruption and transparency on the part of investors in investment contracts. These tribunals are producing opposing decisions[134] due to the lack of binding precedents or Stare Decisis.[135]

Despite adopting open liberal policy for international investment in Pakistan, different governments implemented complex procedures for approval, strict licensing, high public ownership, strict price control, restricted sectors for investments, restrictions on repatriation, inconsistent investment policies and nationalizations. Apart from these deviating approaches by different governments in Pakistan towards international investment regime, the judicial attitude also remained unpredictable

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[130] Younsik Kim, "Challenges and opportunities for the national constitutional system in dealing with the global investment regime: a case study of the indirect expropriation doctrine and investor-state arbitration under the free trade agreement between the Republic of Korea and the United States of America," , The University of Edinburgh, Ph.D. thesis , (2012). Accessed February 5, 2014, http://hdl.handle.net.

[131] Kathleen Claussen, "The Casualty of Investor Protection in Times of Economic Crisis," *Yale LJ* 118 (2008): 1545-1555.

[132] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Soci&eacuteté Camerounaise des Engrais, ICSID Case No. ARB/81/2.

[133]Franck," Legitimacy," 1521.

[134]Yuval Shany, "Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multi-sourced Investment Claims," *American Journal of International Law* 99, no. 4 (2005): 835-851. See also, Franck," Legitimacy," 1521. SGS v Pakistan, ICSID Case No. ARB/01/13 and SGS v Philippines, Award on Jurisdiction, ICSID Case No ARB/02/6, paras 127, 162I. ; Lauder v The Czech Republic (2002), CME Czech Republic BV v The Czech Republic (2001). CMS v. Argentine, ICSID Case No. ARB/01/8. Paras 53–67; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/1.

[135]Jeffrey P. Commission, "Precedent in Investment Treaty Arbitration-A Citation Analysis of a Developing Jurisprudence," *J. Int'l Arb.* 24 (2007): 129-158.

In 2012, the unpredictable response of Pakistan came under heated debate when Supreme Court passed an order regarding the legality and validity of the Joint Venture Agreement between Government of Balochistan and Tethyan Copper Company case.[136] Supreme Court of Pakistan directed the Government of Balochistan and Pakistan to make a request to the ICSID for extending its period for the nomination of Arbitrators and to take further steps in its proceedings so that this Court may dispose of the case finally. After the decision some jurisprudential controversies erupted: whether the Supreme Court had exercised its jurisdiction illegally? When the Apex Court had given its decision contrary to the international contractual obligation which was binding on Pakistan? How an ICSID award (if given for the same claim) contrary to the decisions of the Supreme Court could be enforced? The decision of the case and some other judgments[137] have given rise to controversies regarding the legitimacy and validity of such case rulings. The credibility of the legal framework of Pakistan regarding international contractual obligation has therefore become unsettled and unpredictable.

With this background and developments in international investment law the thesis will critically evaluate the institutional approach of ISDS and its relationship with Pakistan. The thesis will further analyze the national legal framework for foreign investment and critically evaluate those events including judicial decisions which

[136] Maulana Abdul Haq Baloch and Others vs. Government of Balochistan 2012 SCMR 402. The "Tethyan Copper Company Case".

[137] HUBCO vs. WAPDA (the HUBCO Case), P L D 2000 Supreme Court 841; Societ'e Generale de Surveillance SA v. Pakistan, through Secretary,Ministry of Finance, 2002SCMR1694, SGS Societe Generale vs. Pakistani (The SGS Case) 2002 CLD 790Lah ; Maulana Abdul Haq Baloch vs. Balochistan 2012 SCMR 402.
Impreglio S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/03/3, para 260; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan ICSID Case No. ARB/03/29, para 240, 27. ; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11; Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1.; Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8.

caused an approach of conflict with the prevailing trends of jurisprudence of the subject. These decisions of Pakistani court regarding investor-state disputes which appear to be unconformable rather conflicting towards prevailing trends of jurisprudence for the settlement of foreign investment disputes.[138] The non-compliance approach has its roots in the legitimacy rhetoric of the ISDS. The institutional ISDS system has been developed on the theoretical foundations of legitimacy rather than justice, which seeks its aim of compliance from the stakeholders of the system.

As no such study has ever been conducted in the context of Pakistan a study of doctoral level is needed to critically analyze and evaluating the legislative, judicial, executive, and policy framework in Pakistan. The study will investigate the contributory factors and reasons which have caused to affect for such deviating approach for international investment regime. These trends have created an impression of uncertainty and unpredictability of ISDS. The contributory factors gradually accumulated for a legitimacy crisis for global protectionism under ICSID and emerged in the shape of jurisdictional conflict for legal framework in Pakistan.

1.5.2 Research Questions

The thesis has examined the evolution of institutional ISDS mechanism. The research investigates the prevailing jurisprudence of the subject and inquire about the determinants contributed for the legitimization of new economic order of ISDS. The analysis of inherent deficiencies contributed for the legitimacy crisis of the ICSID mechanism. The legitimacy crisis of the system emerged by the non-compliance and

[138] Tariq Hassan, "conflict of jurisdiction between national courts and international arbitration tribunals" paper presented at the international judicial conference, 2013 held in Islamabad Pakistan from 19-21 April 2013.

contradictory trends towards the ICSID system of ISDS. The study has identified the inherent imbalances and flaws in the assumption and exercise of ICSID jurisdiction. The imbalanced enforcement of rights and liabilities of parties in the exercise of ICSID jurisdiction have been the instrumental to the deviating attitudes of the states. The deviating responses of the states in its aggravated form emerged into a jurisdictional conflict in Pakistan as host stat when some other states has shown their reluctance towards the system foreign investment disputes. The attitude of noncompliance has engender the legitimacy crisis for the ICSID mechanism. The existence of concerns and deviating trends of some host countries are serious challenge to the prevalent system of institutional ISDS. The system can be rationalized by adopting the available principles and rules of international investment law. The solutions of the problem will promote effectiveness and compliance for the resolution of investment disputes. In this context, my research will address the following questions:

1. How of International Investment Law evolved?
2. Why legitimacy is concerned in international law?
3. To what extent the theory of legitimacy by Thomas Franck underpins to ICSID mechanism?
4. To what extent ICSID emerged as a choice for Investor State Dispute Settlement (ISDS)?
5. What extent ICSID jurisdiction has earned its legitimacy?
6. What are the vulnerability challenges to ICSID jurisdiction?

7. How the fault lines of ICSID jurisdiction contributed for the legitimacy crisis for ISDS?

8. To what extent legitimacy crisis of ICSID jurisdiction affected to shape up responses contracting states?

9. How Pakistan responded to international legal framework for ISDS regime?

10. How the conclusions drawn can contribute to enhance the legitimacy standards of ICSID mechanism to create a balance approach?

1.5.3 Literature Review

The contribution of the scholars of the field remain the fact on the subject. The noteworthy work of these contributors are:

The book of **Andreas F. Lowenfeld**,[139] has covered the major elements of international economic law by including chapters 15 &16 on the development of foreign investment law and its dispute settlement mechanism. The writer has explored the origin and political tension existed for the development of international investment law .But the work does not discuss the legal framework for international investment law and its current issues and problems.

The scholarly work of **M. Sornarajah**[140] has discussed the foundations of international investment law. The writer has highlighted the role of BITs and RTAs for the development of this law. A detailed discussion is provided for international legal framework relating to foreign investment and its dispute settlement procedures.

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[139] Andreas F Lowenfeld, "*International Economic Law.*" (Oxford: Oxford University Press, 2008).
[140]Muthucumaraswamy Sornarajah, "*The international law on foreign investment.*" (Cambridge: Cambridge University Press, 2017).
University Press, 2017).
Cambridge University Press, 2017).

The book is a good addition in the literature but is not providing an account of the controversies of the field and uncertainties existed remain unaddressed.

The joint publication of the work by **Chester Brown & Kate Miles**[141] is a good contribution to study the developments of the latter part of twentieth and first decade of twenty first century in the treaty based foreign dispute settlement. The work is valuable in exploring the increasing trends of investment treaties and rise of investment disputes. It also discusses the role of investment treaties for the protection of right of foreign investor and host state. But the work does not provide an account for the controversies and uncertainties existed for treaty base arbitration especially with the perspective of balancing the rights of investor and state.

At the same time, the joint work of **Bishop and Reisman**[142] has provided a conceptual commentary on international investment law. The authors have discussed the history of international investment law. They have declared ICSID as specialized institution for investment dispute settlement and provide a detailed commentary on ICSID procedures. The book pointed out that this specialized institution is for the settlement of legal disputes between investor and the host state. The book entails plain commentary for the concepts of foreign investment law and its dispute settlement mechanism. It does not critically evaluate the procedural provisions of ICSID base institutional arbitration of foreign investment disputes.

The article of **Walter Mattli**[143] has discussed the concept of transnational administration of justice system in the form of institutional arbitration. The article

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[141] Chester Brown, and Kate Miles, eds. *Evolution in investment treaty law and arbitration.* (Cambridge: Cambridge University Press, 2011).

[142] James Crawford, and William Michael Reisman. "*Foreign investment disputes: cases, materials, and commentary.*" (The Netherlands: Kluwer Law International, 2005).

[143] Mattli, Walter. "Private Justice in a global economy: from litigation to arbitration." *International Organization* 55, no. 4 (2001): 919-947.

points out that the adoption trend of this system of private justice is on the rise. The writer has highlighted the characteristics of institutions and their dispute settlement process. The work is partially relevant to the current research because major part of the article is related to trade related investment disputes.

The valuable work of **Peter Muchlinski**[144] has traced the developments of international investment agreements (IIAs) from historical and futurological stand point. The writer advances the argument that the further institutionalizing of legal protection for foreign investor and their investment from government intervention is causing strong limitation over the sovereign rights of the host state. This is creating the risk of backlash and threatening the very existence of international investment agreements (IIAs).

The valuable work by authors **Jutta Brunnée and Stephen J. Toope** [145] has argued that criteria of legality of international law has been embedded in the doctrine of legitimacy. The feature of this shared understanding in international law has the ability to promote adherence to inspire its faithfulness therefore, a consequent legitimacy.

The writer **Hugo Siblesz**[146] has discussed the role of international organizations for the promotion of legitimacy of dispute resolution regimes. This writer of chapter 6 has argued that effectiveness of the source and process of dispute

[144]Peter Muchlinski. "Regulating multinationals: foreign investment, development and the balance of corporate and home country rights and responsibilities in a globalising world." *in Alvarez, Jose and Sauvant, Karl,* eds. (2011): 30-59.
[145]Jutta Brunnée and Stephen J. Toope. "*Legitimacy and legality in international law: an interactional account.*" Vol. 67, (Cambridge; Cambridge University Press, 2010).
[146] Hugo Siblesz, "The role of international organizations in fostering legitimacy in dispute resolution" In *International Organizations and the Promotion of Effective Dispute Resolution* (Leiden: Brill Nijhoff, 2019): 77.

resolution mechanism has its role for supplementing legitimacy with the dispute resolution.

The writer **Kenneth J. Vandevelde**[147] has traced the history of bilateral investment treaty (BIT) in three periods, firstly colonial era that began in late 18th century, secondly post -colonial era which began with the end of world war-II, thirdly global era which began with collapse of USSR and continue till present.

The valuable scholarly work of **Jeswald W. Salacuse** on *The Three Laws of International Investment: National, Contractual, And International Framework for Foreign Capital,*[148] has discussed the general principles of customary international law on foreign investment and their treatification process. The writer has examined the elements of national, international and contractual framework for the protection of foreign investment. It explores their relationship to control the entry, stay, and exit of foreign investment in a host country. This is good contribution in the literature of law on foreign investment but does not critically evaluate these framework with perspective of establishing balance of the rights of stakeholders.

The article of **Jason Webb Yackee**[149] concluded that BITs do have an important role for the inflow of capital. The BITs are instrumental to establish a trust and confidence of capital exporting state and their investors.

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[147] Kenneth J. Vandevelde, "A brief history of international investment agreements." *UC Davis J. Int'l L. & Pol'y* 12 (2005): 157-196.

[148] Jeswald W. Salacuse. "*The three laws of international investment: national, contractual, and international frameworks for foreign capital.*" (Oxford: Oxford University Press, 2013).

[149] Jason Webb. Yackee, "Bilateral investment treaties, credible commitment, and the rule of (international) law: Do BITs promote foreign direct investment?." *Law & Society Review* 42, no. 4 (2008): 805-832.

The Article written by **Todd Allee and Clint Peinhardt**[150] points out that bilateral investment treaty (BITs) have its role for growth of foreign investment in a country. The writers have further advanced an argument that the inflow of foreign capital is also link with the behavior of host country towards its international obligations under these bilateral investment treaties.

Antonio R. Parra in his article[151] has discussed the rising trend of bilateral investment treaties and adoption of ICSID base institutional arbitration for foreign investment disputes. The writer opines that the rise of BITs have also increased the tendency of foreign investment disputes. However, the work does not highlight factors involved for the adoption of ICSID jurisdiction and reasons for the rise of number of disputes in investment treaty arbitrations.

The article of **Patrick C. Osode**[152]examines the relationship of institutional arbitration with doctrine of sovereign immunity. The writer argues that the delocalized and depoliticized institutional approach of international investment arbitration has changed the traditional concept of the doctrine. However, the writer does not explore the relationship of institutional arbitration with the other concerns of capital importing states in the context of sovereignty such as security interests, legislative capacity of the host state, internationally recognized rights of citizens and human rights.

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[150] Todd Allee, and Clint Peinhardt. "Contingent credibility: The impact of investment treaty violations on foreign direct investment." *International Organization* 65, no. 3 (2011): 401-432.

[151] Antonio R. Parra, "ICSID and the rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21 st century?." In *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 94, (ASIL, 2000): 41-43.

[152] Patrick C. Osode, "State contracts, state interests and international commercial arbitration: a Third World perspective." *Comparative and International Law Journal of Southern Africa* 30, no. 1 (1997): 37-59.

The work of **Hege Elisabeth Kjos** titled "*Applicable Law in Investor- State Arbitration: The Interplay between National and International Law,*[153] The book covers the national and international framework for foreign investment disputes. The work provides a comprehensive analysis of its choice of law and methodologies for institutional arbitrations for foreign investment. The writer advances an argument that both frameworks do coexist, interdependent and applicable at the same time for the protection of foreign investment. But the work does not critically evaluate the provisions of ICSID Convention relating to the choice of law, its issues, controversies for establishing balance between the rights of investors and host states.

A join publication by **Zachary Douglas, Joost pauwelyn& Jorge E. Vinuales**[154] has provided an important discussion about the conceptual foundations of international investment law such as investor, investment, jurisdiction of arbitral tribunals and applicable law for these institutional arbitrations for foreign investment disputes. The work highlighting important discussions on the relationship of international investment law with the other areas of international law. The work is a valuable addition to theoretical framework and its conflicting theories in international investment law. Though it's a valuable work but lacking in discussing the competing interests of investor and the host state

The book of **N.Horn and S Kroll,** *Arbirating Foreign Investment Disputes: Procedural and Substantive Legal Aspect,*[155] has been a valuable addition on the procedural and legal aspects of arbitrating investment disputes by highlighting current issues and problems of the subject. The book lacks critical analysis of these

[153] Hege Elisabeth Kjos, "*Applicable law in investor-state arbitration: the interplay between national and international law.*" (Oxford: Oxford University Press, 2013).
[154] Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales, eds. "*The foundations of international investment law: bringing theory into practice.*" (Oxford: Oxford University Press, 2014).
[155] Norbert Horn, Stefan Kroll, and Stefan Michael Kröll, eds. *Arbitrating foreign investment disputes.* Vol. 19. Kluwer Law International BV, 2004.

procedural issues and how these issues are creating uncertainties in the dispute settlement in the field.

The book of **Lucy Reed, Jan Paulsson and Nigel Blackaby** titled "*A Guide to ICSID Arbitration*"[156]discusses the jurisprudence of ICSID arbitration as an essential component of international investment law. This book provides a good insight into the historical background of ICSID Convention, 1965. The book provides a commentary on the procedural provisions of ICSID Convention, 1965. It is a good addition in the literature equip with rich bibliography and case laws. This joint authorship does not analyze important issues of ICSID jurisprudence and the role of ICSID based institutional arbitrations for the development of foreign investment law.

The rare contribution by **Christoph Schreuer** titled "*The ICSID Convention: A Commentary*"[157] is considered to be the bible of ICSID jurisprudence. The book is the commentary of procedural provisions of ICSID Convention, 1965. It's a valuable work comprehending the procedure of institutional arbitration with vast referencing and case law. But it does not provide critical account of these provisions. The last edition of the book was printed in 2001, so the developments of the subject of last decade are missing in the work.

The writer **Mutis Tellez**[158] has explained the 'right of legitimate expectation' of foreign investor which is considered to be one of the major component of the 'fair and equitable treatment' standard for foreign investor during stay in the host country. The writer analyzes the relationship of sovereign powers of the host state and the right

[156] Lucy Reed, Jan Paulsson, and Nigel Blackaby."*Guide to ICSID arbitration.*" (The Netherlands: Kluwer Law International BV, 2011).
[157]Christoph H. Schreuer. "*The ICSID Convention: a commentary.*" (Cambridge: Cambridge University Press, 2009).
[158] Felipe Mutis Téllez, "Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law: 2012 ICSID Review Student Writing Competition." *ICSID review* 27, no. 2 (2012): 432-442.

of legitimate expectations of investor in the context of foreign investment dispute resolution. The article is a good effort to highlight those conditions and criteria required for the application of the right of legitimate expectations. But the writer has not explained the impact of this protection on capital importing developing countries.

The book is a valuable contribution by **Micheal Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin** under the title of *"The Backlash Against Investment Arbitration: Perception And Reality."*[159]This book is an outgrowth of a conference at Harvard Law School in April 2008. The contributors made their contributions with the aim to uncover the drivers behind the backlash against the current investment regime. They have made critical analysis of the issues and problems in the system and suggest an approach to regulate the system on equal footing across different states. The work further suggests that a well-functioning dispute settlement mechanism is indispensable for the long-term survival of the current institution arbitration in the globalized economy. In a contribution made by Mehmet Toral & Thomas Schultz, "State as Perpetual Respondent: Some Unorthodox Considerations" included as chapter 25 of the book. The contributors have argued that international investment agreements (IIAs) fail to impose obligations on foreign investors with obligations for human rights violations in the host state. In other word the current framework for international investment have a tilt in favor of foreign investors.

[159] Michael Waibel, Asha Kaushal, Kwo-Hwa Chung, and Claire Balchin. "The Backlash against Investment Arbitration: Perceptions and Reality." *(The Netherlands: Kluwer Law International*, 2010).

The article of **Thomas Schultz and Cedric Dupont**[160] discusses the functional effects of investment arbitration and analyzes the backlash against this system of settlement of foreign investment disputes. The writer has relied upon the empirical analysis of 541 filed for ICSID arbitrations and concluded from the results that such institutionalized arbitration is a neo-colonial activity to control developing countries and to strengthen the economic interests of developed capital exporting countries.

Kathleen Claussen[161] analyzes the procedure available for ICSID based institutional arbitration and term it as inflexible rather harsh for the host states. The writer has examined the cases including cases against Argentina during her financial crisis and evaluate the attitude of ICSID tribunals. The article suggests a flexible approach for considering some defenses for the durability of system.

A joint work by **Kevin P. Gallagher and Elen Shrestha**[162] empirically analyzes the treaty based claims and awards for foreign investment. The conclusions show that developing countries are subject to more claims filed against them and its heavy costs. The writer concluded an argument that such concerns are hurting the capital importing economies from inside. The paper lacks the data of last decade and the writer fails to advance any suggestions for the establishing balance for the stakeholders for the current regime of international investment law.

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[160] Thomas Schultz and Cédric Dupont. "Investment arbitration: promoting the rule of law or over-empowering investors? A quantitative empirical study." *European Journal of International Law* 25, no. 4 (2014): 1147-1168.

[161] Kathleen Claussen, "The Casualty of Investor Protection in Times of Economic Crisis." *Yale LJ* 118 (2008): 1545.

[162] Kevin P. Gallagher, and Elen Shrestha. *"Investment Treaty Arbitration and Developing Countries: A Re-Appraisal"*. No. 11-01. GDAE, Tufts University, 2011. Global Development And Environment Institute", (2001) Working paper Series (Tuft University), Paper No-11.

The empirical analysis by **Susan D. Frank**[163] provides an empirical analysis of bilateral investment treaties (BITs) and the trends of ICSID awards thereunder in institutional arbitrations. His work concludes that there is a win-win situation both for investors and host states and capital exporting countries are not subjecting developing countries.

The article by **Mansoor al Saeed**[164] analyzes the foreign investment contracts and their relationship with the municipal laws of the host states by highlighting a debate about the application of laws for investment related dispute settlement. These disputes are to be settled in accordance to the municipal laws of the host state under the current regime of international investment law. It is good effort to address the concerns of capital importing countries but does not discuss the background of institutional approach for such dispute settlement and those cases which arise out of umbrella or stabilization clause of the investment contracts.

The article by **Gloria Maria Alvarez**[165] has analyzed the procedure of ICSID annulment and discusses those variables affecting the annulment activities. The writer has explored the procedural gaps in the ICSID base foreign investment dispute resolution and suggests effective solutions in order to achieve finality of awards. It's a valuable contribution on ICSID jurisprudence but fails to discuss the lacunas of the system resulting in uncertainties and are matters of great concerns for the capital importing countries.

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[163] Susan D. Franck. "An Empirical Analysis of Investment Treaty Awards." In *Proceedings of the ASIL Annual Meeting*, vol. 101, (Cambridge: Cambridge University Press, 2007): 459-462.
[164] Mansour. Al-Saeed, "Legal protection of economic development agreements." *Arab LQ* 17 (2002): 150-176.
[165] Gloria María Álvarez. "The ICSID procedure: mind the gap."*Rev. E-Mercatoria* 10 (2011): 163.

The article of **Mir Mustafa Ali Khan**[166] points out the inclinations of developing world for foreign capital. Least developing countries (LDCs) like Pakistan needs of foreign capital for its economic growth for the development of skills. The work suggests that the governments in Pakistan should adopt a policy of less restriction for inward flow of capital. The article is more than five decade old and does not cover the important developments in field of investment law.

Dr. Tariq Hassan in his paper presented on the topic "Conflict of Jurisdiction between National Courts and International Arbitral Tribunals"[167] has pointed out that the superior courts in Pakistan have negated the process of international investment arbitration. Three cases Hubco vs WAPDA, SGS vs Pak, and Maulana Abdul Haq Balooch vs Pak (Reko Dick case), are analyzed by the writer and argued that these decisions have established a conflict with the prevailing jurisprudence of international investment law. The writer argued that these decisions have made the Pakistani legal framework on foreign investment law unpredictable. However, the writer does not discuss the legal framework for international investment law and its dispute resolution mechanism for foreign investment in Pakistan. The paper fails to highlight causes and effects of the unpredictability or uncertainties of legal framework for foreign investment law. The discussion also lacks academic criticisms for these decisions.

1.5.4 Methodology

This research has been conducted by applying the qualitative, analytical and doctrinal methodologies. The work has critically examined the jurisprudence of international law on foreign investment and its dispute resolution mechanism by

[166] Mir Mustafa Ali Khan. "Pakistan and foreign private investment." *Pakistan horizon* 13 no. 3 (1960): 227-239.

[167] Paper presented at the international judicial conference, 13th April 2013 held in Islamabad by the Law and Justice Commission of Pakistan under the auspices of National Judicial Policy Committee.

applying analytical tools. To answer the research questions of the project the study has used both primary and secondary sources of laws. Both Primary and secondary sources are used to answer the research questions raised in the project. Primary sources includes: international conventions, bilateral and multilateral investment treaties, legislations of contracting states and Pakistan and judicial precedents including ICSID awards all awards relating to Pakistan.[168] The study has analyzed the judgments of the superior courts which has affected to shape up the response of Pakistan for their ISDS.[169] The academic work of scholars of the field including books, articles and reports on the subject are used to interpret the research questions of the project. The theoretical framework of project seeks its guidance from the theorists of jurisprudence including Thomas Franck and his theory of legitimacy of international law.

For answering the research questions qualitative research methods are used to study the legal framework of foreign investment dispute resolution shall be conducted. The interpretive analysis of procedural jurisprudence of foreign investment disputes resolution forum or tribunals and their awards or decisions.

In response to the research question No. 9 and the research study the attitude of Pakistan in the context of foreign investment dispute resolution through qualitative analysis conducted to critically examine the National legislations, judgment of courts,

[168] Occidental v. Pakistan, ICSID Case No. ARB/87/4; SGS v. Pakistan, ICSID Case No. ARB/01/13.; Impreglio v. Pakistan, ICSID CASE No. ARB/03/3; Bayindir v. Pakistan, ICSID Case No. ARB/03/29; Agility v. Pakistan, ICSID Case No. ARB/11/8.; Tethyan v. Pakistan, ICSID Case No. ARB/12/1; Karkey v. Pakistan, ICSID Case No. ARB/13/1; Tethyan v. Pakistan, ICSID Case No. ARB/12/1;

[169] HUBCO vs. WAPDA (the HUBCO Case), P L D 2000 Supreme Court 841; Societ´e Generale de Surveillance SA v. Pakistan, through Secretary,Ministry of Finance, 2002SCMR1694, SGS Societe Generale vs. Pakistani (The SGS Case) 2002 CLD 790Lah ; Maulana Abdul Haq Baloch and Others vs. Government of Balochistan 2012 SCMR 402. The "Tethyan Copper Company Case"; Maulana Abdul Haq Baloch and others vs Government of Balochistan through Secretary Industries and Mineral Development, PLD 2013 SC 641; Human Rights cases regarding 'Alleged corruption in rental power plants' The Rental Power Case, 2012 SCMR 773.

executive actions and administrative measures by different governments in Pakistan. This research has evaluated the policies of governments for trade and investment and its dispute settlement mechanism. While conducting this research the legal material to consult from archives of chambers of commerce, State Bank of Pakistan, FBR, Boards of investment, and related official records in Pakistan.

And finally, in response the question to enhance legitimacy rhetoric of ICSID mechanism, the research project has suggest a rationale approach to enhanced the legitimacy standards of icsid mechanism to earn its conformable compliance. The conclusion of the study is a helpful to avoid deviating response including jurisdictional conflicts for the settlement of disputes between foreign investor and host state.

1.5.5 Limitation of the study

The inquiry remains limited to institutional settlement of foreign investment. The institutional settlement mechanisms for such disputes are available through number of international forums including ICC, SCC, LCIA, UNCITRAL and ICSID. Some regional forums are also available for such dispute settlement. UNCITRAL deals with disputes of trade related foreign investment and have jurisdiction to decide where some time two private parties are involved.

This research project remains limited for foreign investment disputes wherein a private foreign investor on one hand and the host state is a party on the other[170]. In 1965, a specialized transnational institution for arbitration was established to deal with ISDS under the auspicious of World Bank. Keeping in view the significance of ICSID institutional arbitrations, the project in hand specifically deal with the ICSID

[170] Art 25 of ICSID Convention

base ISDS. ICSID has been emerged as the most important for last three decades which can be realized from the case load survey[171] of pattern of choice of forum for such dispute resolution.

A case study of Pakistan, the research has critically evaluated the legal framework of Pakistan for foreign investment and the responses of three organs of states i.e. legislature, executives and judiciary for the settlement of foreign investment disputes relating to Pakistan.

1.5.6 Novel Contributions

The project has analyzed the ICSID jurisdiction on the touchstone of 'Legitimacy Theory of International Law' as suggested by Thomas M. Frank. The theory is one the determining foundation for the principles of international law. The author has undertaken the project to analyze the ICSID jurisdiction to satisfy the question that to what extent ICSID jurisdiction to meet the legitimacy standards of the Thomas Frank's theory.

The project has analyzed the fault lines of ICSID jurisdiction which has contributed for the declining standards of Legitimacy rhetoric of investor state dispute settlement. The thesis has analyzed that the declining legitimacy standards of ICSID mechanism contributed for the deviated responses of host states to the ICSID jurisdiction. This deviated response of host states built up in its more aggravated form of jurisdictional conflict in some Pakistani cases.

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[171] UNCTAD, "*Recent Development in Investor- State Dispute Settlement*" (2014) Issue No.I ,accessed on (www.unctad.org);The working paper concluded that out of 568 total treaty base investment known claims filled by the end of 2013, 353 (62%) were brought before ICSID , 158(28%) with UNCITRAL , 28 (5%) with SCC, and 6 with ICC.

The project has concluded to point out that the enhanced legitimacy standards of ICSID mechanism can reassure the strength, stability and compliance of investor state dispute settlements under the auspicious of World Bank.

CHAPTER NO- 2

INSTITUTIONAL ISDS: THEORETICAL UNDERPINNING

2.1 Introduction

International institutions have been playing pivotal role for the introduction of new rules of international practices for the global stakeholders. The pedigree and functionality of these international institutions has become the matter of common interests for the subjects of these international institutions. The quality of the product in the form of international rules of practices has been the matter of concerns for the global community for its validation and adherence. The emergence of legal positivism in international law has introduced the standards of validations and adherence to the rule systems of international law. The international institutions have been instrumental to introduce the determined rules of international practice for its wide acceptance and practice. The mechanisms of these transnational adjudications have gained legitimacy through their stable governance system for the resolution of investment disputes.[172] The legitimacy has become the prevailing standards for the subjects and the potential users of transnational arbitrations.[173] A largely disconnected functionality of investment arbitration has affected the legitimacy of global governance of dispute settlement.[174] Professor Thomas Franck has stated that members of the global community accept any rule of international practice on the

[172] Schill, "Conceptions." 6.
[173] Ibid., 1.
[174] Ibid., 5.

perception of its legitimacy. At the same time, Franck has identified the determinant of legitimacy which exert compliance pull to obey the rule by the stakeholders.[175]

2.2 Legitimacy Discourse in International Law

The answers to the questions why sovereign states obey international law have reference to search it from the incidence of an organized society of natural persons i.e. state. A state envisages a system of superior rules to regulate the conduct of the members of the organized society. The governance of the system of state organized to achieve its object of predictable order for the governed subjects. These inhabitants of the organized community surrender to obey the superior rules in considerations of the protection of some of the inherent rights of the members of the society. Thomas Franck has referred the 'Polis' civil society or community in which citizens affiliations give rise reciprocal rights and duties on the citizens and the states. The citizens' surrender some of their rights and owe duties to follow sanctions in return of the governance to protect some other inherent rights.[176]

On the other hand, when the questions of 'Why' is asked in the context of non-natural persons the teleological answer refers an allegiance to maintain an equilibrium and statehood as aspired by stakeholders of international community. The introduction of legal positivism international framework initiated number of rules with object to maintain stability of international political and economic order. Majority of these international rule system has introduced obligations for their subscribers. The international community has a well-developed global rule system comprise of primary and secondary rules. The secondary rules are defined as

[175] Ibid.
[176] Thomas M. Franck, *The power of legitimacy among nations*, (Oxford: Oxford University Press, 1990), 8.

foundation principles for the primary rules which developed over the period by the recognition and long practice by the states as an obligation.[177] International obligations some time hard to eschew for its fulfilment but nations choose to obey to maintain an aspired economic order in the world. International law as a repository of inalienable rights for the stakeholders have the capacity to invalidate national law.

Sovereign states manifest to be the member of international community which has been a validation of their statehood. The great majority of nations realized such membership as final confirmation of their independence, nationhood and sovereignty status. This status envisages to enjoy the equal rights and privileges like other members.[178] Sovereign states are the stakeholders of the system to obey international normative framework even in the absence of coercive authority and sanctions. Even some of the least developed countries (LDCs) can enforce their rights against far stronger economies of the world. On the other hand, the stronger nation's respect the international norms despite there is no sanctions for not obey or refuse to obey even. These stronger economies choose to obey their commitments with international community in general and with their much less strong counterpart of a treaty. The system of international law is built on the premise that such is to be obeyed.

International rule system shifts its focus from the establishment of rights to secure obedience for an elite authority for the maintenance of international economic order. The coercive dominance of an authority for the habitual assent to its governance has been secured under the system. The quality of governance of such

[177] Ibid., 193.
[178] Ibid., 8.

authority secures the habitual assents from the stakeholders. The characteristics of integrity, fairness and justice engender stable governance and habitual obedience.[179]

This rhetoric of such aspired equilibrium exerts a strong pull for the compliance of international norms despite of unfavorable to economic and political interests of the sovereign states.[180] This strong pull for compliance for the international normative systems compels the mighty economic and military powers even to sit with the LDCs to listen their concerns to preserve the political and economic balance for collective benefits of global community after WWII. This collective object of nations to achieve such balance and its continuity motivated the International stakeholders to establish and stabilize the international economic institutions. The policy makers of the sovereign states are bound by the strong pull to obey the international rules of the international community due to the perceived international political and economic order.[181]

The 'compliance pull' of these rules vary among the stakeholders of international community, some of such rules got more compliance pull than the others. On the contrary, some become redundant with the passage of time due to lack of such compliance pull. The rules of international law gradually gain greater pull or vice versa. These variations of compliance pull to obey are thought not enforced in the usual framework of international law.[182]

Daniel Bodansky has identified three reasons for obeying international directives. Firstly, rationale persuasion work when the state realizes the directives of a

[179] Ibid., 15.
[180] Ibid., 5.
[181] Ibid., 5, 10.
[182] Ibid., 7.

convention or decision to be correct to meet the standards of correctness.[183] Secondly, fear of sanctions for disobedience or non-compliance of the directive of international law i.e. Trade sanction under WTO or Security Council resolution. Thirdly, when the states accept the decision making process as legitimate.[184] The explanation of the voluntary obedience to the international rule system stimulated by legitimacy rhetoric of the rule making institutions and the rule.[185] The determinants of the legitimacy appear to be the adhesives to secure voluntary obedience to the international rule system.

2.2.1 Legitimacy in International Law

The legitimacy is a normative quality of a rule which inhere deference to the directive. The states when considered that it is in their self-interest to obey the authority of an institution or the directive of the rule then she defer to that.[186]

The work of Thomas M. Franck to determine the attributes of legitimacy rhetoric for the rule of international law among nations. [187] Franck has suggested that legitimacy attributes can be set as touchstone to enhance predictability and compliance of the systems of international law. The growth of international institutions has reinforced the legitimacy as a pressing issue in international law. The legitimacy of the rule and the rule making institution is of fundamental importance for its application with greater authority and influence to address the issues of the subjects of international law.[188]

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[183] Ibid.
[184] Daniel Bodansky, "The concept of legitimacy in international law." in *Legitimacy in International Law*, Springer ed., (Berlin: Heidelberg, 2008): 2.
[185] Franck, *power*, 16.
[186] Bodansky, "Concept of legitimacy," 4.
[187] Franck, *power*, 17.
[188] Bodansky, "Concept of legitimacy," 1.

Thomas Franck has identified three group to define the teleological discussions of the legitimacy in international law. [189] Firstly, led by Max Weber to define legitimacy as a specific process of making and apply rules. This group favour the public participation for the making, governance and the application of these rules. The public participation defines a model is obligatory for its member to follow and a consequent adherence to the authority of the institution and command of the rule.[190] Secondly, Habermas defines the legitimacy in terms of procedural and substantive aspects of the legitimacy. This group considers the making and application of the rule in the light of relevant data. These also focus on the procedural questions how the rule and the rulers are justified in a given situation.[191]Third group of neo-Marxist jurists are more interested in the 'outcome' the command. This group considers the rule or command as legitimate if it is defensible on the ground of equality, fairness, justice and freedom.[192] Thomas Franck has pointed out that all these three groups are not able to accommodate all the nuanced position about legitimacy.[193]

2.2.1.1 Legitimacy vs Legality in International Law

Legitimacy and legality have some common roots but the former is broader in its application than legality. The condition of being in accordance with law or lawful is community of the definition of both.[194] The international law of treaties provides justification to establish legitimacy of the rule and the exercise of authority thereunder. At the same time, it is not the only criteria for the determination of legitimacy. The legality is not able to apply outside a legal system which is not the

[189] Thomas M. Franck, "Why a quest for legitimacy," *UC Davis L. Rev.* 21 (1987): 542.
[190] Ibid., 542.
[191] Ibid., 542.
[192] Ibid., 542.
[193] Ibid., 543.
[194] Bodansky, "Concept of legitimacy," 3.

case of legitimacy.[195] Legality has its focus on compliance for the exercise of authority. The transparency and participation cannot be the determinant for legality which is referred in case of legitimacy. The process and source is important for legitimacy application.[196] The international rules imperfectly obeyed and varying degree of compliance do not diminish the legality of rule for its binding impacts. The non-obedience does not terminate its ability to obligate and permit its non-compliance in another situation, therefore, not affect its 'rule-ness'.[197]

Legitimacy has the characteristic to serve the foundation to accommodate the pluralistic legal system of the world to develop a shared understandings of a stable mechanism for the resolution of investment disputes.[198] Legitimate authority embodied the rationale that it is in the self-interest to obey the directive of the rule than otherwise.[199] The legitimacy discourse have replaced legality for the subjects of international arbitrational paradigm.[200] The concept of legitimacy has been used to evaluate the validity of norms, process and the outcomes of international arbitrations.[201]

The legitimacy can be discussed with the perspective of philosophy and sociology. The philosophical perspective legitimacy refers the normative terms which establish the authority to rule. The social legitimacy is grounded on the social reality about the rule or rule making institution. The views of states about the institution and concerns about the process based on factual evidence of the institution reflect the social legitimacy. The normative legitimacy emphasizes upon the procedural

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[195] Ibid., 3.
[196] Ibid., 4.
[197] Franck, *power*, 44.
[198] Schill, "Conceptions." 4.
[199] Bodansky, "Concept of legitimacy," 4.
[200] Schill, "Conceptions." 1.
[201] Ibid., 1.

requirements for legitimate authority like transparency and accountability of outcome of exercise of authority and the application of the rule.[202] Apart from its legal dynamic legitimacy discourse of ISDS mechanism has socio-political acceptance of the rule and rule making institution.[203]

A perception has been solidified into law that the normative legitimacy provides the bases for the sociological legitimacy. The legitimacy has its relation with exercise of authority by the institution. The greater the authority of the institution greater the demand of the legitimacy recommendations.[204] The competency and binding impact of decisions of the institution underpins the legitimacy.[205] The legitimacy does not emerge at once. It develops gradually when the rule or rule making institution produce good results to the satisfaction of the stakeholders. The evaluation of these result develops a perception of worthy of support by deference of the rule or rule making institution.[206]

2.2.2 Legitimacy Theory by Thomas M. Franck

Thomas Franck has referred three explanations of legitimacy rhetoric by different group of internationalists. Firstly, the legitimacy may be presumed when the rules are made by adopting a narrowly specific and due process by the honestly elected governors. Secondly, identifies the term to choose rules and rulers in the light of all relevant objective data. Thirdly, the expression explains the rule and the rule

[202] Bodansky, "Concept of legitimacy," 6.
[203] Schill, "Conceptions." 4.
[204] Bodansky, "Concept of legitimacy," 7.
[205] Ibid., 7.
[206] Ibid., 6.

making seek its validation and defensible on the touchstone of equality, fairness, justice and freedom.[207]

2.2.2.1 Thomas Franck's Explanation of Legitimacy

Thomas Franck has referred a definition for the legitimacy to explain the compliance pull for the international rule system. Thus, 'Legitimacy' could be formulated as:

> "*A property of a rule or rule-making institution which exerts a pull towards compliance on those address normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*"[208]

Thomas Franck has referred "those addressed" might include sovereign nations, international organizations, leadership elites and multinational corporations.[209] The term secular community the author refers a system of multilateral reciprocal which has the capacity to validate its members and its institutions to pursue certain collective interests of a society. These collective interests include as health, environment protection, economic development, trade and earnings.[210]

The aboriginal stakeholders of International community usually include sovereign states. The current international stakeholders include sovereign states with different economic conditions, institutions to deal with international subjects and the international corporations. The emergence of global village rhetoric and economic

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[207] Franck, *power*, 17.
[208] Ibid., 24.
[209] Ibid., 16.
[210] Ibid., 51, 52.

interests beyond boundaries of these states have persuaded the sovereign states to recognize some non-state actors to accept as the genuine stakeholders of international economic interests. Multinational corporations can be cited as an example for such non-state actor. There are number of international instruments including conventions and treaties which do recognize the multinational corporations (MNCs) as a genuine stakeholder of the system.

The legitimacy has its dependence on the answer to the question that how such rules are made. The quality of pure state of rule and rule-making institution exert a compliance pull to obey the international rule system.[211] Thomas Frack has identify the attributes of right process are the determining factors for the establishment of belief about a legitimacy discourse of a rule or rule making institution even in the absence of global sovereign and police. The right process belief of stakeholders for legitimacy of a system of rule provide foundations for the patterns of adherence of a predictable and stabilize system. The integrity of the process and fairness of the rule making process engenders stability and predictability for the international subjects who addressed in the rule. The rules which are created by right process of rule-making institution are believes to a legitimate norm to follow by the stakeholders. Thomas Franck claimed determinacy, coherence, validation and adherence four building blocks of right process is the determinants of legitimacy.[212]

The clarity which the rule communicates, its venerable pedigree and conceptual coherence are the motivator for the conformity behavior of the states.

[211] Ibid., 20-26.
[212] Ibid., 235.

These determinants of legitimacy discourse conduce a justification for the final respect and compliance of the rule and rule-making system.[213]

The international rule system is a system of mutual obligations which emerged from the contractual bonds adopted by the entities. The texts of international rules which relate to the conduct of the states to states, states with citizens of other states, states and the legal entities of other states i.e. multinational corporations. These rules are available in treaties, resolutions of international organizations, judgment of international courts and tribunals, customary practices of states.

International rule system has indicated that some rules are usually obeyed, some never and some rarely by the stakeholders. The compliance behavior of states fluctuate from rule to rule and time to time. Some rules gain compliance pull with the passage of time or vice versa. The quality of rule got influence by the determinants of legitimacy. The contributory factors which mitigate the quality of for the rule or rule making institution and rule derive the compliance pull for the conformity.[214] The conformity response of states appears under the effect of compliance pull of a rule or rule making institution where it acquires a qualification of absolute obligation as law to comply with the rule. The compliance pull is the direct consequent of the determinants of the legitimacy. [215]

Thomas Franck has referred incidence of statehood and pressure of psychic cost for voluntary compliance for international obligations.

The legitimacy of the rule does not derive from the consent of the states to abide by but from the concomitant of the status of membership of global

[213] Ibid., 38.
[214] Ibid., 28.
[215] Ibid., 37.

community.[216] Thomas Franck holds the response of the states to comply with the obligations of the command as an 'incident of their community bestowed statehood' rather than the result of the consent of the states. The states adhere to duties of statehood not because of agreement undertook but of status of membership in the international community. This membership inhere the rights and obligations as the part of global secular community.[217]

The sense of obligation and voluntary compliance evolves under the effect of the pressure of 'psychic cost'. This cost is payable by the non-obedient and violators of the international norms. The cost inflates with negative perception about the behavior of the host state. This sense of voluntary obedience in a non-coercive framework measures by the number of instances in which the rule texts have been ignored or deliberately not applied. The compliance ratio is suggestive for a rule to applied or disregarded in future contingencies.[218] The compliance factor is one of the indication of the perceived legitimacy of the international rule. The peer pressure for the compliance of the rule is also a relevant indicator for the validity of the rule due to its legitimacy pull. The members of the global secular community interest for the compliance of the rule can be evidence of the legitimacy existence.[219] The rule system is a system of obligations which emerge from international customs and treaties.

The response of members of international community appears on perceiving dangers of chaos, disorder and material progress of these entities.[220] On the other hand, legitimacy uphold stability and predictability. The survival of the global rule

[216] Ibid., 193.
[217] Ibid., 190.
[218] Ibid., 196.
[219] Ibid., 198.
[220] Ibid., 239.

system depends upon the existence of manifest legitimacy for the creation of the rules.[221]

The compliance capacity of a rule depends on the qualities of its rule-ness of text, legitimacy ratio index and the predictable accuracy. There are correlations between the quality of international rule and the compliance behavior of the states. The descriptive and predictive value of norm correlate with the inherent factors of the international rule.[222] These inherent quality of a rule is identified as legitimacy. [223] The author of the theory of legitimacy has asserted that when a rule or rule-making process exhibits these properties it will exert a strong pull on the states to comply. The reiterates that in the absence of such properties it would have diminishing impact and easier for the states to avoid. The states prefer self-interest in contrast to the interests of the global community.[224]

2.2.3 Franck's determinants of Legitimacy

Thomas Franck has identified four determinants of a rule or rule making process contribute to establish normative legitimacy. These determinants are: determinacy, validation, coherence and adherence. The author has discussed these characteristics to increase and decrees of the legitimacy of a rule or rule making institution.

2.2.3.1 Determinacy

The 'determinacy' as a textual quality of a rule affects legitimacy has been termed as 'Transparency' in its first sense of the term. These are the rules with high

[221] Ibid., 246.
[222] Ibid., 47.
[223] Ibid., 48.
[224] Ibid., 49.

degree of ascertainable normative contents without any opaque message to regulate the conduct of the states. In other sense, determinacy is referred as 'Clarity'. It is noted that determinacy is achieved by 'textual clarity'. The clarity reflects the agreement among authors of the rule about its normative contents with specificity. The rule must communicate what conduct is permitted and what is out of bound.[225] The contents of the rule clear enough for the potential violators to offer an exculpatory definition and outer boundaries of a rule.[226]

The clear understanding about the expectation of normative contents i.e. what it covers and its continuity generate a compliance pull for the conformity behavior of the states in a global secular community.[227] The rules which predict with accuracy gain more adherence from these global stakeholders. The adherence to the rules of international organizations vary with the varying of predictability and accuracy in its regulation of the conduct of these international subjects from strong compliance to avoidance.[228] The textual accuracy and predictability of behavioral relation to regulate the conduct of these international entities exert a compliance pull for the states for its adherence. The subject states realize a 'pressure' and psychic costs for the non-compliance of the pull exerted by the 'rule.[229]

A rule which perceived to be an unjust by the subjects undermines the compliance pull. The single-minded passion for arrow like truths where it does not purportedly appear to conflict with the principles of fairness and common sense. In other sense, a sophist rule with its multilayered complexity hedged by 'why' and 'to whom' exculpation constitute a powerful motive for ignoring its practice by the states

[225] Ibid., 52, 56.
[226] Ibid., 56.
[227] Ibid., 58.
[228] Ibid., 42.
[229] Ibid.,,43, 44.

in their response.[230] For example, where the investment treaty is clearly to accommodate foreign investors, where an investment treaty between the states radically change to make it a disadvantageous for the existing foreign investors, where the state further divide into states the rule of *pacta sunt servanda*. Such treaty provisions to follow as binding would make the rule unfair and absurd to insist on its immutability.[231] The rule engenders 'indeterminacy' when disagreements and uncertainty left unsolved by the authors or the legislators of the rule in the making process.[232] At the same time, superficial clarity of an international rule when not satisfy the test of fairness create justifications for the non-compliance responses.

The author has claimed that the textual 'indeterminacy' has its 'Costs' to pay. These costs of indeterminacy are paid in the coins of 'Legitimacy' when it causes uncertainty and unpredictability. The rules suffered legitimacy cost due to its complexity and invite disputes for the ambiguous incidents of applications the rule. This cost increase with the shortage of legitimate institutions capable of clarifying the complex rule because of its use to promote the indecisive self-interests of stakeholders.[233]A clear and transparent rule inhere how effectively communicate to stakeholders the circumstances to engender its compliance pull.

This could have the implications of the non-compliance behaviors of the states toward the rule and the rule making institutions.[234] The rule making institutions can be responsible for the uncertainty of the textual clarity. This textual indeterminacy may be due to lack of agreements of the legislators or their desire to preserve flexibility for

[230] Ibid., 73-79.
[231] Ibid., 85.
[232] Ibid., 52.
[233] Ibid., 82.
[234] Ibid., 53.

the issues in future.[235] Some degree of indeterminacy is inevitable in any body of rules and rule-making institution to maintain a desired promotion and flexibility. This indeterminacy or elasticity of words or text is inserted as a deliberate strategy in the rule.[236] These textual flexibilities of the rule are desirable for future progress, preservation and to resolve issues of the system. This opaqueness of the rule creates elasticity and more amenability for the interpretations of the text.[237]

The failure of members of international community or the part of it to obey the command of the rule demonstrates the prospects of alternatives of the rule. The defiance of the existing rule persuades the substitution for the new better rule.[238] The state behavior is assessed when it affect the reinforcement or undermine the generalized application of the command of the rule.[239]

Thomas Franck suggests that

"It is perfectly possible that a state (or a person) could lose a lawsuit without incurring shame or ridicule, as long as the rule text at issue is sufficiently indeterminate to make various interpretations rationally possible."[240]

The textual determinacy varies from rule to rule as matter of degree which directly affects the degree of perceived legitimacy of a rule.[241]

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[235] Ibid., 53, 54.
[236] Ibid., 56.
[237] Ibid., 53.
[238] Ibid., 151.
[239] Ibid., 152.
[240] Ibid., 56.
[241] Ibid., 56.

2.2.3.2 Coherence

Coherence is another determinant of legitimacy of an international rule.[242] Thomas Franck's theory pleads 'coherence' as another element as determinant of legitimacy of a regime among nations. The consistency of interpretations and uniform application of rules in like cases to promote the rhetoric of fairness of a system are required to achieve the element of coherence. The consistency attributes require that a rule is to apply uniformly in some similar situations.[243]

The legitimacy destroys in the absence of coherence of practice and the application of the rule or rule making institutions. The practice and application of the rule depend upon the degree of its perceived legitimacy. This reciprocal dependence of coherence and legitimacy appears sensed by the secular community of the states.[244] Coherence create legitimacy of a rule, principle or rule making institution as it establishes a connection between rule or rule making institution to the vary purpose of the rule ,its previous applications to solve the like problems when required to resolve different problems.[245] Coherence demonstrates about the application of a rule to distribute a certain quantity of relief employ to resolve quite different problem of entitlements. This quality of a rule system generates its wide acceptability as legitimate.[246] The principle of state equality illustrates the coherence of application of rule of right and relief as a key indicator of legitimacy.[247] The denial of equal

[242] Ibid., 142.
[243] Franck, "The Legitimacy," 1586.
[244] Franck, *power*, 142.
[245] Ibid., 148.
[246] Ibid., 148.
[247] Ibid., 153.

treatment may trigger the option for abandonment of the command of the rule or rule making institution.[248]

Thomas Franck reveals the requirement of coherence as 'likes be treated alike' and the demand justifying reasons for the distinct application of rules for 'alike'.[249] The author stated that legitimacy of a rule is partly depend upon the coherent practice of it. Conversely, the coherent practice suggests the legitimacy of the rule. Practice coherently and coherent application of a rule depend on the degree up to which it is perceived as legitimate by those addressed and host states applying it. This shows the reciprocal dependence of coherence and legitimacy appears. [250]

The adjudicative integrity of rule or rule making regime assumes the pattern of application of the rules. A certainty and predictability of application of the rule system motivates the members of global secular community to obey the command of rule. The predictability and certainty emerges when the rule system convey a command in a coherent manner. The coherence is related to consistency of the application of the rule.[251]

Thomas Franck has referred moral and adjudicative integrity of a rule or rule making institution as an explanation of compliance pull as enunciated by Ronald Dworkin. The moral integrity of the rule system is relative to the other like regimes. The rule system which is more dependable voluntary basis is deemed to have more authority to attract compliance pull to follow the system than other like system of rules.[252] The settlement of disputes under a coherent system of rules extends a natural

[248] Ibid., 169.
[249] Ibid., 144.
[250] Ibid., 142.
[251] Ibid., 143.
[252] Ibid., 143.

limit on the authority or the command of a rule system.[253] The command that emanate from the rule making institution when refers a high degree of willingness of compliance under the sense of obligation to obey.[254]

The inconsistent applications of the command of a rule system generates incoherence. This incoherence can be cured by reconsidering its application in its adjudicative applications to engender predictability convey its command.[255] Incoherence of the rule or rule making institution loses its acceptability as it achieved part of the desired outcome for distributive relief in the settlement of disputes.[256] The rule which is inconsistent in its application for the 'likes' it has questionable legitimacy and weaken its compliance pull as sense of global community.[257] A rule may lose its psychological power to persuade where it fail to retain coherence, thus its legitimacy. The new coherent rule or principle can the inclination of states for the rule obey.[258]

2.2.3.3 Validation

The validating act of collective membership establish a degree of legitimacy which carries entitlements and obligations for the stakeholders. The symbolic and true cues give rise validation of a rule or rule making institution.[259] These cues have the potential to validate the rule of international practice. Such validations reinforce the legitimacy discourse of the rule and rule-making institution.[260] These cues have been

[253] Ibid., 146.
[254] Ibid., 150.
[255] Ibid., 144.
[256] Ibid., 149.
[257] Ibid., 153.
[258] Ibid., 172.
[259] Ibid., 111.
[260] Ibid., 134.

the recognition of the statehood of the country.[261] Two tier approach of international law of de-facto and de-jure is relevant under the validating cues for legitimacy.[262]

The voluntary acknowledgment by states for the contents of the treaty establish an authenticity or validation for the rule making system or its process. [263] The states are admitted to participate at formulation stage of treaty has been the symbolic validation of statehood and cued by right of recognition in relation to other states.[264]The effective participation of the system surrogate to enunciate reasons for the obedience. This participatory validation for the rule making institution regularizes the relationship between the states and the rule making institutions.[265] Pedigree earned by the longevity of the rule or rule making institution.[266] The pedigree or the long-term relations establish its validation. The pedigree of a system is usually earned by longevity and deep rootedness of the relationship with its stakeholders. The participatory validation cues instrumental value in securing the compliance with the rule and its command.[267] The emergence of supranational system of rule such as United Nations Organization (UNO) and Bretton Wood institutions base International Bank for Reconstruction and Development i.e. World Bank has earned their legitimacy by the participatory validation of member states.[268] The equal participation of the member state with equal rights despite of their unequal powers cues the entitlement of rights in case of UNO. The World Bank is an exception for this rule of

[261] Ibid., 135.
[262] Ibid., 141.
[263] Ibid., 91.
[264] Ibid., 112.
[265] Ibid., 91, 92.
[266] Ibid., 93.
[267] Ibid., 94.
[268] Ibid., 100.

equal participation where the decisions are taken by the voting rights by shares rather 'one state one vote'.[269]

The participatory validation for the rule making institutions to regularize and reinforce the authority of rule-making institution and its processes of enforcement of those rules.[270] The equal participation for the process of treatification and processes on the basis of one nation one vote with sovereign equality has the process of validation of legitimacy of the rule or rule making institution.[271]

On the other hand, failure to validate a rule or a package of rules in the form of treaty cues to others to sense a reality of legitimacy of the rule and its maker institution.[272] Withholding recognition of the process and non-rectification of a treaty has the potential to be interpreted invalidation thus, lowering the legitimacy discourse of the rule or rule making institution.[273]

2.2.3.4 Adherence

The adherence to the system of rules formation, interpretation and its application create a compliance pull for the obligation of the command.[274] The obligation of command derive its compliance pull not from consent of the states for treaty but from its membership of the rule making institution. As the rule for the binding effect of law of treaties found in *Pacta sunt servanda* i.e. treaties to abide by. This unwritten rule may infer from the conduct and belief of the states.[275] The fundamental principle of international law that it prevails over the domestic law is

[269] Ibid., 101.
[270] Ibid., 92,93.
[271] Ibid., 113.
[272] Ibid., 136.
[273] Ibid., 112.
[274] Ibid., 186,187.
[275] Ibid., 187,188.

another example of recognition of an unwritten binging obligation. The states do not avoid the obligation to follow international law when it conflicts with the domestic law.[276] Another principle of international obligations that 'time and practice have strong suggestion for its binding effect. The pedigreed customs of international rules has the compliance pull for the behavior pattern of the states.[277] A rule has more compliance pull for its legitimacy derives when it presents its validation accordance with secondary rules of rule-making. The legitimacy of the primary rule is perceived when it was engendered with the right process outlined by the secondary rules. And the legitimacy of secondary rules may be justified by the consent of the states. The international concept of right process can be inferred by considering the validity of the right process for the rule making.[278]

The perception of states toward the rule due to the justified reasons shapes the behavior patterns. The psychological perception of a rule for its adherence assume the conscious existence of legitimate responsibility.[279] The quest of the state for a connected rule governs the principles of the system endowed with legitimacy.[280]

2.2.4 Franck's Theory of Legitimacy in Institutional Investment Arbitration

Thomas Franck's approach to legitimacy is a useful prism for inquiring ISDS system for international investment regime. In the absence legitimacy standards, the foreign investors and the host states are not able to anticipate the compliance requirements of laws for ISDS system. In the context of international economic relationships clarity and consistency of rules of law affect the stakeholders' response.

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[276] Ibid., 188,189.
[277] Ibid., 189.
[278] Ibid., 194.
[279] Ibid., 175.
[280] Ibid., 181.

The willingness and ability to adhere to such rules by the governed can lead to a legitimacy crisis in the absence of the factors like determinacy and coherence.[281]

Susan D. Frank has discussed the legitimacy approach for international investment law. According to S.D. Frank the rights of the foreign investors and the obligations of the host states are to be clear. The provisions of the investment treaties and investment contracts are to be predictable and feasible for ISDS by the application of fair rules of procedures. The low textual clarity and obscure standards for ISDS can create indeterminate boundaries for the settlement of investment disputes. The application of vague standards for ISDS has the potential to create justification on the touchstone of legitimacy and consequently to facilitate for the non-compliance of the ISDS regime.[282]

The low textual determinacy can be rectified by interpretations, but it again depends upon the clear mandate of interpretive authority and their coherence of decisions.[283] The determinate and coherent application of rule provide to establish legitimacy of the rule or rule making system. At the same time, the different applications of the same rule do not undermine coherence in case of justified explanation to the satisfaction of the community.

The determinacy crisis can be inferred from the unpredictable standards of interpretations for the determination resolution of investment disputes by institutional arbitrations. There are instances available which are evidence of legitimacy crisis of ISDS. The transparency and fairness of rule-making and its application can reduce the level of tension between investor's reasonable expectations for investment stability

[281] Franck," Legitimacy," 1584.
[282] Ibid., 1584, 1585.
[283] Ibid., 1585.

and host state obligations for citizens of the states.[284] The normative expectations of international arbitration system include the independence of arbitrators, questions of fairness of the arbitral procedure and reasoning of arbitral awards build the narrative of legitimacy.[285] The ISDS mechanism derive its legitimacy from the acceptance by the stakeholders and their participation of settlement of investment disputes.[286]

The international courts and tribunals in general and ISDS in particular under attack due to its adjudication mechanism of dispute resolution by ad hoc judges. The ISDS mechanism despite its rapid growth is facing difficulties to defend its position to face the criticism of legitimacy.[287] The ISDS mechanism deals with the issues of state as questions of public law by applying the standards of review developed from the application of private law. These tribunals frequently analyzing the measures of public interests when it affect the rights of the foreign investors. To scrutinizing such issues the application of private commercial law of contract raise the questions of legitimacy of the mechanism.[288]

2.3 Conclusion

The rule system of international is system of voluntary compliance in the absence of international coercive authority. The sovereign members of international community choose to comply any normative standard where they find such norm as in their interest or in the interests of internationalism. International rule system inhere legitimacy rather justice to attract the compliance pull.

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[284] Franck," Legitimacy," 1586.
[285] Schill, "Conceptions." 18.
[286] Ibid., 14.
[287] Brower and Schill, " Is arbitration a threat," 472.
[288] William W. Burke-White, and Andreas Von Staden, "Private litigation in a public sphere: the standard of review in investor-state arbitrations," *Yale J. Int'l L.* 35 (2010): 285.

Thomas Franck has identified two reasons for the in-application of justice to resolution of international disputes including investment disputes. Firstly, operational reasons that the concept of justice has its application for the settlement of disputes of persons rather collective entities i.e. states. There may be rule or treaties may prima facie appears to be injustice for the some of the parties but members of the global community accept it as legitimate transaction i.e. Versailles Treaty[289]. Secondly, the concept of justice is different from legitimacy as justice is the moral aspect is more interest of human being than international entities.[290]

The legitimacy attributes of the theory of Thomas Frank pivotal pillar to achieve the stability of ISDS system through coherence, determinacy and fairness elements of the theory. International ISDS system is constantly in search of an adequate theoretical framework which can stabilize the multifaceted dimensions and implications of ISDS. The stability of the ISDS regime can ensure the predictability and certainty of the system for its enhanced compliance.

[289] The treaty severely deprived Germany and Turkey by distorting reality. The treaty adds the suffering in the life of individuals of these states.
[290] Franck, *power*, 208,209,233.

CHAPTER NO- 3

GLOBAL EMERGENCE OF ICSID: AN INSTITUTIONAL ISDS SYSTEM

3.1 Introduction

The foreign investors desire to protect their interests relating to movement of their assets into and out of the states, their treatment during their stay and impartial dispute settlement mechanism in case of disputes. Institutionalization for the disputes resolution of international economic law as a tool for protectionism imbedded in the rationale of impartiality and de-politicization of dispute settlement. The rationale reasons for this protectionist approach are pleaded as the inherent deficient structures of capital importing states for the protection of foreign businesses and investments. The growth of economic activities across the borders and invest in the foreign territories gave rise the demand for the reliable infrastructure for the protection of their asset in foreign lands. The stakeholders moved the international economic organizations to build a mechanism for the protection of their legitimate economic interests on the foreign territories. The international economic organizations contributed their efforts to build the consensus for establishing an ISDS mechanism for protection of foreign investments by transnational tribunals.

The preservationist approach among capital importing state had been inclined for the retention of sovereign attributes of the state. For the reasons thereby, the capital importing nations remain resistant for the supranational supervision of their economic activities. The preservationist has been asserted their position to preserve economic and legislative sovereignty of their states.

The international economic organizations played their role for the establishment of institutions for the protection of foreign assets to create balance in the world economic regime. The support of these institutions for the encouragement of foreign investment and its protection evolved with the growth of investment flow across borders. The protectionist approach for the protection of economic interests and their persistent inclination for supranational ISDS proved to be impetus for paradigm shift of the regime.

The institutional disputes settlement emerged after WWII in the form of ICJ, ICC, SCC, LCIA and WTO for the settlement of the investment disputes. The jurisdictions of these institutions for the settlement of investment disputes was appeared limited to deal with the disputes of foreign investors. The ICJ jurisdiction is available to states only to the extent of interpretation of laws. The dispute settlement understanding (DSU) procedure of WTO is available on the request of the states. The ad hoc arbitration procedure of ICC, SCC, LCIA and some other regional arbitration institutions can be invoked on the request of the private parties for their commercial disputes. In the context of a dire demand for a specialized supranational tribunal to resolve investment disputes the International Bank for Reconstruction and Development (World Bank) undertook its successful efforts to establish a specialized forum to deal with the foreign investment disputes. The World Bank started its effort for this specialized forum in 1961 and finally the consensus was built in the form of the Washington convention of 1966. The international convention on the settlement of investment disputes between states and nationals of other states (ICSID) was formulated by the Executive Directors of IBRD on 18th March 1965 which was summited to the governments for its signature and ratification. The ICSID convention

1965 was entered into force on October 14, 1966 with the ratifications of 20 founding members of the convention.

International investment law regime witnessed the low participatory trends for the ICSID convention and for the assumption of the jurisdiction for their ISDS in its first two decades of its establishment. The establishment of ICSID jurisdiction have shifted the paradigm for the ISDS in 1990s. In December 2020 more than 163 countries of the world have been the signatory of the convention.[291] ICSID has provided a transnational mechanism for the settlement of investment disputes by exercising its jurisdiction in case of legal disputes upon the consent of the contracting parties. The ICSID jurisdiction requires one party is to be foreign investor as complainant against the host state in the matter of foreign investment in its territory.

The legitimacy discourse of ICSID jurisdiction has extensively underpinned for the conformity response of international economic community. The adherence derives of nations for the flow of inward foreign investment has reinforced the legitimacy rhetoric of ICSID mechanism for ISDS. At the same time the perceived fairness and determinacy of ICSID procedure has contributed to avoid state to state conflict and to generate economic activities in the host states.

3.2 Emergence of ICSID: A New Choice for Institutional ISDS

After WWII the Politico-economic changes replaced with the geo-political through the introduction of transnational contractual regime.[292] The international binding obligations appeared to incentivize the politico-economic interests of the states in consideration for the flow of foreign investment for the capital importing

[291] Database of ICSID member states, accessed December 15, 2020, https://icsid.worldbank.org/about/member-states/database-of-member-states.
[292] Brower and Schill, "Is arbitration a threat," 472.

LDCs. These international binding obligations mostly have been incorporated in the international investment treaties. The international investment treaties have had advance its aim for investment liberalization and investment protection. The treaty provisions relating to entry and standards of treatment are to achieve economic efficiency by elimination of restrictions for the foreign investment. The rules of investment treaties for expropriation and settlement of investment disputes provide future protection for the foreign investment. The provisions of investment treaties provide protection to the investment from uncompensated nationalization or expropriated[293] assets of foreign investors.

3.2.1 Historical Analysis for the Establishment of ICSID

The UNO initiated its demand for the protection of foreign investment assets among the members' states with the object to avoid any future conflict. The UN Economic and Employee Commission had conducted a study for the "investment code" in 1947.[294] After the UN initiatives taken for the promotion and protection of foreign investment some other world economic organizations started their efforts for providing acceptable solution for ISDS.

In the post WWII era, the investment disputes were resolved between the states by ICJ by treating such as dispute between states.[295] The paradigm shifted when the 'foreign investors' were allowed to approach the international tribunals for the redress of their grievances directly without the intervention of the home states. The transnational tribunals such as ICC, SCC, and LCIA have provided some impartial forum for the settlement of the commercial disputes of foreign investors. The

[293] The term direct expropriation referred to the compulsory transfer of investment property of foreign investors. On the other hand, the indirect expropriation involved the regulatory taking of invested assets of the foreign investors.
[294] Antonio R. Parra, *The history of ICSID* (Oxford: Oxford University Press, 2017), 11.
[295] Treaties of Friendship, navigation and commerce of USA.

growing trends of ISDS in supranational tribunals raised its dire need for a specialized forum for the settlement of investment disputes. Thus, the efforts of World Bank remained successful to introduce a specialized forum for the settlement of foreign investment dispute.

In early 1960s, the president of International Bank for Reconstruction and development (World Bank) took initiative to establish an international adjudicatory body for the settlement of foreign investment disputes. [296] The secretary general of World Bank put up their notes for the establishment of multilateral approach to settle investment disputes.[297] The executive director gave their affirmation for the proposal to establish an international multilateral forum for the settlement of investment disputes in its meeting in March 1962. A special committee was constituted for the preparation of working paper for the multilateral agreement to establish a body of international arbitration for the investment disputes. [298] The committee submitted as First Preliminary Draft of the convention in August 1963 to the executive directors. [299] The preliminary draft was considered by Regional Expert Committees in their Consultative Meetings at the UN regional headquarters from December 1963 to May 1964.[300] The expert committee reports along with revised version of the preliminary draft was considered by the executive directors. This preliminary draft was adopted by the executive directors with some amendments and submitted to the Board of Governors along with their reports. The Board of Governor gave approval in its meeting held in Tokyo in September 1964 and resolved to formulate the convention

[296] Parra, *history*, 12.
[297] "History of ICSID Convention," *vol. I, ICSID*: 2. Accessed February 22, 2018, https://icsid.worldbank.org/en/Pages/resources/The-History-of-the-ICSID-Convention.aspx.
[298] Ibid.
[299] Ibid.
[300] Twenty nine governments designated experts to attend the meeting in Addis Ababa, 20 in Santiago, 18 in Geneva and 19 in Bangkok. See also, *ICSID*, "History of ICSID Convention."

for this effect.[301] The staff of World Bank prepared the *First Draft* of the convention in the light of discussions of regional consultative committees their reports and discussions of executive directors of preliminary draft.[302] During this whole process of consultations and formation of the convention the jurisdiction clause remained heavily under debates.

During the working paper stage of the convention, it was proposed that the jurisdiction of the center would be flexible and excluded the option of diplomatic involvement of the host state to bring any action against the host state.[303] The private foreign investor party can directly approach to the forum without seeking help or intervention of the home state. The working paper suggested the forum *prorogatum*[304] principle for the jurisdiction in Preliminary Draft was dropped in First Draft of the convention.[305] The proposal for pecuniary limit of the claim i.e. A minimum one hundred thousand dollars assets contributed in the economy of the host states for at least five years which was propose to invoke jurisdiction could not be finalized in the final draft of the convention. First Draft added the definition of legal disputes and investment.[306] These definitions ware dropped in the text circulated to the states and inserted the words disputes directly out of investment. This subject was left open for the contracting parties to decide with their mutual consent documents for the inclusion and exclusion of nature of claim to invoke the jurisdiction of the center.[307] The political subdivisions are suggested to consent for the jurisdiction of the center. But the suggestion for the subrogation of the home state and the nationals of both the

[301] *ICSID*, "History of ICSID Convention."
[302] Ibid.
[303] Working paper vol. I of the Convention. See also Parra, *history*, 31, Appendix I.
[304] The doctrine affords an informal way for a state to express consent to the court's jurisdiction. Such as ICJ depend upon the consents of the disputing states. Parra, A. R. (2017). See also, *The history of ICSID* , 41.
[305] Parra, *history*, 31 and (Appendix II, III).
[306] Ibid., 41, 63 and (Appendix II, III).
[307] Parra, *history*, 73 and (Appendix II, III, IV).

contracting states was dropped on the objections of some states in the First Draft stage.[308] The writing consent of the contracting states is required to be proved by the claimant. The consent might be witness by investment contract or legislation or any other legal instrument. The consent once given suggested to be irrevocable for the existing transactions which barred the diplomatic protection under international law.[309] The private foreign investor party can directly approach to the forum without seeking help or intervention of the home state. The competency of the claimant suggested to be determined on their nationality. The issue of jurisdiction received much debates at regional consultative stage.

The LDSs and newly independent countries expressed their concerns about the much wider application of the center. They were inclined that its jurisdiction to apply on the future contractual transactions rather than past agreements.[310] The objections regarding the misuse of direct filling of the claim in the center even without the permission contracting home state resolved in a different way. The final draft appeared that investor is required to submit and prove the consent of the host state.[311] The concerns regarding the unclear standards of the controlling companies which possess the nationalities of both the contracting states. The suggestion for the certificate of foreign ministry to clarify the status of nationality as conclusive proof could not sustain in later stage.[312]

The first draft regarding jurisdiction clause was different than the preliminary draft which was finalized after its consultative meeting with the group of countries.[313] The opinions remained divided between the capital exporting nations and capital

[308] Ibid., 364 and (Appendix II, III).
[309] Ibid., 31 and (Appendix II, III, IV).
[310] Ibid., 51.
[311] Ibid., 53.
[312] Ibid., 52.
[313] Ibid., 63.

importing states on the flexible approach of invoking jurisdiction of the center. At consultative stage, the majority of Latin American states, developing states and less developing states of Asia and Africa opposed on the issues relating to jurisdiction on the concerns of undermining of sovereignty and economic or fiscal policy approaches of the states. These states were concerned about such a flexible approach.[314] The working groups failed to build consensus for the jurisdictional approach of the center on regional consultative process.[315]

At legal expert stage, the issues relating to nature of jurisdiction remained irritant due the difference of politico-economic approaches of developed and LDCs. The legal committee held 22 meeting on the issues of dispute settlement mechanism in Washington DC session during November 23, to December 11, 1964. The changes for the revised draft of the convention was summarized by the Chairman of the Legal Committee in the report to the executive directors of the World Bank. The executive director in their meeting between February 16 and March 4, 1965 adopted certain changes and gave final approval of the text of the convention along with their report on March 18, 1965.[316]

Tunisia was the first country to sign the convention. There were thirty countries which signed the convention till December 1965. The nine industrial capital exporting states, seventeen African LDCs and only three Asian countries including Pakistan were the pioneer signatory members of the convention. There were no Latin American and countries from communist and socialist block, which signed the till the end of the year 1965. Nigeria was the first country which submit its ratification with the World Bank on 23rd August 1965. USA ratified the convention on 10th June 1966.

[314] Ibid., 71.
[315] Ibid., 71-87.
[316] Ibid., 71-87.

The first 20 countries which ratified includes 14 countries from African and the Netherland was the 20th country which ratified the convention to qualify on October 14, 1966.[317]

The ICSID convention provides for informal means of settlement of investment disputes between foreign investors and the host states which includes conciliation and arbitration. The administrative and jurisdictional structure of ICSID has been established with the aim to promote international economic cooperation with participation of foreign investor. The confidence of foreign investors has been persuaded by extending a reliable structure and jurisdiction for the settlement of investment disputes in consequent of their investment.[318]

3.2.2 Structural Analysis of ICSID

The ICSID institution administratively compose of Administrative Council and Secretariat. The administrative structure of ICSID has a skilled and impartial establishment to cater the dispute mechanism of international investment regime. The ICSID structure established its strong relationship with the World Bank group. ICSID is the fifth organ of World Bank group along with IBRD, IDA, IFC and MIGA.[319] This kinship of ICSID has contributed to establish a dependable system of protection of foreign investment through its flexible approach to invoke jurisdiction. The administrative structure of ICSID is compose of administrative Council, Secretariat and panel arbitrators.

[317] Ibid., 87 and (Appendix II, III, IV).
[318] Preamble of the ICSID Convention.
[319] International Centre for Settlement of Investment Disputes (ICSID), International Bank for Reconstruction and Development(IBRD), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA)

The Administrative Council composed of one representative from each contracting states. In the absence of nomination from the contracting states, the member representative appointed International Bank of Reconstruction and Development i.e. World Bank to act as the ex officio representative for the ICSID Administrative Council as well. The President of World Bank is the ex- officio Chairman of the Administrative Council. The Administrative Council is empower to adopt procedural rules, to approve the facilities and budget for the ICSID center with 2/3 the majority of the membership of the administrative council.[320]

The second most important administrative organ of the ICSID is Secretariat headed by Secretary General ICSID and one or two Deputy Secretary General as the principal officer of the center. These principal officers are elected by the Administrative Council for the period of six years by 2/3 majority of the members. The Secretary General is responsible to appoint staff of ICSID center and to enforce rule of procedures adopted by Administrative Council. An important function of this principal officer is to act as the registrar ICSID for the registration of claim after scrutinizing the requirements and authenticate arbitral awards before its enforcement.[321] The secretariat plays a pivotal role to establish the panel of professionally skilled arbitrators with the cooperation of member states to exercise ICSID jurisdiction for the settlement of investment disputes.

The ICSID arbitrator's panel consists of more than 500 members. The panel receive four member from each contracting party and ten are nominated by the Chairman Administrative Council of ICSID representing all the major legal systems of the world. The members of the panel are designated for the renewable period of Six

[320] Art. 4-7 of the ICSID Convention.
[321] Art. 9-11 of the ICSID Convention.

years unless seat fall vacant due to death or resignation of the member.[322] The contracting states are required to send their nomination from the personalities of high moral characters, independent judgment and recognized competency in field of law, commerce, industry or finance.[323]

3.2.3 Relationship with the World Bank Group

The ICSID center has its close administrative relationship with the World Bank. The ICSID center has financial and administrative dependent upon the World Bank. Two financial sources are provided to run the day to day affairs of the ICSID institution. Firstly, the charges paid by the litigant parties as the fee of the center. Secondly, in case if further finances are required the contracting states of the World Bank in proportion of their respective subscription contributed as the member of the World Bank.[324]

The president of World Bank is ex officio Chairman of Administrative Council of the ICSID who has the authority to propose names of Secretary General and its deputy for the election by the members of the Administrative Council. At the same time, the World Bank financial subscribers are responsible for substantive portion of their expenditure of the ICSID center.[325] This institutional administrative and financial support provide mechanism to facilitate ICSID in the exercise of its jurisdiction.

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[322] Art.13,14 & 15 of the ICSID Convention
[323] Art. 14 of the ICSID Convention.
[324] Art. 17 of the ICSID Convention.
[325] Art. 5 & 17 of the ICSID Convention.

offer, when accepted by the foreign investor vest jurisdiction upon the ICSID tribunal. In other words an undertaking between the contracting states to the BIT or MIT or ICSID convention to introduce a standing offer of the contracting states for the individuals of other state for the acceptance of jurisdiction of ICSID.[328]Gus van Harten has identified this distinctive characteristics of ISDS which differ this mechanism from the other international adjudicative regimes.[329] The consent of contracting sovereigns are generally and prospectively available to individuals against the host state even without any intervention of the respective states. The mechanism provide for damages as the only remedial option available against the host state even without exhausting any prior domestic remedy and post award judicial review in host state.[330]

The consent for the ISDS in an investment treaty by the contracting states is a sovereign act which is the matter of public law. As the relationship of the states in the context of treaty is not limited to a single contractual transaction.[331]

3.3.2 Attributes for Assumption of ICSID jurisdiction

The states assume obligation for ICSID jurisdiction by consenting thereto. There are different ways and means of consent to assume obligations of ICSID convention. The contracting states can confer jurisdiction upon ICSID tribunal by treaty obligations or contractual liabilities for the settlement of investment disputes of the host states. At the same time, the ICSID tribunals assumed jurisdiction by

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[328] Mehmet Toral and Schultz, Thomas, "*The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*", *in The Backlash Against Investment Arbitration: Perceptions And Reality* Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, eds., (Netherland: Kluwer Law International, 2010);

[329] Gus Van Harten, "Investment treaty arbitration, procedural fairness, and the rule of law," International Investment Law and Comparative Public Law (2010): 6, 7.

[330] Ibid., 7.

[331] Gus Van Harten, "The Public—Private Distinction in the International Arbitration of Individual Claims against the State," *International & Comparative Law Quarterly* 56, no. 2 (2007): 388,391.

considering the attributes provided by the ICSID jurisdiction under Article 25 of the ICSID convention. The ICSID tribunals are constituted to exercise jurisdiction where the disputes are of legal nature in consequent of the foreign investment and the contracting states have consented for assumption of ICSID jurisdiction.

3.3.2.1 Consent to ICSID Jurisdiction for the Arbitration

The consent is an essential condition for the exercise of ICSID jurisdiction by the tribunal. The ICSID convention left this autonomy on the parties. The proof of consent is required at the time when request is made for the ICSID tribunal. The burden is on the foreign investor to provide about the existence of the consent in writing on the date of registration of the dispute with the ICSID forum. The supporting documents are required for this effect.[332]

The foreign investors consent for remedial opportunity for investor state arbitration is treated as an acceptance in response to the 'standing offer' of the state. Such generalized offer made available as the result of interstate bargain over the regulatory standards of treatment of the investors from the contracting states in investment treaties.[333]

The parties to the investment agreement compromised to insert such consent clause as the part of dispute settlement provisions of the agreement. The indirect methods of consent include: firstly, local legislation by the state for the acquisition of ICSID jurisdiction for investment disputes; secondly, affirming the jurisdiction in

[332] Rule 2(2) of ICSID institution rules.
[333] Harten, " Public—Private Distinction," 380.

investment treaties; thirdly, the state is competent to offer consent to constitute ICSID tribunal for the dispute.[334]

The state has the option to file its consent to ICSID jurisdiction to even a unilateral instrument communication to the World Bank depository. This type of consent can be revoke by a subsequent communication instrument i.e. withdrawal letter to ICSID secretariat.[335]

Sometime state may give consent through an investment promotion domestic legislation. The vary purpose of such legislations is to provide incentives to foreign investors consequential conducive investment environment in the country. The domestic legislation is usually considered as the domestic issue which can be repeal by domestic piece of subsequent legislation. The domestic legislation which has the impact to create international obligations are to be treated under the VCLT and principles of international law to make it irrevocable in its effect by subsequent statue law.[336]

The most common method of consent to assume ICSID jurisdiction is investment treaties. These investment treaties may be in form of Bilateral Investment Treaty (BIT) between two parties or Multilateral Investment Treaties (MIT) among more than two parties. The common consent of parties to the treaties are to be interpreted in accordance of VCLT.[337] The consent by investment treaty is irrevocable unilaterally.[338] The termination of the treaty can be dealt under VCLT or agreement of the parties through the treaty provision or separate agreement between the parties to

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[334] Schreuer, *ICSID,* 192.
[335] Oscar M. Garibaldi, "On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy," *Transnational Dispute Management (TDM)* 6, no. 1 (2009): 264.
[336] Ibid., 267,268.
[337] Ibid., 269.
[338] Art. 26 of ICSID Convention.

that effect.[339] Article XVI of Bolivia-USA treaty 1998 can be cited as an example, which provides that the treaty remain effective for ten years and on the expiry of such term will remain continue unless any party of the BIT serve notice of termination of one year. The terminated treaty will provide a safeguard ten years to the covered investment during this period of validity.[340]

The consent to ICSID arbitrations contain in treaty is itself sovereign act of the states. The consent to assume ICSID jurisdiction is mostly through bilateral investment treaties i.e. 60% of the case registered so far show that the BIT is the major source of consent for the assumption of ICSID jurisdiction. On the other hand, there is weak trend to confer ICSID jurisdiction by host state domestic legislations i.e. 9% and investor-state contracts i.e. 16%. Even this pattern of consent for ICSID jurisdiction remain continue in the year 2018. BIT consents were invoked in 56.5% cases while consent under investment contract between investor-state in 18% cases. On the other hand, ICSID jurisdiction was invoked only in 1.5% of cases under domestic legislations of the host states.[341]

The contracting parties to the investment treaty can limit the application of consent clause for ICSID jurisdiction. Art 25(4) of ICSID convention provides to exempt certain disputes or category of disputes by the application of reservation clause for ICSID jurisdiction.[342] The states some time use the inclusive clause to specify the dispute or can exclude a category from the application of the treaty or legislation for the ICSID jurisdiction.[343]

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[339] Art 54 & 56 of Vienna Convention on Law of Treaties.
[340] Bolivia- US BIT 1998. See also, Garibaldi, "Denunciation of the ICSID Convention," 269.
[341] *ICSID*, "Caseload 2019," accessed August 24. 2019. https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1.
[342] Art 25(4) of ICSID.
[343] Schreuer, *ICSID*, 231.

The disputes which are within the ICSID jurisdiction can be subjected to some additional procedural requirement before the exercise of ICSID jurisdiction. Art 26 provide freedom to the contracting state to impose procedural requirements in the form of exhaustion of local administrative or judicial remedies for the settlement of investment dispute.[344] These additional conditions can be expressed through investment treaties or local legislations and such requirement are to be fulfilled before the exercise of the ICSID jurisdiction.[345]

The states have the option to file their reservations to notify at the time of ratification, acceptance or approval of the ICSID convention even any time after its ratification.[346] The contracting state can include the exhaustion of any local administrative or judicial remedy at the time of consenting to ICSID arbitration with the other contracting party of BIT or MIT as condition of its consent.[347]

The legal effect of consent clause is that a state as Contracting Party cannot frustrate ICSID jurisdiction unilaterally even by effecting changes in its municipal law.[348] Art. 25(1) of the ICSID convention provides that no party can unilaterally withdraw its consent. The consent is given in common with the other states. The investment contract made by the parties to precludes the subsequent withdrawal of the consent for ISDS despite of its denunciation of the ICSID convention. The acceptance of the other party of the ICSID litigation amounts to perfecting of such consent of the contracting host state.[349] The acceptance of consent by the litigant party need not to express in one single document. [350] This consent even remain effective till six months

[344] Art 26 of ICSID Convention.
[345] Schreuer, *ICSID,* 237.
[346] Art. 25 (4) of the ICSID Convention.
[347] Art. 26 of the ICSID Convention.
[348] Osode,"State contracts," 39-59.
[349] Garibaldi, "Denunciation of the ICSID Convention," 253.
[350] Ibid., 258.

of the service of notice of denunciation in the depository of the World Bank.[351] The rights and obligations remain unaffected which have arisen before notice of denunciation.[352] The consent of the host state and the private foreign investor in an investment contract would have the irreversible consent for the ICSID jurisdiction for both the parties to the contract. This common consent is treated as perfected consent and cannot be withdraw unilaterally.[353]

The ICSID jurisdiction can be exercised on the fulfillment of certain conditions. These conditions are the pre- requisite for invoking jurisdiction under ICSID convention. The ICSID convention does not provide definitions for the investment and foreign investment. Article 25 of the ICSID convention provides the determinative attributes for the invoking of ICSID jurisdiction. [354]

3.3.2.2 II- BIT applicable or contract applicable or local legislation or MIA –

A contracting state may consent to ICSID jurisdiction either by a clause in the investment contract, unilateral instrument, national legislation or investment treaty i.e. BIT or MIT.[355] Some host states offer to submit investment disputes in ICSID through their investment promotion legislations if investor accepts this offer in writing then ICSID jurisdiction will be binding for the investor and the state[356]. Other ways to entrust jurisdiction to ICSID are through multilateral and bilateral investment treaty between the countries for the promotion and protection of foreign investment and

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[351] Art. 71 of the ICSID Convention.
[352] Art. 72 of the ICSID Convention.
[353] Garibaldi, "Denunciation of the ICSID Convention," 264.
[354] Article 25(1) ICSID convention, provides as follows:
"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 Contacting 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."
[355] Garibaldi, "Denunciation of the ICSID Convention," 264.
[356] Parra, "ICSID," 41-43.

resolution of the potential dispute.[357] The parties in some cases adopt direct expression of the consent for the parties to adopt through their investment agreement between foreign investor and the host state. The dispute must relate to the existence or scope of a legal right or obligation.[358] The Centre arbitrates foreign investment disputes of legal breach of international obligation upon the voluntary consent of the parties[359]. The dispute can be arbitrated through ICSID when clauses of consent to submit the dispute is mentioned in the agreement between investor and the state.[360]

3.3.2.3 Legal dispute

The existence of a dispute refers to a point of disagreement or conflict of views on some issue of law or fact between the parties. The existence of such dispute pre-supposes some event and communication between parties about the violative actions and a consequent disagreement for the settlement of the dispute.[361]

There are three possibilities of question of controversy to invoke adjudication jurisdictions; the issue of fact or issue of law and mix issue of law and fact. The issues of facts are justiciable by the production of evidence and its appreciation in a trail proceeding. However, the issues of law for any dispute can be solved by consulting the applicable law. The legal framework of ICSID is not devise to trial proceedings but to apply relevant law in an institutional arbitration proceeding for the issues of law.[362] The disputes where the assertion for the rights or obligations are involved and legal arguments are advanced for some legal remedy can be treated as legal disputes. The ICSID decisions in the case of Continental Casualty v. Argentina held that;

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[357] Ibid., 41-43,
[358] Report of executive directors World Bank, 1965.
[359] Art 25 of ICSID Convention, 1965. See also, Parra, "ICSID," 41-43.
[360] Parra, "ICSID," 41-43.
[361] Schreuer, *ICSID,* 93.
[362] Art 25 of the ICSID convention

"The Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina that in its view have been breached by those measures."[363]

The ICSID jurisdiction arises for the settlement of legal disputes relating to foreign investments.

3.3.2.4 Foreign investment

ICSID jurisdiction can be invoked in case of dispute relating to foreign investment.[364]The definition of foreign investment is a key element for the application of *Rationae Materiae.* The ICSID convention has not defined the expression but left it open for the contracting state or parties to determine the same as per their economic requirements. In the absence of common legal definition which varies for different investment instruments including BIT, MIT or investment contracts. The investment from outside deals with two major categories including foreign direct investment (FDI)[365] and portfolio investment in stocks. The portfolio investments were the major form of foreign investment in the first half of the twentieth century when countries were interested in issuing bonds to generate money for the reconstruction activities in post WWII era.[366] The nature of investment changed after the emergence of

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[363] Continental Casualty v. Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/9. para. 37.
[364] Article 25(2) of the ICSID Convention.
[365] "Definition of Investor and Investment in International Investment Agreements. International Investment Law: Understanding Concepts and Tracking Innovations," *OECD, 2008.* Accessed http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf%5Cn.
This definition characterizes direct investment as follows: "Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise).
[366] *OECD,* "Definition of Investor and Investment."

multinationals corporations and expansion of their subsidiaries in post war era.[367] The expression foreign property was familiar with the literature of law in customary international law for the property of the long resident foreign national. The notion of foreign property replaced with the more dynamic expression of foreign investment, which implies certain duration and movement of the property from one territory to another.[368] The important features have been identified for the foreign investment which includes the substantial commitment involve for some duration with the risk for both sides. The profit and return is involved in the operation of activities significant for the development of the host state.[369]

The traditional open-ended definition of investment provides to include all type of assets including portfolio investment, contractual rights and intellectual rights. However, some definitions adopted through the investment treaties have excluded the short term and speculative investments.[370] The recently appeared trend is that every kind of asset of the foreign investor is considered as the foreign investment.[371] The recent trends of BITs and FTAs have expanded the scope of investment, which included a criteria of ' attempt to make investment'[372] The indirectly controlled investment and local affiliates of the parent company is also fall within the scope of foreign investment.[373] In ICSID tribunal treated the money claims and 'concession

[367] Ibid.
[368] Ibid.
[369] Ibid., 61
[370] Karl P. Sauvant and Federico Ortino. *Improving the international investment law and policy regime: options for the future* (Helsinki: Ministry for Foreign Affairs of Finland, 2013), 56. See also world investment Report 2012
[371] Subedi, International investment law (Hart, 2008), 58.
[372] Ibid., 58, 59.
[373] Ibid., 60.

under the public law' to be held to fall within scope of investment on the criteria of foreign investment.[374]

Sometime, investment instrument uses the close list approach for the inclusion and exclusion of possible assets related to foreign investment. There are few BITs and FTAs which have use the defined list of entities for the investment criteria. Sometime the investment treaties incorporate definitive list approach of for the type of assets to specify to be the part of the foreign investment. There are some RTAs ASEAN and a draft agreement on EU/PACP trade which have excluded the portfolio investment to seek ISDS protection. But the IISD's Model Agreement on Investment for Sustainable Development of April 2005 has included the portfolio investment in the definition of investment.[375]

3.3.2.5 Foreign Investor

The ICSID convention was introduced in the arena of jurisdictions to settle investment dispute with the objectives to recognize 'individual' as the subject of international law.[376] The preamble ICSID convention advocates that the private investor can approach to invoke jurisdiction of the Centre for the settlement of investment disputes. The foreign investor includes legal persons incorporated in third country and national of the contracting party of international investment agreement incorporated in the territory of the other contracting party.[377] The criteria for foreign investment and investor thereof has been defined in the ICSID convention. That whether the foreign investor is of public or private entity. However, the question is left open to decide by the states in their treaty or contractual obligations. The ICSID

[374] Ibid., 60.
[375] Ibid., 62.
[376] Schreuer, *ICSID,* 160.
[377] Sauvant and Ortino, "*Improving the international investment law,*" 59.

jurisprudence has recognized the private, public and state controlled companies as the foreign investors to approach ICSID jurisdiction.[378] The state-owned corporations can invoke ICSID that if the corporation is not functioning as an agent of the respective government. The corporation cannot be treated as government owned entity unless it is not acting to discharge the essential functions of the government and work to advance purposes of the government.[379] The objection about source of capital has been meaningless for the purpose of determining of status of foreign investor.

The criteria for the foreign investor depend upon the investment treaty if so provided with the determinative list for the inclusion of entities as foreign investor. The majority of investment treaties have provided the criteria to include state owned and a private foreign national of a foreign state participant of a foreign investment.[380] The state owned enterprises (SOEs) or state control enterprises (SCEs) play its part in the foreign territories worldwide for promotion of foreign direct investments. These are treated with same protection as the foreign investors unless otherwise agreed by the parties.[381] The shareholding, irrespective of the minority or majority of the assets in the foreign investment qualify to avail the protection of the ISDS.[382]

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[378] Ibid., 38.

[379] Schreuer, *ICSID,* 161.

In CSOB v. Slovakia, the Respondent contested the Tribunal's competence, arguing that the Claimant was a State agency of the Czech Republic rather than an independent commercial entity and that it was discharging essentially governmental activities. The Tribunal rejected this contention. The decisive test was whether the company was discharging an essentially governmental function.

In CDCv. Seychelles, the Claimant was a company with a separate legal personality but was 100% owned by the British Government. The Respondent initially raised, but did not pursue, an objection that the Claimant was not a "national of another Contracting State". As the Claimant's investment related to a commercial loan,

In Telenor v. Hungary, the Claimant was 75% owned by the State of Norway. No issue was raised as to whether the Claimant qualified as a "national of another Contracting State".

In Rumeli Telekom v. Kazakhstan, it was held that the Claimants were independent commercial entities and qualified as nationals of another Contracting State. The Respondent's argument that the State of Turkey was the real party in interest was rejected.

[380] Subedi, International investment law (Hart, 2008), 58, 59.

[381] Sauvant and Ortino, "*Improving the international investment law,*" 59, 60.

[382] Subedi, International investment law (Hart, 2008), 60.

The legal persons qualify as foreign investors on the test of their seat of incorporation and control determine the nationality of the foreign investor. On the other hand, natural person's nationality according to the home state law is the determining factor for his claim as foreign investor of that nationality on the date of registration of the consent to arbitrate.[383]

3.3.2.6 Nationality of the investor

The ICSID institutional arbitrational jurisdiction is established to deal with the disputes between foreign national of a contracting party and the host state.[384] The nationals of other contracting states have been given direct access to the institutional arbitration without intervention of the home state. The access is conditional with the determination of the nationality of the investor. The investor from non-contracting states are not treated to have access of ICSID jurisdiction due to the absence of the reciprocal obligations between the states.[385] The Article 25(2) (b) of the ICSID convention deal with nationality requirement for legal persons.

The Art 25(2) (b) provides that the legal person must have the nationality of the contracting state on the date of consent for arbitration other than the host state. This clause provides an exception to the host state consent and foreign control to treat legal person as foreign investor.[386] The identification of the nationality has its impact to debar foreign investors for the appointment of arbitrator to constitute investment tribunal.[387] The customary international law approves place of incorporation or registered office or effective seat of legal person as the touchstone of nationality. The nationality of the natural person is to be determine according to the national law of the

[383] Ibid., 17.
[384] Art 25 of the ICSID Convention.
[385] Schreuer, *ICSID,* 164.
[386] Art 25(2) (b) of ICSID Convention.
[387] Schreuer, *ICSID,* 166.

contracting state to which the claimant belongs on the date of the institution of the claim with ICSID forum.[388] ICSID jurisdiction can be approached by contingent submission on the condition to cure the defect of non-contracting party by the subsequent execution of BIT by the states and the novation of investment contract.[389] The acquisition of the nationality even after the date of consent destroy ICSID jurisdiction as foreign investor.[390] The ICSID tribunal have adopted same approach in the settlement of investment disputes.

The investment tribunals are entitled to apply the national law of the home state but not bound as exclusive determinant of the question of nationality and go beyond for other consideration such as fraudulent acquisition or involuntary acquisition violative of international law.[391] An unincorporated consortium does not qualify as legal person on behalf of other partners despite of their agreement to represent.[392]The legal persons are not absolutely debarred to access ICSID tribunal on the basis of double nationality. The agreement of parties for the question of nationality carry weight for the question of nationality. This agreement cannot create nationality if investor otherwise not belong to the state which is contracting party.[393] The legislation of a state can extend its coverage to incorporated legal persons of other territory outside the territorial limit of the contracting state.[394] The treaties can extend their criteria for the nationality by using the concept of controlling interests for the corporation. The reasonable control of the corporation is good reason to prove nationality of a legal person. At the same time this relationship between control and

[388] Ibid., 245,
[389] Ibid., 166.
[390] Art. 25(2)(a) of the ICSID convention
[391] Schreuer, *ICSID,* 160.
[392] Impreglio v. Pakistan, Award on Jurisdiction, ICSID CASE No ARB/03/3, 692.
[393] Schreuer, *ICSID,* 283.
[394] Ibid., 286.

the agreement suggests its objective existence and cannot be replaced by the agreement.[395]

The natural persons are required to be the national of the contracting party other than the host state either at the time of consent to the ICSID jurisdiction or at the time of the request for the arbitration to the ICSID forum. The claimant must have some legal personality to access ICSID tribunal.[396]

3.3.3 Exercise of ICSID jurisdiction

A formal request in writing to constitute ICSID tribunal by the foreign investor to the Secretary General ICSID is required to file for the registration of the claim in ICSID center. The request to contain the information regarding the identity of parties, issues of disputes and consent of parties for the assumption of ICSID jurisdiction.[397] The secretary general ICSID is authorize to register the request and notify the respondent state along with the relevant documentation.[398]

On the registration of arbitration request of the foreign investor, the parties are authorized to decide about the appointment of arbitrators and fix their number but uneven. The litigant parties decide mutually for the sole arbitrator as well. In the absence of such term in agreement the number of arbitrators treated as three wherein both the parties are entitled to appoint one arbitrator on their behalf. The arbitrators appointed by the parties shall decide about the president of the ICSID tribunal with the mutual consent of the appointee arbitrators.[399] In case of non-compliance or disagreement by the parties after the lapse of 90 days, the secretary general ICSID is

[395] Ibid., 312,
[396] Ibid., 286.
[397] Art. 36 of the ICSID Convention.
[398] Rule 6 & 7 of The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID
[399] Art. 37 of the ICSID convention.

authorize to fill the vacancies to constitute three member tribunal for the ICSID arbitration from the date of registration of request. The arbitrators appointed by Secretary General shall belong to the nationality other than the parties and the president of the tribunal to be selected from the ICSID panel of arbitrators.[400] The arbitrators are to be known for high moral character, independent judgment and their recognized competency in the field of commerce, industry, finance and law with its special preference.[401] The parties have the option of appointing any person as tribunal member or president of such qualification even from outside the panel of ICSID arbitrators.[402] In case of default of such appointment by parties, the Chairman Administrative Council on the request of the secretary general ICSID has the authority to fill the vacancies to constitute ICSID tribunal. The chairman to appoint qualified arbitrators or president from the ICSID penal a member who holds nationality other than the contracting parties.[403] The parties can file objection of disqualification on any arbitrator of the tribunal by stating his lack of qualification according to the requirements of Art. 14(1) of the Convention.[404] The objection of disqualification is to be decide by the tribunal except the member concern. In case of equally divided members of the tribunal such question is to be decided by the Chairman Administrative Council finally.[405] After the constitution of ICSID tribunal, the vacancy if arise is to fill by parties or the chairman in case of death, resignation or disqualification like original procedure.[406]

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[400] Art. 38 & 39 of the ICSID Convention.
[401] Art. 14 of the ICSID Convention.
[402] Art. 37 of the ICSID Convention.
[403] Art. 38 & 39 of the ICSID Convention.
[404] Art. 57 of the ICSID Convention.
[405] Art. 58 of the ICSID Convention. Rule 9 of ICSID Rules of Procedure for Arbitration proceedings (Arbitration Rules)
[406] Rule 9 & 11 of ICSID Rules of Procedure for Arbitration proceedings (Arbitration Rules)

The ICSID tribunals are the judge of their own competence or jurisdiction. The parties can raise objection to ICSID jurisdiction. The challenge to jurisdiction is to be decided by the ICSID tribunal either as preliminary question of law or join it with the merits of the case. In case the tribunal decides to take it as preliminary question before the rest of the proceeding the remaining proceeding remain suspended till the award on jurisdiction after hearing both the parties.[407]

3.3.3.1 Exercise of Jurisdiction by ICSID Tribunals

The ICSID tribunals exercise its jurisdiction to decide disputes by application of agreed rule of law by the parties. In the absence of such agreement, the ICSID tribunal applies the relevant laws of the host states and such international laws.[408] The rule of *stare decisis* is not followed for the investment arbitration before ICSID and arbitrators can refer other decisions of international laws in the decisions of the ICSID tribunal.[409] The ICSID tribunals are exercising its jurisdiction by the application of law as agreed by the contracting parties of an investment treaty or investment contract. The ICSID convention provides for the party autonomy for the selection and application of laws. In the absence of such instruction of the parties, the majority of the ICSID tribunals apply special laws of the international investment law.

3.3.3.2 Sources of International Investment Law for ISDS

ICSID Convention provides provisions both substantive and procedural law as applicable for the investment dispute settlement mechanism. The contracting parties enjoy autonomy for the selection of substantive law in accordance to the vires of Art. 42(1) of the ICSID convention, which provides:

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[407] Art. 41 of the ICSID Convention. Rule 41 of ICSID Rules of Procedure for Arbitration proceedings (Arbitration Rules).
[408] Art. 42 of the ICSID Convention.
[409] Garcia, "Dirty little secrets," 309.

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."[410]

The ICSID convention encourages the state parties to express their intentions for the application laws in case of dispute resolution. This autonomy of choice of law sometime appears in investment contracts between investor and the host state or in domestic legislation.[411] Despite of this party autonomy regarding the choice of law the ICSID procedural law shall be applicable for ISDS before ICSID tribunals.[412]

In the absence of the guidance from the investment contract or domestic legislation the ICSID tribunals has to determine about the applicable law. The ICSID tribunals have the mandate to decide about the absence of an agreement on the choice of applicable law on a particular issue of the dispute. Once the tribunal decides such absence, the discretion is vested for deciding which law i.e. national or international shall be applied to resolve the vary issue of the case. The ICSID tribunals can resort to national law where the rules of national law are relevant and not in contradiction with the international law.[413] The treaties and customary international rules are regarded as the primary source of international law of the same weightage for their application. And in case of inconsistency between the two the three important principles interpretations of international law usually regulate the relationship between two sources. These three principles are firstly, *lex specialis derogate generali* i.e. a specific rule prevails over general one; secondly, *lex posterior derogate priori* i.e. a

[410] Article 42(1) of ICSID Convention.
[411] Okpe, "Endangered Element", 242.
[412] Ibid., 240.
[413] Ibid., 242.

later rule prevails over a prior one; thirdly, respecting the intentions of the parties. [414] On the other hand the decision of the international courts or tribunals are considered as subsidiary sources of international law.[415]

The Art. 38(1)[416] of the statute of ICJ provides that disputes are to be resolved by the application of international conventions recognized by the state, international customs and general principles recognized by civilized nations for taking its decisions for the contesting states. The other subsidiary sources include judgments of international courts or tribunals and scholarly writings of highly publicist writers.[417]

The investment treaty is treated as specific expression of intentions of the parties as *lex specialis* and is referred with preference over the customary international law, despite of their same weightage.[418] There are more than 3300 investment treaties regulating the relationship regarding foreign investment in the host states. The investment treaties have incorporated mainly the substantive law regarding the rights and obligations of the states for their foreign investment interests of foreign investors of contracting states in the host state. The major portion of the investment treaty regime consist of Bilateral Investment (BIT). The procedural rule are provided by the ICSID convention 1965 unless the parties agree for some different rules of procedures e.g. UNCITRAL. International law recognizes the specificity of subject

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[414] Moshe Hirsch, "Sources of international investment law," in *International investment law and soft law*, (Edward Elgar Publishing, 2012), 22.
[415] Ibid., 25, 26.
[416] Art. 38 of statute of ICJ "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply : a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations ; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bond, if the parties agree thereto."
[417] Art. 38(1) of statute of international court of justice.
[418] Hirsch, "Sources," 26.

and intentions of the parties to the treaties or convention.[419] The parties' preference expressed in BIT or MITs have frequently relied upon the BITs by the investment tribunals for ISDS.[420] The inconsistencies between investment treaties and environmental treaties obligations are determined by the investment tribunals by adopting an approach under party preference and specificity of intention of contracting parties in bilateral investment treaties.[421] The investment treaties are regulating the relationship between the foreign investors and the host state.

These treaties have not been covering all the issues of international law of ISDS. In case if investment tribunals have decided the investment disputes by taking recourse of customary international law and there appear some vacuum after the application of treaty law. Investment tribunal have had applied the customary international law in the issues of 'Responsibilities of States' and "necessity as defense'.[422] The tribunals take recourse of international customary law that covers both the physical acts of the states i.e. state practices or from some non-physical acts of declaring under the sense of obligation i.e. *opinion juris.* The investment tribunals have had inferred the existence of customary international law from the decisions of tribunals or expert writings or the reports of international law commissions identifying the existence thereof.[423] The contemporary patterns of ISDS awards suggest that customary rule of international law has filled the gaps after the application of international treaties.[424]

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[419] Art. 38(2) of statute of international court of justice. Art. 59 of Vienna Convention of Law of Treaties 1969.
[420] Hirsch, "Sources," 6.
[421] Ibid., 7.
[422] Ibid., 7.
[423] Ibid., 13.
[424] Ibid., 27.

Investment tribunal have applied the 'principles recognized by civilized state' to fill the gaps of the decision or to strengthen the reasoning of the ICSID award where it find appropriate. The decision of *klockner* case[425] has held that the investment tribunals are not allowed to base their ruling on the general principles of law recognized by civilized nations. These principles are not universally applicable to all legal system of the world and has the potential to create bias in favour of foreign investors from a particular legal system. Residual character and vague nature of the general principle has diminished its reliance due to its subjectivity of a particular legal system in the contemporary decisions of investment tribunals.[426]

The adjudicative forum of investment disputes do not follow the law of *stare decisis* and precedents. The decisions of international courts or tribunals have the non-binding effect for the other tribunals. The decisions are considered to be binding between the parties only.[427] Despite the non-applicability of law of precedent and non-binding nature of judgment or awards, the ICSID tribunals had referred these judgments in almost all the cases of investment disputes. At the same, time one cannot claim that investment tribunals are bound by the decisions of the previous awards of the former tribunals.[428] The scholarly writings are rarely referred in the judgments of the ICJ but have been of extensively used in the decisions of WTO Appellate Body and investment tribunal. The investment arbitration tribunals refer these scholarly writings in majority of their decisions to analyze or test the application of rules or to define the term of the international law as expert opinion.[429]

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[425] Ibid., 22.
[426] Ibid., 15.
[427] Art. 59 of the Statute of International Court of Justice.
[428] Ibid., 19.
[429] Ibid., 22.

In the legal framework of international law, the conventions has acquired the same status as the legislations in the domestic law in the absence of the global parliament.[430] The political organs of the institution launched the norms of new rules of the regulatory mechanism that has the capacity to become the law though acceptance, acquiescence, adoption or usages.[431] The wide ratification of a treaty made it a law as binding norm to follow as sovereign consent.[432] The stabilization clause of investment contract has the effect of freezing up of domestic laws of disputes resolution. The international tribunals have relied upon the resolutions of the international institutions and publications of the highly publicist writers. There are large majority of highly publicist writers which are shaping the international investment law on arbitration. The arbitration tribunals have choices to apply any source of international investment law even to exclude the resolution of international organization by the writing opinion of highly publicist writer to develop or resolve an investment dispute.[433]

Additionally, the code of conduct is in the form of soft law of international community regarding the relationship of host states with transnational corporations. The code is in the form of general guideline to deal with multinational entities and the nation states. These soft laws deal with the transnational corporations by following the principles of transparency about their transactions while operating in the host states. The multinational corporations from other states are under an obligation to respect the sovereignty, law and regulatory procedures of the host states. The UNO

[430] Thomas M. Franck and Mark M. Munansangu, "The new international economic order: international law in the making?" United Nations Institute for Training and Research, (1982): 2.
[431] Ibid., 2.
[432] Ibid., 10.
[433] Muthucumaraswamy Sornarajah, "Power and Justice: Third World resistance in international law," *SYBIL* 10 (2006): 31.

and The World Bank played its role for the effort to establish a rational approach for the responsible system of foreign investment.

The guideline protects the business enterprises or transnational corporations as specialized organs of the society. These general principles recognized that the state should enforced to protect requiring business enterprises to respect for human rights. The host states should take steps to protect human rights abuses by the transnational corporations in their commercial transactions.[434]The World Bank group recognized a guideline on the treatment of foreign direct investment in 1992 to facilitate the flow of investment. According to the guidelines issued each state to encourage to foreign investment by imposing more favourable standards of treatment by avoiding complicated procedural regulations on admission and residence of the foreign investors.[435]

The states are committed to treat the transnational corporations equitably and to protect their investments. In case of dispute regarding the investment, the local laws as well as the contractual obligations are to be fulfilled by the states and the multinational corporations. The transnational corporations are subject to local jurisdiction but the contracting states are free to choose the mechanism and applicable law to resolve the investment disputes.[436]

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[434] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

[435] World Bank Group, "Guidelines on the Treatment of Foreign Direct Investment", Frame work for the treatment of foreign investments: Vol II, Guideline (1992), The International Bank for Reconstruction and Development/THE WORLD BANK): 35-44.

[436] Commission on Transnational Corporations, Report on the Special Session (7-18 March and 9-21 May 1983) Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II. This text of the Code was also reproduced in United Nations Centre on Transnational Corporations (1986). The United Nations Code of Conduct on Transnational Corporations, Current Studies, Series A (New York: United Nations) United Nations Publication sales No. E.86.II.A.15, (ST/CTC/SER.A/4), Annex I, 28-45

3.4 ICSID Jurisdiction: The Paradigm Shift for ISDS Legitimization

The emergence of ICSID jurisdiction in consequence to weak governance system, deprived position of investors of their and international sentiment for economic liberalization. A strong demand for independent, impartial and skilled forum advocated in response to the large scale nationalization of multinationals with the alleged bias and deficient legal structure of the host states. The deprived position of foreign investors motivated the sentiment for impartial and skilled system of ISDS. The democratic norms demand liberal policies to provide an oppertutnity of commercial activities including trade and investments. The adoption of liberal economic policies provides space to attract foreign investment by adopting international contractual obligation for the states to boost their economic conditions.

3.4.1 Impetus behind the Establishment of ICSID System

The events and determinants contributed for the establishment of transnational system of ISDS include incentivized liberal economic policies, to redress apprehension of foreign investors and weak legal governance system of host states. The major factors which contributed for the establishment of new mechanism for ISDS are:

Firstly, the vulnerability and deprived position of foreign investors under the customary international law and to protect their assets has been the predominant factor for raised demand for independent system of ISDS. The multinationals of capital exporting nations experienced large scale nationalization or expropriation had raised concerns for the protection of their investments in the host states. Thereupon, the investors have no enforceable rights to compel the home state for the initiation of claim on behalf of aggrieved investors. The diplomatic protection for foreign

investors can be declined by the host state. The home state also has the option to settle, waive and modify the settlement claim for political considerations. These political settlements may not satisfy the claims of the foreign investors.

In customary international law, the right to receive compensation not vested with the foreign investors but the home states which pursue the claim.[437] Under the customary international law the foreign investors have no right to initiate their claims before the international tribunals but the home state can do. The exhaustion of local remedy rule in customary international law hardly provide an efficient dispute settlement option for the satisfaction of foreign investors.[438]

Secondly, weak governance and rule of law as justification for dramatic rise in private enforcement of international obligations, bypassing the domestic judiciary.[439] The perceived partiality of host state judicial system is another factor for shift of paradigm from national to transnational adjudications for ISDS. The reluctance and handicaps of domestic courts to scrutinize fully the affair of the sovereign state action for constitutional or legal reasons. Thus, the domestic courts are considered to be bias and to protect the alien's property and are considered politically motivated. The incapability to domestic court is obvious because they have expertise of dealing with the issues of international obligations, which are the prerequisite of ISDS mechanism.[440] These acts of the state in its sovereign capacity got its justification to redress the issue through international forums by independent adjudicators under the customary international law.[441]

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[437] Brower and Schill, "Is arbitration a threat," 480.
[438] Ibid., 481.
[439] Garcia, "Dirty little secrets," 301.
[440] Charles N. Brower and Lee A. Steven, "Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11," *Chi. J. Int'l L.* 2 (2001):196.
[441] Brower and Schill, "Is arbitration a threat," 479.

Thirdly, the economic liberalization efforts of the capital exporting nations have been the part of controversies opposite economic ideologies during cold war era. The capital exporting nations and international economic organizations lobbied for the comprehensive mechanism for the protection of their assets abroad. The efforts started in the context of foreign investment domination over key industries of capital importing countries with the apprehension of abusive interference with the alien properties.[442] USA and other capital exporting nations started their efforts for the liberalization of restriction on the investment after WWII.[443] The two opposite political and economic ideologies of the bipolar world were in the helm of affairs in the international economic regime to block each other strategies. The major economic liberalization efforts were implemented through the incentivized contributions of Breton Wood Organizations after WWII. The international economic institutions like IBRD and IMF extended their major role to capital importing nations through structural reform policies to attract foreign capital. The protection of foreign investments and dispute resolution mechanism thereof was the major characteristics of these strategies.

Fourthly, the contributions of Breton Wood economic organizations are the major motivations for capital importing countries for the adoption of liberal economic policies to attract more foreign capital for their social and economic uplift. The international financial institution World Bank carry its one of the objective is to promote and encourage foreign investment by the private investors by grantees participation of loan.[444] The World Bank has created another organ ICSID to

[442] Garcia, "Dirty little secrets," 317. Nationalization measures in Indonesia, Iran, and Latin American countries can be cited as an example.
[443] Brower and Steven, "Who Then Should Judge," 194.
[444] Art. 1(2) of the Articles of Agreement of the International Bank for Reconstruction and Development.

constitute World Bank group for the disputes settlement of foreign investments. The conditionality of privatization and free market economy for providing loan facilities are used as policy tools to keep the pace and equilibrium in international economic balance.[445]At the same time, the IMF is the sister financial institution of World Bank under Bretton Woods Agreement whose main function is to protect the national economies from international fluctuation of exchange rates. Over the period of time, it has been emerged as the world's largest lending institution, which requires the structural adjustment programs (SAPs) for repairing the national economies. The majority of national economies have been the partners of IMF and World Bank for their SAPs or Structural Adjustment Loan (SALs). At the same time, World Bank require the approval of its Structural Adjustment Loan (SALs) from IMF. The creditworthiness of national economies has been linked with the level of openness for the protection of foreign investment. These financial institutions induce conditionality of reform in borrowing countries, to provide protections of foreign investment and its disputes resolution mechanism.[446] The World Bank is providing ICSID facilities for the resolution of investment disputes. The majority of national economies have been the participant of these programs of IMF and World Bank with lack of alternatives in bargaining except to accept the conditionality for receiving IMF and World Bank programs.[447] The lack of alternatives for capital and credible commitments through BITs have been necessary alternatives for the capital importing nations to keep pace with their economic goals.

Fifthly, the shift of paradigm with the end of cold war in the last decade of twentieth century, after the fall of Soviet Union, has been emerged as decisive factor

[445] Kaushal, "Revisiting history" 505.
[446] Ibid., 505.
[447] Ibid., 506.

to establish a new political and economic dominance of unipolar world. The instrumentality for the protection of dominant political and economic interests of the United States and its allies made the interest of the third world developing options less significant.[448] The United States and its European allies promoted their political and economic interdependent interests by supporting to establish democracies. They encouraged global free market economies in the world which ensure the liberalized flow of trade and investment.[449]

In1980s and 1990s the majority developing nations of Asia and Latin America significantly switched their economic strategy toward free market economies to attract foreign capital for their economic growth. These nations changed their economic strategies by their reduced regulatory governmental role for industrialization. The majority of nations joined WTO, ICSID, MIGA, FTAs, BITs and promulgated liberalized laws for FDIs to enhance their export base economies.[450] In the Latin American region, US-Argentina BIT in 1991 was the first treaty signed by any Latin American state to accept the ICSID jurisdiction for investment disputes. This has been the symbolic importance for the abolition of Calvo Doctrine ISDS purpose.[451]

Sixthly, the treaty shopping facilities to choose ICSID forum for ISDS has made it attractive for the foreign investors to invoke its jurisdiction. Gus Van Harten has analyzed that the freedom of foreign investors to bring their claim relating to all the aspects of the treaty, without exhausting any local remedy, has been the major attraction in the current ISDS regime. The foreign investor can shop forum of their choice without any interference from the home states. These fora regulated by the

[448] Sornarajah, "Power and Justice," 22.
[449] Ibid., 22.
[450] Garcia, "Dirty little secrets," 318.
[451] Ibid., 319.

capital exporting nations, where the majority of arbitrators belong to these economically dominating nations are attractive deal for the foreign investor to demand for such elite ISDS mechanism.[452]

In the last decade of 20th century, investment treaties i.e. BITs, MITs and FTAs have become the main instruments for the protection of foreign investment. The alleged claim that signing of BIT attract foreign investments has been motivation of proliferation in the BITs since the last decade of twentieth century. These incentives of signing BIT is operative in background of investments by the private investors for the participation in the privatizations programs in the capital importing countries.[453] The majority of these BITs have referred ICSID jurisdiction for the settlement of investment disputes as an assurance for the protection of foreign investment interests in the host states.

3.4.2 International Response: ICSID Jurisdiction as Global ISDS Regime

The expansion of trade and investment interest of world capital exporting nations and their largescale multinational corporation provide basis to shape contemporary normative standards for ISDS regime. The end of cold war and retreat of soviet influence in Eastern Europe, Asia and Africa showed up with the implementation of new global economic regulatory regime. The geo-economic changes replaced with the geo-political through the introduction of transnational contractual regime.[454] In twenty first century, the economic interests are shaping the dynamics of the international politics.[455]

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[452] Gus Van Harten, "Five justifications for investment treaties: a critical discussion," *Trade L. & Dev.* 2 (2010): 7.
[453] Kaushal, "Revisiting history" 507.
[454] Brower and Schill, "Is arbitration a threat," 472.
[455] Sornarajah, "Power and Justice," 23.

The capital exporting counties have been providing capital to LDCs with the desire for an enhanced protection of their capital. The investment treaties have defined the contemporary normative standards of substantive law of ISDS. Consequently, measures have been introduced to protect foreign investment through dispute settlement mechanism as the confidence building of interested foreign investor.[456] The multilateral international or regional and bilateral investment treaties are integrated commitments for the international obligation to protect foreign investment by ISDS mechanism.

The regional integration through North American Free Trade Agreement (NAFTA) signed by USA, Canada and Mexico in 1992 is a citable example of regional integration for the protection of foreign investment. The other recently emerged mega-regional[457] structures of economic agreements such as Trans Pacific Partnership (TPP) and Comprehensive Economic and Trade Agreements (CETA) have been influenced by the protectionist approach towards foreign investment. In the presence of BITs, these mega-regional agreements have developed a complex relationship for the protection of foreign investments. Many BITs would have replaced or terminated in the presence of meg-regional agreements. However, the contracting states accepted treaty obligation for ISDS by realizing the comparative advantages of expected economic gains, specifically, to attract or retain foreign

[456] Harten, "Five justifications," 6. See also, Olivia Chung. "The lopsided international investment law regime and its effect on the future of investor-state arbitration," *Va. J. Int'l L.* 47 (2006): 957.

[457] Mega-regional are the Trans-Pacific Partnership (TPP) signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam on 4 February 2016, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) on which negotiations have been concluded in February 2016 and which has been signed by the parties on 30 October 2016, the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013, the Regional Comprehensive Economic Partnership (RCEP) on which negotiations have been launched in 2012 by the ten member states of the Association of Southeast Asian Nations (ASEAN) and six other countries like China, India, Japan and Australia, as well as the proposed free trade agreement (that at the time of writing still lacked a more or less fancy name and

investment.[458] These agreements have overtaken effect on BITs.[459] Despite of these multilateral investment treaties, the BITs are the major source of substantive law making to refer the ISDS mechanism for the protection of foreign investment.

The trends indicate that investment treaties are on the prolific rise since 1983. The proliferation can be realized from the data of UNCTAD in 2017. The facts show that 65 economies have adopted 126 policy measures for the protection of foreign investment, including BITS and TIPs in one single year i.e. 2017.[460] The last decade the 20th century has been the start of the rising trends of investment treaties when the number jump-up from 385 BITs in 1989 to 1941 in the year 2000.[461] The highest ever recorded investment treaties were signed in the year 1996 i.e. 200. After the start of new millennium, these international instruments showed a paradigm shift to protect the competing economic interests of the foreign investors with the capital importing states. In December 2018, with the addition of forty new treaties signed to make it a total of 3317 investment treaties by more than 150 nations including 2932 BITs and

[458] Alex Mills, "Antinomies of public and private at the foundations of international investment law and arbitration," *Journal of International Economic Law*, 14, no. 2 (2011): 478.
[459] Karsten Nowrot, *Of" plain" Analytical Approaches and" savior" Perspectives: Measuring the Structural Dialogues Between Bilateral Investment Treaties and Investment Chapters in Mega-regionals* (Fachgebiet Rechtswissenschaft, Fachbereich Sozialökonomie, Fakultät für Wirtschafts-und Sozialwissenschaften, Universität Hamburg, 2017), 8. According to more recent information compiled and published by the United Nations Conference on Trade and Development (UNCTAD), only the envisioned regional trade agreement between the EU and Japan does not face the issue of future treaty parallelism in the realm of investment protection. On the contrary, the entering into force of CETA could lead to an overlap with eight existing BITs. In addition, a successful conclusion of TTIP has the potential to result in nine respective overlaps, and an entry into force of TPP might even create overlaps with 14 BITs as well as 26 other investment agreements. Among the mega-regionals currently under negotiation, this "achievement" would only be outnumbered by the entering into force of RCEP, potentially resulting in respective overlaps with 68 current BITs and 28 .15 other investment agreements between some of the parties. Even in light of the total number of currently more than 2.950 BITs and roughly 360 other investment agreements worldwide, these almost 100 BITs and more than 50 additional investment-related treaties potentially affected by the successful conclusion of the four mega-regionals in question is already from a quantitative perspective incontrovertibly far from an insignificant amount. Furthermore, it is equally certain that clarifying their relationship with respective investment chapters in mega regionals requires a closer look at a number of challenging legal issues.
[460] *UNCTAD*, "World Investment Report 2018".
[461] Ibid.

385 TIPs.[462] US government begins its BIT program in 1977 with an inclination to provide high standard protections to foreign investments rather their promotion. USA has created a model BIT in 1982 to pursue the same desire and concluded its first of such in the same year. China despite its late start of its BIT program in 1982 is the 2nd highest signing country after Germany. [463] India signed its first BIT in 1995 with some major exporter countries such as Germany and Italy which came into force in 1998.[464]

The rising trend of investment treaties has directly affected the growth of investment treaty arbitration by the foreign investors. The majority of such ISDS have been filed directly to ICSID. The case load of ICSID begin to increase at rate of 25 per year in 2009. The total number of ISDS registered in the ICSID counted as 305 in December 2009. This frequency of filing trend change which was one or two cases every year in first twenty years.[465]There are different forums to deal with investment arbitrations. However, majority of those investor-state arbitration proceedings are pending before ICSID.[466] There has been a significant rise of such disputes in the last two decades since 2000.[467] The accumulative number registered ISDS litigation has been reached to 855 cases till December 2017. [468] ICSID jurisdiction was invoked in majority of ISDS during the period. In June 30, 2020 a total of 768 cases have been registered with ICSID tribunals under ICSID arbitration rules and additional facility rule.[469] The foreign investors approached ICSID arbitration center in 720 cases and

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[462] *UNCTAD,* "World Investment Report 2019".
[463] Newcombe and Paradell, *Law and practice,* 56.
[464] Harten, "Five justifications," 6.
[465] Daphna Kapeliuk, "The repeat appointment factor: exploring decision patterns of elite investment arbitrators," *Cornell L. Rev.* 96 (2010): 57.
[466] Garcia, "Dirty little secrets," 337.
[467] *ICSID,* "List of Pending Cases," accessed http://www.worldbank.org/icsid/cases/pending.htm. ; *ICSID,* "List of Concluded Cases, accessed http://www.worldbank.org/icsid/cases/conclude.htm.
[468] *UNCTAD,* "World Investment Report 2019".
[469] *ICSID,* "ICSID caseload of 2020," accessed December, 2020, https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.

under additional facility rule 67 cases. ICSID institution was approached in 10 cases under ICSID convention conciliation rules and 2 cases under ICSID additional facility conciliation.[470]

The ICSID convention was adopted in 1965, but the first ever case which was registered in the institution in 1972, after seven years of its establishment. In the early years of its establishment, this transnational forum for the settlement of investment disputes was not the popular destination for the foreign investors. In its first 25 years i.e. 1965-1996, there were only 38 cases in which the foreign investors approached the ICSID mechanism. This trend skyrocketed after 1996. In 1997 was for the first time a double-digit number of cases were registered for ICSID mechanism. From 1973 to 1992, fifty-six cases were registered for ICSID arbitrations[471] as compare to in 2018 when 49 cases have been register in one single year for ICSID arbitration.[472] This number is the highest ever number of cases in one single year since the establishment of the ICSID center. Since 1997, ICSID has become a popular destination for the foreign investors for the settlement of their investment disputes. From 1997-2018 a total of 668 cases ICSID institution have been filed by the foreign investors for the settlement of their investment disputes.[473] The rising trend can be realized in tabulated form as provided by World Bank.[474]

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[470] *ICSID*, "ICSID cases" accessed December, 2020, https://icsid.worldbank.org/cases/recent
[471] As compare to not any case registered in the year 1973, 1975,1979,1980,1985, 1988, 1991, and 1992 a maximum number of cases i.e. 56 have been registered
[472] *ICSID*, "ICSID caseload of 2019"."
[473] *ICSID*, "ICSID caseload of 2019".
[474] *ICSID*, "ICSID caseload of 2020"

Year	Number of Years	Number of Cases	Registration per Year
1966-1971	(6 years)	No case registered with the ICSID center	
1972-1977	(6 years)	6	1
1978-1983	(6 years)	8	1.3
1984-1989	(6 years)	10	1.6
1990-1996	(6 years)	11	1.8
35 cases were registered with ICSID institution in its first 30 years			
1997-2002	(6 years)	65	10.8
2003-2008	(6 years)	148	24.6
2009-2014	(6 years)	194	32.3
2015-2020	(6 years)	278	46.3
685 cases have been registered in last 24 years			

The litigation trend of ICSID base ISDS has been the clear indication of the global acceptance of ICSID mechanism. The acknowledgement of the ICSID institutional arbitration by more than 150 economies of the world is the reflection of legitimate acceptance of the mechanism.

3.4.3 ICSID Jurisdiction: Instrumentality to Enhance Legitimacy for ISDS

The ISDS system has emerged into a global governance mechanism through transformative evolution in decades after WWII. The central transformation process

takes place in the area of reorientation of ISDS standards, broadening of subject matter, territorial expansion for arbitration and inclusion of arbitration as default mechanism. The emergence of these new transnational ISDS institutions have engendered a universal culture of arbitration.[475] The unprecedented growth of international investment treaties and its consequent increase of flow of foreign investments has caused the hike of investment disputes due to the asymmetric relationships of investors and the host state[476]

Gus Van Harten has identified five major justifications for the establishment of investment transnational ISDS system: Firstly, investment treaty obligations promote foreign investment into contracting states. Secondly, this system has affirm the sovereignty of the state. Thirdly, the treaty base ISDS mechanism promotes global rule of law for investment disputes. Fourthly, the unreliability of domestic system has prompted to evolve the transnational mechanism for the settlement of investment disputes. Fifthly, the investment treaty base system is endorsed by democratic process of participation by the members of the international community.[477]

The ISDS system has earned some virtues by granting private investor of independence of sole initiator of ISDS mechanism.[478] The states have adopted more responsible attitude of non-interference with the long-term interests of the states. The independent dispute settlement procedure on some neutral palace has empower the investors to counter the breach of the commitments of the host state. Thus, the capital importing countries are compelled for credible commitments by lowering the risks for

[475] Schill, "Conceptions." 7.
[476] Brower and Schill, "Is arbitration a threat," 472.
[477] Harten, "Five justifications," 1.
[478] Brower and Schill, "Is arbitration a threat," 476.

their investment.[479] Foreign investors have increased the efficiency by lowering the premium cost of their risk insurance connected with the investment. The services of the foreign investor become cheaper and cost-effective offers for host states.[480]

The ISDS mechanism protect the foreign investors from the political risk of interference rather than business risks. The report of Executive Directors of the World Bank on ICSID convention 1965, has explained that the demand of transnational forum for ISDS. The report has stated that ICSID is designed to facilitate the settlement of investment disputes, to build mutual confidence for the flow of private capital into the territories of the potential host states.[481]

"The desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it."[482]

The establishment of ICSID has contributed to avoid conflicts between the states to protect their citizens' properties and assets and build an environment of peace and international order. The ICSID jurisdiction restrains expropriation of the foreign investments. The provisions even remain effective to avoid expropriations even in the countries which had history of nationalization or control of assets of foreign investors. Mexico can be sited as an example which has the history of

[479] Ibid., 476.
[480] Ibid., 477.
[481] Sadie Blanchard and Charles N. Brower, "From 'Dealing in Virtue' to Profiting from Injustice: The Case Against Re-Statification of Investment Dispute Settlement," *Harvard International Law Journal Online* 55 (2014):48.
[482] *ICSID*, "Report of the Executive Directors on the ICSID Convention, 1965)," accessed https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section03.htm.

expropriation of foreign assets, but later on, accepted standards under NAFTA agreement of ISDS protection under Chapter 11 of the agreement.

The BIT base ISDS has eliminated the chances of state sponsored threat to intervene for the resolution of such investment disputes. These disputes sometime aggravated to the extent of military actions by the home state, rather than diplomatic measures to resolve such disputes.[483] The BIT base ISDS mechanism has left the responsibility to approach the adjudicative forum i.e. ICSID by the aggrieved private foreign investors, which in effect exonerated the home state of its responsibility to redress the dispute.[484] Direct approach to ICSID mechanism, without any diplomatic protection from the home states and diplomatic immunity for host states, has reduced the chances of deteriorated relationships between the home and the host states.[485]

The ISDS tribunals has crafted a rebalanced public and private interests in international treaty arbitration by its substantive and procedural laws for the governance of investor state relations.[486]The rebalanced investor state relationships have restructured the social, political and economic order of international communities.[487]

The investment treaty regime aims that the host government not to discriminate against the foreign investors and provide credible protection to their

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[483] Garcia, "Dirty little secrets," 317.
[484] Ibid., 317. See Ibrahim F. I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA," ICSID Rev. Foreign L.J. 1, 1 (1986). Citing the investment -example of French justification for armed intervention in Mexico in 1861-1862 on the basis, in part, of nonpayment of a nominal amount of an incomplete loan (Jecker claim)
[485] Ibid., 317; Shihata, "Towards a Greater Depoliticization," 11. As noted by former secretary general of the ICSID, Ibrahim Shihata, the removal of diplomatic protection was a key objective of the ICSID Convention; see also World Bank Executive Directors' Report, 4 I.L.M. 524,33 (1965). "When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so".
[486] Schill, "Conceptions." 22.
[487] Ibid., 23.

investment. The existing framework which is heavily dependent upon the BITs and their ISDS mechanism to provide foreign investor a prompt and adequate compensation in case of expropriation or mistreatment. The incidents of mistreatment by the host states to the foreign investors from influence resulted in 'Gunboat diplomacy'. The gunboat diplomacy caused military intervention in number of countries. Thus, the foreign investment disputes had, some time, resulted state to state conflict.[488] The powerful states resolved for the protection of their commercial interests resorted to the military intervention in the host states. There are evidences of eighty eight time intervention by US military in different countries of the world under gunboat diplomacy, in order to protect American private commercial interests. The protection provided by investment regime has changed the situation otherwise.[489] The legitimate acceptance of investment treaty regime and its wide application of the ISDS standard is adherently adopted by majority of nations under exiting framework of investment law. Such adherence to the rule and rule making institution has promoted the legitimacy rhetoric of investment protection under ICSID regime.[490]

The consequent contributions of ICSID system for the protection of foreign investment can be examined in the following points: Flow of Investment Internationalization of obligations of host states for investment protection. Last decade of the 20th century has seen the increase of flow of foreign investment from capital exporting states to the capital importing nations. One of the most important factors was the ISDS mechanism under the investment treaties.[491] The number of the developing counties, under the changed political environment of the world agreed for

[488] Jonathan Klett, "National Interest vs. Foreign Investment-Protecting Parties Through ISDS," *Tul. J. Int'l & Comp. L.* 25 (2016): 215.
[489] Ibid.
[490] Ibid.
[491] Kapeliuk, "Repeat appointment factor," 55.

the BIT system. The stagnant economic growth is one of the reason for the increase of the BITs.[492] In the last decade of twentieth century, the fall of Soviet Union, economic stagnation of Africa and of Latin American countries and rapid growth of free market results in East Asia contributed for the attraction of BITs. The contracting states accepted ICSID jurisdiction for sake of getting advantage of foreign direct investments from the capital exporting nations of the world. The capital exporting nations were concerned for the protection of their investor's assets in host states. The ISDS clause of BITs has encouraged the flow of foreign investment in countries of East Asian nations such as South Korea, Taiwan, Singapore, Hong Kong and Thailand. These states are considered the successful examples which materialized benefits through foreign direct investments in the last decades of twentieth century by realizing attractive investment climate for the inflow of foreign capital.[493]

The availability of neutral place for ISDS motivates the host states to make credible commitments to uphold its international obligations.[494] This treaty base private enforcement of international obligations through ICSID played its role to attract foreign investment as complimentary factor rather the reason for such investments. Brazil is an example which has signed investment treaties to adopt this supranational jurisdiction for foreign investment disputes, though did not ratify any of such treaty but still on the major recipient of the foreign investment.[495]

The LDCs signed BITs to take advantage to attract foreign investment over the rival competitor host states.[496] But the capital exporting nations like Germany and

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[492] Andreas F. Lowenfeld, "Investment agreements and international law." *Colum. J. Transnat'l L.* 42 (2003):127.
[493] Ibid., 127.
[494] Blanchard and Brower, "Dealing in Virtue," 50.
[495] Garcia, "Dirty little secrets," 315.
[496] Ibid., 316. See also, Guzman, "Why LDCs" 639.

France require BITs as for the issuance of investment insurance to their foreign investors.[497]

The capital exporting nations had experienced the expropriations in Latin American states in the period after WWI and 1970s. The American- Iran foreign investment disputes of 1970s and early 1980s played a substantial role for the shift of pattern in the American trade and foreign policy. The US model BITs are the type of negotiations for the terms of the treaty but such may be the discussions of either 'to take it or leave it'. These agreements can hardly term as voluntary and un-coerced transactions.[498]

3.4.3.1 Legitimate Discourse of ICSID System

Legislations are legitimated on the bases of democratic participations for the rule making and the process of adjudication thereunder.[499] In the legal framework of international law the conventions has acquired the same status as the legislations in the domestic law in the absence of the global parliament.[500]

The new choice inherently promised for the achievement of Legitimacy for the stability and the predictability of ISDS. C N Brower has argued that ICSID arbitration mechanism has presented a penal of credible experts of arbitrations who are participating to balance the legitimate interests of foreign investors and the host states.[501]The ICSID system makes the host states to comply with international obligations does not mark against the legitimacy of the ISDS mechanism.[502]The

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[497] Ibid., 316.
[498] Garcia, "Dirty little secrets," 316. See also, Jose E. Alvarez, a former member of the U.S. State Department BIT negotiating team, and now a Columbia University law professor,
[499] Bodansky, "Concept of legitimacy," 7.
[500] Franck and Munansangu, "New international economic order," 2.
[501] Brower and Steven, "Who Then Should Judge," 196.
[502] Brower and Schill, "Is arbitration a threat," 482.

attributes of jurisdictional exercise include consent to ICSID jurisdiction, arbitrator and decisions. These attributes played its role for the gradual growth of a 'Legitimacy Crisis' for ISDS system. The participation of parties in ISDS and its appointment procedure of arbitrators reflect the legitimacy outlook of the system.[503] The legitimacy rhetoric of ISDS is rooted in the fact of state acceptance and compliance to the mechanism.[504] ICSID system can be evaluated for the adherence, determinacy and fairness drives of legitimacy:

The growth of international institutions and their perceived legitimacy rhetoric has reinforced the rule of international law. The legitimacy of international rule and the rule making institution has established the greater authority and impact to settle the international disputes.[505] The deference to maintain balance among unequal exert a strong pull for the compliance rhetoric of international normative standard.[506]

The former colonies have exercised sovereignty by signing BITs. In majority of BITs, these states are the counterpart contracting parties with their past colonial masters. This authority to of equal partnership with the capital exporting i.e. ex colonial master, on the bases of reciprocity has provided justification for the legitimate exercise of sovereign authority. The signing of BIT on the principle of reciprocity is the acknowledgment and exercise of sovereignty which has posited the sense of equal partnership instead of reduction of sovereignty.[507]

ICSID jurisdiction has been adopted by majority of nations of international community. The largescale recognition and reliability of ICSID mechanism has strengthen the adherence attribute of legitimacy.

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[503] Ibid., 494.
[504] Ibid., 495.
[505] Bodansky, "Concept of legitimacy," 1.
[506] Franck, *power*, 5.
[507] Kaushal, "Revisiting history" 512.

The transnational disputes settlement system has gained its legitimacy from the stable governance mechanism.[508] The predictability and compliance prospects of a transnational mechanism for the settlement of international investment disputes has the potential to reinforce legitimacy rhetoric among the nations of the world. The establishment of the ICSID institution has special focus on procedural determinacy which is one of the foundation stone of the ICSID. The assumption of ICSID jurisdiction is based upon the premise of consent of parties. The mechanism proceeds while depending upon mutual consent of the litigant parties. The freedom of parties extended to choose the rule of law and procedure for their dispute.. The foreign investors have perceived protection from the timeline available for the mandatory establishment of tribunal on registration of dispute with the icsid.

The ICSID mechanism has introduced its drive to establish a fair system of procedures. The ICSID tribunals to consist of qualified arbitrators of high moral character and competency. The requirement of uneven number of ICSID judges of independent judgment in the tribunal ensures fairness of procedure. The constitution of ICSID tribunal requires the arbitrators of different nationality than the litigant parties to ensure transparency and independent of judgment without any political influence. The ICSID mechanism provides an oppertutnity to challenge the ICSID jurisdiction or the qualification of arbitrators including president appointed by the chairman control, strengthen and ensured fairness of the mechanism for the ISDS.

3.5 Conclusion

The establishment of ICSID system of ISDS is the outcome of World Bank's efforts. The system has been built on the premise that it shall create a transnational

[508] Schill, "Conceptions." 6.

impartial jurisdiction by experts free from political interference or influence of the host states. ICSID jurisdiction has provided protection to vulnerable foreign investments in host states from the weak governance of domestic courts.

Pakistan participated in the negotiations of ICSID Convention 1965 and signed the same in 1966. The introduction of dispute settlement clause in BITs has been the major development to confer ISDS jurisdiction to transnational adjudicative forums. In 1959, Pakistan and Germany signed first ever BIT for the protection of foreign investment prior to ICSID Convention. The later development shows that ICSID mechanism has been accepted through more than three thousands BITs which are responsible to legitimize ICSID jurisdiction in international law.

ICSID contributed to provide a fair and legitimate system of transnational adjudication. ICSID earned its adherence of legitimacy under the perception of expert, impartiality and independence from political interference. According to the World Investment Report 2018 of UNCTAD, more than 150 world economies have signed 3317 investment treaties including 2932 BITs as the major tool of protection for foreign investment.[509] The overwhelming response of international community under the compliance pull has acknowledged the legitimacy of ICSID jurisdiction.

[509] *UNCTAD*, "World Investment Report 2019".

CHAPTER NO- 4

ICSID JURISDICTION: A QUEST FOR LEGITIMACY

4.1 Introduction

ICSID system of ISDS was established on the premise to provide a fair, independent, impartial and transparent mechanism of transnational adjudication. This system of adjudication attracted its compliance pull because of its quality of perceived legitimacy. The large number of adoption of the regime resulted to enhance the frequency of ICSID litigations by ICSID Tribunals. The inherent fault lines of ICSID jurisdiction catalyze to engender asymmetrical results. ICSID tribunals exercise its jurisdictions where some judgments have contributed to create indeterminacy and incoherence thus, the consequent legitimacy crisis of ICSID mechanism.

S.D. Franck has identified a group of jurists who considered the prevalent ISDS system as bias and declared its judgments unreasoned, inappropriate exercise of jurisdiction for decision making, lack of pedigree and accountability of arbitrators that have been the essential attributes for legitimacy of the system. S.D. Frack has referred that the misconduct of arbitrators are challengeable in institutional ISDS so the suggestion of bi-national or multi-national tribunal on the pattern of EU could not satisfy the stakeholders of the system. S.D. Franck has noted the existence of a nonpublic nature of current ISDS, lack transparency and interpretive determinacy of decision making. The author has suggested defined parameters for transparency of proceedings, which is the effective way to promote transparency. These public forums and judges are not likely to promote clarity, uniformity and coherence of interpretations in their awards because the adjudicators are not expert judges of

complex economic law issues.[510] The inherently imbalanced rights of investors and the host states caused a backlash for the ISDS mechanism. A bonded assumption of jurisdiction and unpredictability of exercise of ICSID jurisdiction has contributed for the legitimacy crisis of the ISDS mechanism.

4.2 Challenges to ICSID Jurisdiction

The ICSID jurisdiction has been established in 1965, after the assertive campaign of the economic organization i.e. World Bank. The ICSID system of ISDS has been under criticism since its creation. The negotiation campaign started among the unequal negotiators in 1963. In post WWII industrialization era, the majority of negotiating nations were thirsty of foreign capital inward flow to develop their natural resources so as to change the socio-economic conditions of their masses. The hasty finalization of ICSID convention has created vulnerability to potential host states. The potential host capital importing nations have consented for ICSID obligations, and even the compromise sovereign rights to regulate public rights of citizens of the states. The inherently imbalance system of public and private rights have been resulted mostly to generate insurmountable baggage of economic liability on the tax payers of the host states. The hasty efforts for the creation and the bonded consent to regulate an inherently imbalance system of ISDS have engendered the vulnerability of states. These determinants have been the challenge to the legitimacy of ICSID jurisdiction since its establishment. There are questions which are challenging the legitimacy rhetoric of the ICSID jurisdiction: firstly, the hasty efforts for ICSID convention. Secondly, bonded consent of states for ICSID jurisdiction. Thirdly, vulnerability of contracting states.

[510] Franck," Legitimacy," 1594.

4.2.1 Hasty Efforts for the Finalization of ICSID Convention

The unsuccessful attempts to build consensus for the multilateral investment treaty by other international economic organizations motivated the World Bank to initiate its efforts for the multilateral approach for the protection of foreign investment. The pivotal initiative for the multilateral approach has been the establishment of adjudicatory body to ensure protection of foreign investment. World Bank started its efforts in March, 1962.[511] The proposed preliminary draft of the treaty was discussed in December, 1963 to May, 1964 consultative meetings of four Regional Expert Committees at UNO headquarters. The board of governors approved first draft of ICSID convention in September, 1964 in its Tokyo Meeting.[512] The legal expert committee of the representative of 61 nations held 22 meetings during 23rd November to 11th of December, 1964 to finalize the draft of ICSID convention in the light recommendations of Regional Expert Committee. Thereupon, the Chairman Legal Expert Committee submitted its Report to the Executive directors. The executive directors discussed amendments of the draft in the light of Expert-Reports and Legal Committee in the meetings during 16th February to March 4, 1965. The executive directors approved finally the text of the ICSID Convention on 18the March 1965.[513]

The proposed ICSID jurisdiction for ISDS became controversial when it could not to address certain unresolved objections from developing states for the establishment of the transnational forum. In 1964 during World Bank meeting in Tokyo, 21 developing states including 19 of Latin American states along with Iraq and Philippine voted against the establishment of the ICSID jurisdiction for ISDS.

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[511] *ICSID*, "History of ICSID Convention."
[512] Ibid.
[513] Ibid.

This consensus of opinion for voting 'NO' of 19 Latin American states[514] is known as 'El No de Tokyo' or the 'Tokyo No'. The Latin American Countries and Soviet Block stayed out of ICSID Convention.[515]

Tunisia was the first country to sign the ICSID Convention. Despite of the fact that the representatives of 61 nations participated as members of Legal Expert Committee, but there were only 30 countries which signed the convention till December, 1965. The first thirty economies include seventeen (17) least developing countries (LDCs) from Africa, three (3) from Asia, including Pakistan, and nine (9) capital exporting i.e. developed nations of the world.[516]

Nigeria was the first country to submit the first ratification of the ICSID Convention with the depository of World Bank on 23rd August, 1965. The first 20 nations which submitted their ratifications to qualify the convention into force include fourteen (14) LDCs of Africa. USA ratified the Convention on 10th June, 1966 and Netherlands on 4th October, 1966, which was the 20th nation to complete membership of 20 for entering the Convention into force.[517]

4.2.2 Bonded Consent for ISDS

The capital importing states have accepted the binding treaty obligation with the desire and expectations of inward flow of foreign capital. These states have preferred to accept a practically irrevocable consent despite of realization that it could have arisen a harsh economic liabilities on the tax payers of the subjects of the state.

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[514] There were 21 votes against ratifying the ICSID convention, including the 19 Latin American World Bank member countries. The countries voting no were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iraq, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Uruguay, and Venezuela. See also, Robin Broad, "Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador," *U. Pa. J. Int'l L.* 36 (2014): 855.
[515] Parra, *history*, --. See also, Broad, "Corporate Bias," 854.
[516] Parra, *history*, 71-87.
[517] Parra, *history*, 87 and (Appendix II, III, IV).

The LDCs have placed aside of the potential economic liabilities but to accept the long term irrevocable obligation under some compelling need of foreign capital. The thirst for foreign capital has pushed the capital importing nations to choose for ICSID jurisdiction as a demand of foreign investor as an assurance of protection of international investment. These LDCs have consented to the ISDS regime under the expected comparative advantage. The capital exporting nations are in advantageous position while negotiating for the BIT liabilities for their corporations. The capital importing nations with pressure of their economic uplift, of bargain on very weak pitch so that to surrender their sovereignty on the hope of future uncertain benefits.[518] The politico-economic influence of capital exporting nations and attract large scale foreign investments from international economic organizations, which have contributed for the bonded consent of investment treaties and jurisdiction.

Some host states have little realization of the legal and economic impact of the BIT signing which they did as photo show by the officials of these host states. Jan Paulsson has referred an interview of the Attorney General Pakistan, Makhdoom Ali khan, who reported that before year 2000s there was no any record of any meaningful negotiation about BIT program in Pakistan. The officials in Pakistan continue to sign BITs without any expertise and realization of the economic risk for the country till 2007.[519] In 2009, a South African Commission has published its report on the bilateral investment treaties framework, which discloses that the country has not participated in any negotiation for any commitment under BIT program till 1994. The report admits that some inexperience negotiators of investment law participated for finalizing BITs. These negotiators were deficient to safeguard critical interests of the South African

[518] Olivia Chung, "The lopsided international investment law regime and its effect on the future of investor-state arbitration," *Va. J. Int'l L.* 47 (2006): 963.
[519] Lauge Poulsen and Damon Vis-Dunbar, "Reflections on Pakistan's investment treaty program after 50 years." *Investment Treaty News* (2009). ;. See also, Harten, "Five justifications," 22.

nation.[520] On the other hand, capital exporting nations have expertise and resources to understand the risk appreciation about the incorporation of treaty provisions relating to investment rights and obligations under BITs.[521]In treaty formation level, in most of the cases, the respective executives of the sovereign contracting states prepare a draft without any discussion with the legislators of the states. Afterward, the executives of the states legislate for the creation of international obligations of the states.[522]

4.2.2.1 I-Bonded Consent for ICSID Jurisdiction

There are large number of BITs which are between the past colonies and their colonial masters. The advantageous position of the colonial masters and their politico-economic influence in the colonies have contributed for the bonded consent of the LDCs. These colonial powers have been the capital exporting countries in most of the cases with strong ties to influence and accommodate these nations in international issues. There are number of such developing and least developing countries (LDCs), which have been receiving the sort of technical and financial grants to address their domestic social and economic issues. In the given context, the negotiation session between LDC and the capital exporting nation i.e. economic power can hardly be termed as voluntary discussion. The capital thirsty nations accept the conditionality of ISDS in the name of reciprocity. The US approach of negotiation of BITs has been a sort of 'take it or leave it' on the negotiation table with South American nations with the realization of their economic dependence on the USA. Alvarez has explained the US negotiation approach that:

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[520] Harten, "Five justifications," 23.
[521] Ibid., 28.
[522] Harten, "Investment treaty arbitration," 5.

"The U.S. "cookie-cutter" approach to BIT negotiation results in a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft."[523]

After the end of cold war in 1990s, the financial aid dependent states had to switch on the alternative options to grab foreign capital in order to keep pace of their economic and social developments. And withdrawal of aid money opened opportunity for foreign investment into the developing economies of Eastern Europe, Asia, Africa and South American nations. The institutions which have had played a leading role to maintain pace of international trade and investment include IMF and IBRD. These institutions participated very actively to keep the pace of economic development of the emerging or developing economies of the world. The essential capital has been available for developing or Least Developing Countries at the cost of credible assurances for investment protection through investment instruments, either bilateral or multilateral. The international financial institutions have promoted the significance of ISDS mechanism for the protection of these foreign investments. The capital exporting nations negotiate aggressively for the incorporation of ISDS mechanism in their BIT with capital importing nations for the ideological commitment of open economic regime so as to attract foreign capital.[524]The LDCs under lack of reliable alternatives to attract foreign investment consent for BIT or MIT. Consequently, the capital importing nations assume ICSID jurisdiction to ensure the protection of foreign investment. Alvarez has pointed out that:

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[523]Jose E. Alvarez, "The Development and Expansion of Bilateral Investment Treaties: Remarks." *In American Society of International Law Proceedings*, vol. 86 (1992): 553.
[524] Harten, "Five justifications," 10.

"BIT partners turn to the **U.S.** BIT with the equivalent of an IMF gun pointed at their heads; others may feel that, in the absence of a rival superpower, economic relations with the one that remains are inevitable. For many BITs the relationships are hardly a voluntary or uncoerced transactions. They feel that they must enter into the arrangement, or that they would be foolish not to, since they have already made the internal adjustments required for BIT participation in order to comply with the demands made by, for example, the IMF."[525]

4.2.2.2 Irrevocability of Consent

The current treaty regime lacked policy choices for generations to come. The investment treaties normally do not allow to be revisited by future decision-making once it is entered upon. There are few examples which can be cited examples where the treaty allow for revisit on serving short term notice to the other contracting states. In NAFTA a notice, of six months can be served to revisit it to the other contracting states.[526]

The prevalent practice reveals that most of the BITs are signed for the period of 10 to 15 years with the role over period of another 10 to 15 years. There are number of treaties which provide limited time for the withdrawal after its initial expiry. The BITs framework has virtually made the choice of withdrawal limited in its scope, and the host states remain bounded for lengthy period of time, in order to meet international obligations undertook by their predecessor regimes.[527] The policy of maximizing investment protections for the multinational corporations in response to the untested assumption of flow of investment for the economic development of the

[525] Alvarez, "Development and Expansion," 555. See also, Kaushal, "Revisiting history" 507.
[526] Harten, "Five justifications," 31.
[527] Ibid., 31.

host states has enable the elite corporations to owe its rights to invoke mechanism against the host states without vesting any corresponding liability on the host states.[528]

The negotiating developing nations used to accept the ICSID jurisdiction because of the inherent vulnerability of the contracting host state. LDCs have joined ICSID convention to submit the dispute even without realizing impact of substantive obligations for the host state under Art. 42 of the convention.[529] These nations accept these obligations choices extended by capital exporting nations realizing their weak bargaining positions and relative attraction for the flow of investment.[530] The trend shows that the weak economic conditions of countries made them more vulnerable for ICSID litigations.

4.2.3 Vulnerability of Contracting States

The vulnerability is apparent from the unequal status of participants of the negotiation and imbalanced of parties state vs private individuals of foreign investors under the investment treaties. Vulnerability of contracting LDCs extend to regulate public rights of their citizens thus, cost of the sovereign authority.

Foreign investors have the option to establish Multinationals Corporation in any country with the view to invoke ICSID jurisdiction for ISDS. The treaty shopping right of the foreign investor has the tendency to maneuver binding obligations against the host states. This treaty shopping facility can encourage a domestic investor to change its nationality to make it foreign by setting up a holding company for his

[528] Sornarajah, "Power and Justice," 32.
[529] Lowenfeld, "Investment agreements," 125.
[530] Ibid., 126.

investment and availability of ISDS mechanism before transnational arbitration forum.[531]

4.2.3.1 Inherent Restriction to Regulate the Rights of Public Interests

The ICSID jurisdiction deals with the issues of state as questions of public law by applying the standards of review developed from the application of private law. These tribunals frequently analyzing the measures of public interests when it affect the rights of the foreign investors. To scrutinizing such issues, the application of private commercial law of contract raise the questions of legitimacy of the mechanism.[532] The ICSID tribunals upheld the liabilities of the host states when she even took measures in response to financial crisis and reject such defense in favour of foreign investors. The measures taken by the host state to stabilize the economic crisis were considered even the cause of action in ISDS.[533] The ISDS system has been appeared to be a protector to foreign investors every sort of risk factors for their assets and profits.[534] The academia of law and policy extended their support to the point of view of the US senator Elizabeth Warren and explained how such corporations Use ISDS arbitrations to challenge the measures taken for environment, health and safety by denying the regulations for toxic waste.[535]

In the case of *Philip Morris vs Australia* the multinational corporation filed its multibillion claim against Australian government on cigarette packaging restrictions under Tobacco Plain Packaging Act 2011. The state legislation imposed restrictions of mentioning health warnings, plain packaging and limited branding to regulate public health. The restrictions imposed for the sake of regulating public health. The foreign

[531] Harten, "Five justifications," 9.
[532] Burke-White, and Staden, "Private litigation," 285.
[533] Brower and Schill, "Is arbitration a threat," 483.
[534] Ibid., 483.
[535] Chermerinsky Letter. See also, Nolan, "Challenges," 436.

investor asserted its claim through relying upon the fair and equitable clause of Hong Kong-Australia BIT 1993 and alleged that the host state's restrictions have indirectly expropriated the foreign investment.[536] The treaty provides for the institutional arbitrational settlement of investment claims by Permanent Court of Arbitration under UNCITRAL Arbitration Rules 2010. The issue discussed in the case that whether ISDS system can interfere with the democratic authority to regulate public interest in a state? The arbitral tribunal decline jurisdiction for the claim and decided that the court has no jurisdiction to decide the case.[537] Permanent Court of Arbitration declined to exercise jurisdiction for the sake of legitimate imposition of law to protect public health. On the other hand, ICSID tribunals have assumed and exercise its jurisdiction and refused to accept the defense of environmental protection, heath and financial security of the state.

In 2012, Vattenfall, a Swedish power generation company, filed its multibillion claim (3.7 B$) for damages against Germany. The claim arose in response to the measures taken by the host state to regulate environmental hazards. German legislature passed Atomic Energy Act, 2011 which required gradual phase out nuclear power generation after Fukushima Power Plant incident in Japan. The host state government required to shutdown nuclear plants of power generation. The Swedish company filed its claim by asserting that the government's measures have expropriated their investment for power generations. The ICSID tribunal has assumed its jurisdiction to start the proceedings, which are pending till date. [538] In another case, in 2009, Vattanfall vs Germany, the foreign investor, a Swedish company, invoked ICSID jurisdiction due to imposition of environmental regulation on the

[536] Art.2 (2) of Hong Kong-Australia BIT 1993.
[537] Philip Morris Asia Ltd (Hong Kong) v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12; See also Nolan, "Challenges," 430.
[538] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

emission of carbon and for water pollution under Hamberg Environmental Law. On the assumption of jurisdiction by ICSID tribunal the German government finally settled the dispute by dropping the additional environmental requirements on the coal plan and allow permit to operate the same.[539]

The criticism of investment treaty arbitration appeared when the transnational arbitrators review the acts of the governments and intervene the domestic affairs. In the Uruguay and Australian cigarette packing[540] and nuclear phase out[541] in Germany, the arbitrators have assumed the jurisdiction by redefining scope of investor state relationships. The transnational assumption of jurisdiction in case of pesticides ban[542] in Canada cause friction with the domestic law of the host state. The inconsistent approach to deal with plea of financial crisis in Argentina and produce incoherent decisions has earned a wide criticism from the host states.[543]

4.2.3.2 Imbalanced Relationship for ISDS

Another factor which has enhanced vulnerability of the host state is the asymmetric nature of relationship between foreign investor and the host state. The foreign investors are important participants/ subject of international law, and have no obligations for which they can be held liable.[544] The establishment of ICSID system

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[539] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6.

[540] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7 (registered 19 February 2010); Philip Morris v Australia, UNCITRAL, PCA Case No 2012-12 (registered 21 November 2011).

[541] Vattenfall v Germany, ICSID Case No ARB/12/12.

[542] Chemtura Corpn (formerly Crompton Corpn) v Government of Canada, UNCITRAL (NAFTA Award, 2 August 2010).

[543] There are more than forty investment treaty-based arbitrations concerning the lawfulness of Argentina's legislative response to its economic and financial crisis in 2001/02. On these cases, see Paola Di Rosa, 'The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues' (2004) 36 U Miami Intern-Am L Rev 41.

[544] Gazzini, "Bilateral investment treaties," 10. See also, Tarcisio, G. (2012). 'Bilateral Investment Treaties'. Gazzini, de Brabandere International Investment Law: The Sources of Rights and Obligations (Leiden: Martinus Nijhoff, 1999).

of ISDS vest multinational corporations the right to proceed against the host state for the enforcement of their liability to protect their investments. Even home states also have compromised their diplomatic protection and sovereign immunity rights under this new economic order.[545] The aggrieved foreign investors can invoke ICSID jurisdiction directly to enforce their claims against sovereign host states, which affect public rights of the citizens of the state.[546] The foreign investors as third party, without privy to bilateral agreement, have been proved to be a sole beneficiary of the transaction. The foreign investors can invoke ICSID jurisdiction without exhaustion of local remedies under host states local laws.[547] The contracting states has no authority to stop foreign investors from invoking ICSID jurisdiction. The contracting parties have created rights and obligations for the parties without their consent. The rights are accumulated for the foreign investors and the obligations for the host state. Thus, the tax payer are the citizens of the states who have never consented or participated in the consent process. This indifferent treatment has generated backlash in capital importing nations of the world. Bolivian president expressed his government policy to withdrawal from the ISDS system by asserting that this system has been protecting the foreign investors' rights without providing any mechanism for the enforcement of any rights of the host states. The multinational corporations always win in case of dispute with the host state, by generating harsh damages respondents.[548]

In majority of cases, the capital exporting states gain maximum benefits for their corporations. The LDCs usually surrender its sovereign authority to legislate for public interest so as to achieve the global objective of free market economy and

[545] Sornarajah, "Power and Justice," 80.
[546] Gazzini, "Bilateral investment treaties," 10.
[547] Art. 26 of ICSID convention
[548] Nolan, "Challenges," 433.

democracy.[549] The host state's vulnerability enhances when it has all the obligations for the protection of foreign investment, without any mechanism to enforce any public right against foreign investor.[550]

4.2.3.3 Surrender of Sovereignty to Regulate Public Rights

The understanding of sovereignty has been discussed by John H. Jackson that it refers to the allocation of power to make laws and take decision.[551] Jackson has explained that when any one persuade to avoid to accept investment treaties, which impacted to restrict the authority of the state to take decisions for some governmental policies such impediments have the impact of infringement of sovereignty.[552]

The controversies regarding the question of sovereignty surrounded since inception of efforts of its establishment in 1964. The number of participant members of the World Bank group resisted for the setting up of the system of ISDS whereby a foreign investor can invoke jurisdiction against a sovereign state without intervention or permission of the home states. These states considered such efforts to undermine sovereign authority of states. A large majority of Latin American states rejected the then proposed system of ISDS.[553] The Chilean Representative Felix Ruiz when spoke on behalf of Latin American Countries termed ISDS as unfair and unnecessary. He articulated that foreign investors had been enjoying the same constitutional and legal protection of their assets same as available to the locals. The new system of ISDS would have tendency to undermine the sovereignty of the states. The Chilean Representative voted 'NO' and spoke that:

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[549] Sornarajah, "Power and Justice," 23.
[550] Ibid., 82.
[551] John H. Jackson, "Sovereignty-modern: a new approach to an outdated concept," *American Journal of International Law* 97, no. 4 (2003): 784. See also, Kaushal, "Revisiting history" 511.
[552] Ibid.
[553] Broad, "Corporate Bias," 854.

"The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority."[554]

The states which are party to the bilateral or multilateral investment treaties are denied access to deal with the dispute bilaterally or multilaterally. The treaty obligations under BIT, MIT and investment contracts have the surrendering effect for exploiting natural resources, internal economic policies and to regulate public rights. The BIT obligations for the state have its impact to restrict the authority, to make laws and to take policy decisions to regulate the domestic issues of essential nature. The international obligations under investment instrumentality the power or authority of the host states is not available for the matters which have indirect impact upon the foreign investments. The foreign investment instruments have affected sovereignty of states.

The treaty arbitration mechanism unlikely to respect democratically elected governments' executive and legislative policy choices of the states. The treaty obligations have barred to opt for an independent exercise of the supremacy of parliament, to regulate public rights in the interest of the states.[555] However, the treaty obligations have recognized the rights of the foreign investors to invoke ICSID jurisdiction in case of violation of fair and equitable treatment clause and taking over

[554] Parra, *history*,---. See also, Broad, "Corporate Bias," 855.
[555] Harten, "Five justifications," 31.

of investment assets. The foreign investors can claim adequate compensation, in terms of damages, in case of expropriation or take over.[556]

4.3 Analysis of Assumption of ICSID Jurisdiction

The registration of claim with ICSID Secretariat initiates the procedure to constitute ICSID tribunal where the other attributes for ISDS otherwise met. The constitution of ICSID tribunal involves act of parties or Secretary General ICSID. The jurisdiction is assumed by the ICSID tribunals of selected arbitrators on filing of claim for damages by the aggrieved foreign investors on the violations of treaty obligations. A duly constituted ICSID tribunal has the authority to assume jurisdiction for the investor-state settlement of investment disputes. The appointments of arbitrators are made from the ICSID panel of arbitrators or otherwise. The ICSID panel of arbitrators has been established by the nominations of the member states. The member states are required to nominate persons of high moral character, independent judgment, who are recognized professional of law, commerce, industry, or finance.[557]

4.3.1 Constitution of ICSID Tribunals

The Secretary General proceeds to constitute ICSID tribunals on filing of complain along with consent of parties for ICSID adjudication. The ICSID tribunals of even number of arbitrators are constituted by appointment of arbitrators, both by claimant and respondent. The claimant appoint one arbitrator and propose the presiding arbitrator to ICSID tribunal. The respondent host state requires to appoint one arbitrator and propose a name for presiding arbitrator. Where ICSID rejects the proposed name of the president and may suggest someone else to be appointed as the

[556] Lowenfeld, "Investment agreements," 128.
[557] Art.14 of the ICSID Convention.

president of the ICSID tribunal. In case of disagreement or inability to nominate any name as president, Chairman administrative council has the authority to constitute ICSID tribunals either to appoint arbitrator for respondent and presiding arbitrator.[558] In case if respondent host state does not appoint its member to constitute the penal within the period of 90 days, the Chairman[559] of ICSID Administrative Council has the authority to appoint that third arbitrator to constitute ICSID tribunal.[560] The arbitrators are selected by the parties of the proceeding one each and then mutually decide for the name to the president of the three member ICSID tribunals. The litigant parties have the option to appoint their part of appointment even from outside the ICSID panel.[561]There is however, restriction on appointment of the arbitrators of the same nationality.[562]

The arbitrators are selected with the choice of parties as the man of integrity and expertise in the matter with relevant experience of the work as lawyer, judge or scholars from the panel of arbitrators of ICSID.[563] Article 40(1) of the Convention provides that the Chairman of Administrative Council i.e. the President of the World Bank be called upon to appoint arbitrator from the panel of arbitrators. The panel of arbitrators consists of the designated members of the contracting states and of Chairman of the Administrative Council. The disputing parties can choose arbitrators of their own choice from ICSID panel of arbitrators, consist of more than 500 members. The members of the panel are nominated by the more than 150 contracting states each can designate four members to the panel. The Chairman of the Administrative Council have the privilege to nominate up to 10 members for the

[558] Art.37 & 13 of the ICSID Convention
[559] Art. 5 of ICSID Convention provides that the president world bank is ex officio chairman of ICSID administrative council
[560] Art. 38 of ICSID Convention.
[561] Art. 14 of the ICSID Convention.
[562] Art. 38 of ICSID Convention.
[563] Art. 40 & 14 of ICSID Convention.

ICSID panel of arbitrators. [564] It is an invariable practice that Chairman relies upon the recommendations made by the ICSID Secretary General to appoint arbitrators of the tribunals.[565]

Article 14(2) of the convention provides for the 'assuring representation' of the principal legal system of the world. The data released by ICSID center about the compositional mix of ICSID tribunals, which shows that in 2013, 70% of arbitrators belonged to Western Europe or North America. On the other hand, around 4% of tribunal members belongs to Eastern Europe, Central Asia, Middle East, North Africa and sub Saharan African.[566] These percentages slightly changed in case of memberships of ad hoc committees. However, the vast majority of arbitrators or conciliators or members of ad hoc committee are appointed from the nationalities of the developed capital exporting world: Western European (47%) and North American (20%) nations have participated as the referee of the ICSID settlement mechanisms. Contrarily, the regions which are facing the most ICSID litigations have negligible participation in the settlement of dispute such as South American arbitrators have participated in 11% litigations. Similarly, very low ratio of arbitrators have appeared for ICSID base settlement of ISDS from Middle East and North Africa (4%), Eastern Europe and Central Asia (3%) and sub Saharan African(2%) regions. Almost similar trends with some variation, still continues and have been following in 2018 Western Europe (47%), North America (16%), South America (15%), Eastern Europe (9%) Middle East and North Africa (4%) and Sub Saharan Africa (1%).[567] The responsibility lies with the forum to ensure proper representation of all the regions of world.

[564] Art. 13 of the ICSID Convention
[565] Nassib Ziade, "Is ICSID heading in the wrong direction?" GAR, 2015, accessed Bilaterals.org.
[566] Ibid.
[567] *ICSID*, "Caseload 2019".

mainly handling the majority of cases of investment disputes. These arbitrators have their vested interests to prioritize the rights of foreign investors at the cost of the sovereign states. The report shared data of 130 investment treaty base litigation which involved only three law firms from UK and USA in the year 2011 alone. At the same time, just 15 arbitrators from Europe, USA or Canada decided about 55% of the litigation in the same years. These arbitrators has adopted pro investor (claimant) interpretation in 140 treaty base ICSID disputes to protect their rights.[590] The conflict of interest on behalf of arbitrators apparent because it does not support the fairness for the constitution of arbitration tribunals in icsid. This absurdity of the situation arise when Ecuador challenged the appointment of arbitrator over the multiple appointments from the same law firm in Burlington vs Ecuador ICSID arbitration. [591]

These elite law firms are charging heavy fee for their arbitrators or lawyering service. There is no fixed standard of fee for the arbitrators to be paid. The fee has been charged on average at the rate of US$ 3000 per day for the meeting or other related activities of such arbitration. There are some leading law firms which charge US$ 1000 per hour for providing counsel work. The length of the litigation would harshly increase the cost of arbitration for the parties. The example of Philippine government can be cited which spent $ 58 million to defend investment dispute against the German airport operator. The arbitrators on average earns $ 1 million in a reported ICSID case. This cost is mostly lifted by the tax payers of the LDCs who sometime have no access to basic necessities of life.[592] The arbitrators have their vested financial interests of the million dollar income and are potential bias.[593] The

[590] Ibid.
[591] Ziade, "ICSID heading".
[592] Olivet and Eberhardt, "Profiting from injustice," 2.
[593] Waibel and Wu, "Are Arbitrators," 6.

heavy incentives to participate under ICSID mechanism motivate the panelist arbitrators to be appointed in future litigations.

4.3.2.4 Repeated Appointments

The arbitrators have their bias for the reason of their self-interests of reappointment in future cases. The urge for reappointment has its relationship with the disclose mind of arbitrators and part of exclusive elite club of the arbitrators. The empirical results have suggested that in 15 years period (1994-2009) out of 124 case concluded by three members ICSID tribunals got repeated appointments in 105 cases.[594] There are some elite arbitrators which got appointments in number of cases, one out of 26 elite arbitrators got 11 , three in 10 cases , four in 9 times , one in 8 cases two in 7 cases, four in 6 litigations, three in 5 cases and eight in 4 cases. These cover 80.2% of the decided cases of the ICSID tribunal during 15 years period of 15 years from 1994 to 2009. These 26 arbitrators belong to 16 countries. This exclusive club includes only two women.[595] Daphan Kapeliuk has termed them 'Elite Arbitrators' who remain successful to catch up 4 or more ICSID litigations per year.[596]

The repeated appointments of arbitrators have close relationship with the outcome of the ICSID litigations. Three cases against Argentina can be cited as examples wherein Non-precluding Measures (NPM) have been the matter in issue due to financial crisis of the state. The Emergency measures under NPM were pleaded as

[594] Kapeliuk, "Repeat appointment factor," 73. This research suggests that during 15 years period (1994-2009) there were 124 cases were decided by three members' tribunals while 7 others by single member tribunals. According the empirical data provided by the research explain that 175 total arbitrators remain involved for the conclusion of these cases. Out of these 175 a total of 26 were appointed more than 3 times, 18 were appointed 3 times, 24 were appointed 2 times and 107 participated for only once for theses litigations.
[595] Ibid., 78.
[596] Ibid., 50.

consult any interpretation of highly publicist writers to defy the stare decisis from international courts. In the absence of application of precedent and hierarchy of applicable law, ICSID tribunals have produces the lopsided judgments and conflicting judgement of the investment disputes.

These incoherent and unpredictable decisions of ICSID tribunals have contributed for the legitimacy crisis of ICSID regime in the absence of a fair and effective mechanism of review. The unpredictable application of sources of international laws and their interpretation has compromised the fairness and transparency of the ICSID regime. In the disputes relating to Pakistan, unpredictable treatment of construction contract claim to be as treaty claim to invoke ICSID jurisdiction in one occasion and service contracts were made the basis of ICSID jurisdiction, which gave rise controversies regarding jurisdiction of tribunals. The objection to such jurisdictional assumption by the respondent was declined, which added unpredictability of ICSID system of ISDS adjudication.

4.4.1 Uncertainty of Relevant Sources of International Law

Article 42(1) of ICSID Convention provides that contracting parties have the choice of applicable law through treaty law, domestic legislation or investment contract between investor and the host state. But in its absence, choice of law lies with the ICSID tribunals to determine the issue of applicable law. In the case of *Wena Hotels Ltd vs Egypt*[605], ad hoc committee held that the ICSID tribunals have been give discretion to choose the relevant provision from national or international law. The tribunal can exercise to select either national or international law where it finds its justification to apply. The committee held that even both laws can be applied

[605] Wena Hotels Ltd. v. Arab Republic of Egypt, Annulment Proceeding, ICSID Case No. ARB/98/4.

" the use of the word 'shall' imply a substantive right and the term 'any obligation' is capable of applying to the obligations arising under local law such as those arising from a contract. Art. X(2) would appear to say that each sovereign shall observe any legal obligation it has assumed or will in the future assume, with regard to specific investments covered by the BIT"

The tribunal rejected the reasons of SGS vs Pakistan regarding such expanded interpretation to treat a local commitment of foreign investment as international obligation. This expansion of concept of international obligation would have potential to open the flood gates of ICSID litigations for investment disputes. The tribunal assumed its jurisdiction to elevate the scope of international obligations by using the textual approach to protect substantive rights to foreign investors.[626]

The regulatory space of public rights of host state is another matter in issue in investor state relationship in the backdrop of international obligations to protect foreign investment. The investment treaty arbitrations have applied balancing criteria to recognize the general regulatory powers of states.

The state exercise its power to introduce a bona fide regulation which would not affect foreign investor to the extent of restricting use of investment. Such general regulations are if not directly discriminatory to the foreign investor are not treated to have the effect of indirect expropriation of foreign investment.[627] LG&E Corp vs Argentina provides that where investment continues despites decrease of profits as a result of general regulation, it does not have the impact of expropriation. The expropriation envisages when business activity of investment disappears and the

[626] Franck," Legitimacy," 1521.
[627] Brower and Schill, "Is arbitration a threat," 484.

economic value of enjoyment of proceeds of the investment destroyed.[628] Indirect expropriation includes deprivation of foreign investor's wealth caused by government measures, fall short of outright seizure and control of foreign investment.[629] In case of Methanex Corp vs United States, the ICSID tribunal held that where any non-discriminatory regulation which affect the foreign investment, if enacted for public purpose in accordance with the due process of law, is not deemed expropriatory unless specific commitment of restrain have been given to the foreign investor in this regard.[630] The view expressed that the host state has the power to implement its public policies when justified on the touchstone of fairness, transparency and equality of its application.

On the contrary, in case of Metalclad Corp vs Mexico, the tribunal resorted upon the rigid application of the standard of expropriation on the consideration of the frustration of an assurance of the government for the permits to operate is treated as expropriation.[631] The tribunal in case of Saluka Investments vs Czech Republic[632] provides for an assessment of a balance between requirements of claimants' legitimate expectations and respondents' right of legitimate regulation of public interest of the subjects of the state. The same criteria for the application of regulatory power was also laid down in case of Parkering-Compagniet vs Lithuania, which provided that the sovereign states have the right to enact, modify or cancel a law at its own discretion, unless the stabilization clause of investment contract refers otherwise.

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[628] LG&E, ICSID Case No ARB/02/1. See also, Brower and Schill, "Is arbitration a threat," 486.
[629] Brower and Steven, "Who Then Should Judge," 198.
[630] Methanex Corporation v United States of America, NAFTA, UNCITRAL,, Award of (Aug 3, 2005) available online at http://www.state.gov/documents/organization/51052.pdf (visited on 31-07-19). See also, Brower and Schill, "Is arbitration a threat," 485.
[631] Metalclad Cotporation v The Mexican United States, ICSID Case No ARB (AF)/97/1. 30, 2000). See also, Brower and Schill, "Is arbitration a threat," 487.
[632] Saluka Investments, B. V. v. the Czech Republic. Partial Award, ICGJ, (2006), *368*, 17.

But the legislative powers cannot be exercise to act unfairly, unreasonably or inequitably to affect foreign investment.[633]

On the contrary, ICSID tribunals have adopted an approach to restrict that state has no authority to enact any law to phase out nuclear power generation to regulate environmental hazards in fulfilment of international obligations.[634] At the same time, in case of Philip Morris vs Uruguay, the ICSID tribunal has disregarded plea of public health to enforce liabilities of foreign investor under Plain Packing Cigarette laws.[635] In another case of Biwater Gauff vs Tanzania, the arbitration tribunal rejected the respondent's argument to justify the measures of imposing restriction on Biwater Gauff companies to protect major water supply and sanitation in the time of crisis as justifiable measures of margin of appreciation.[636]

The same inconsistent approach was adopted in the ICSID litigations against Argentina. The cases appeared in result of financial crisis when security of state was under threat. The maintenance of public order become major concern for governments. Argentinian government introduced measures to control the economic meltdown due to extraordinary currency crisis in the country. The foreign investment corporation invoke jurisdiction of ICSID arbitration tribunals. The respondent host state pleaded the 'Defense of Necessity' on the ground Non Precluded Measures (NPM) clause of the US-Argentina BIT, 1991. The treaty clause which provides that the emergency measures are not precluded for the sake of maintenance of public order, security of the state.[637] In fact ICSID tribunals adopted an inconsistent, rather

[633] Parkerings-Compagniet A S v Republic of Lithuania, ICSID Case No ARB/05/8.
[634] Vattenfall v. Germany, ICSID Case No. ARB/12/12. See also, Nolan, "Challenges," 433.
[635] Philip Morris Brand v Uruguay, ICSID Case No ARB/10/7.
[636] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.
[637] Art. XI of US-Argentina BIT 1991.

contradictory approach, to deal with the 'Defense of Necessity' on the ground of NPM.

The decisions appeared in the cases of CMS, Sempra, Enron and LG&E vs Argentina the tribunals applied opposite approaches for the interpretations of NPM clauses and its justifications of applicability.[638] In the cases of CMS, Sempra and Enron, the ICSID tribunals held that the NPM as 'Defense of Necessity' is inapplicable in the circumstances of financial crisis of the host state.[639]

The approaches of tribunals in three cases i.e. CMS, Sempra, and Enron provided that contribution of the host state to create circumstances of 'Necessity' are substantially relevant to defuse the scope of defense. The ICSID tribunals held that the NPM clause is not self-judging but dependent upon the rigorous requirements of the customary international law.[640] The matter of fact is that Argentinian government has participated for the crisis through their acts or omissions therefore, the host has no qualification to invoke NPM clause of the BIT.[641]

On the contrary, in case of LG&E vs Argentina, the tribunal held that contribution of the host state is neither intentional nor significant for the economic crisis of the state. The NPM can be invoked as a defense in an ICSID litigation as an

[638] William W. Burke-White, "The Argentine financial crisis: state liability under bits and the legitimacy of the ICSID system," *Asian J. WTO & Int'l Health L & Pol'y,* 3 (2008): 1.
[639] CMS v. Argentine, ICSID Case No. ARB/01/8; Sempra v. Argentine, ICSID Case No. ARB/02/16, Enron v. Argentine ICSID Case No. ARB/01/3; LG&E Energy Corp. v. Argentine Republic, Decision on Liability, ICSID Case No. Arb/02/1. See also, Burke-White, "Argentine financial crisis," 11.
[640] Art.24 (14) of the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles):
"Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (*a*) The international obligation in question excludes the possibility of invoking necessity; or (*b*) The State has contributed to the situation of necessity."
[641] Burke-White, "Argentine financial crisis," 21.

operative part of the investment treaty. LG&E tribunal disagree to consider the requirements of customary international law for application of necessity as defense and held that defense can be judged by considering the 'good faith of the action' of the host state.[642] The tribunal held that:

"The concept of excusing a State for the responsibility for violation of its international obligations during what is called a "state of necessity" or "state of emergency" also exists in international law. While the Tribunal considers that the protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in Article 25 of the ILC's Draft Articles on State Responsibility) supports the Tribunal's conclusion."[643]

The inconsistent interpretation has narrowed down the scope of treaty clause of NPM, which has prompted legitimacy concerns for the exercise of ICSID jurisdictions. The legitimacy concerns got affirmative recognition by stance through ad hoc annulment committee in CMS vs Argentina under Art. 52 of the ICSID convention. The committee was headed by Gillbert Guillaume the then president of ICJ along with other members Nabil Elaraby (member ICJ), James Crawford Whewell professor of international law at Cambridge University and Rapporteurs of international law commission on the Draft Articles on the Responsibility of the states for international wrongful acts. The annulment committee on CMS vs Argentina reported:

[642] LG&E Energy Corp. v. Argentine Republic, Decision on Liability, ICSID Case No. Arb/02/1. See also, Burke-White, "Argentine financial crisis," 21.
[643] Ibid.

> "The NPM of the BIT and the customary law defense of necessity are two separate and distinct standards. The two texts having the different operation and content.....; The CMS tribunal gave an erroneous interpretation of Art. XI (NPM i.e. Non Precluded Measures US-Argentina BIT of 1991).....; the failure to apply Art. XI constituted another error of law which has decisive impact on the operative part of the award."[644]

Number of vague expressions are negotiated to introduce open-ended standards, which could hardly achieve and open a flood gate of ISDS. These expressions includes 'pro investor climate', indirect expropriation, fair and equitable treatment, full protection and security and protection from the denial of justice to take the advantage of the language of the BIT.[645] The ICSID tribunals have explained the standards of 'fair and equitable treatment' to enhance the obligatory canvass of host states. The tribunal decided that provisions of 'a stable legal and business environment is obligation of the host state to avoid breach the standards of BITs.[646] Furthermore, in Tecmed vs Argentina, the host state had to act consistently to inform beforehand all the regulatory provisions which could have possibly effect the governance of investment in the host state.[647]

The unhappy complainant have the opportunity to claim under BIT for its business failure on account of improper state regulations and misguided

[644] CMS v. Argentine, ICSID Case No. ARB/01/8.; See also, Burke-White, "Argentine financial crisis," 28.
[645] Chung. "Lopsided international investment law regime," 960.
[646] CMS v. Argentine, ICSID Case No. ARB/01/8. See also, Chung. "Lopsided international investment law regime," 960.
[647] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.

macroeconomic policies. Thus, a flood gate of tedious and expansive ISDS litigations have been emerging against the permanent respondents i.e. host states.[648]

4.4.2.2 Increase of Dissents for ICSID Awards

The dissenting opinion of awards is accepted practice in international arbitrations. The treaty law and investment arbitration rules allow to file a dissent with decision of majority. Even the dissenting opinions of the arbitrators contribute for the development of laws when stimulate to generate scholarly debates on point of settlement.[649] The normative justification of dissenting opinion claims that it contribute for better award by majority of arbitrators of the tribunals. Thus, the dissents contribute to a well-reasoned judgment and establish legitimacy of process for further development of international investment law.[650] In case of CME vs Czech Republic, majority of three members' tribunal decided a large amount of $ 350 million award against a developing economy of Europe. Third member wrote a separate opinion to file his dissent on the amount of damages that such a heavy amount of damages could not be awarded for crime against humanity after a war of aggression against such a fragile economy.[651]

In ICSID cases on some occasions the dissenting opinions paved way for annulment of the award as witnessed in the case of Klockner vs Cameroon.[652] In the same case, Cameroon prevail in original arbitration when dissenting opinion of the

[648] Chung. "Lopsided international investment law regime," 962.
[649] Charles N. Brower and Charles B. Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded," *Arbitration international* 29, no. 1 (2013): 6.
[650] Albert Jan Van Den Berg, "Dissenting opinions by party-appointed arbitrators in investment arbitration," in *Looking to the Future* (Brill Nijhoff, 2011), 823.
[651] CMS v. Argentine, ICSID Case No. ARB/01/8.
[652] Klöckner v. Cameroon, ICSID Case No. ARB/81/2.

party appointed arbitrator survived in annulment proceedings.[653] The risk of leakage of secret deliberations on the sensitive issues of security of the respondent states are hazardous for further course of action for the case or the state.[654] The dissenting opinions of arbitrator, are considered as contributory to the further development of law as it expresses the well-reasoned wisdom of the decisions. At the same time, it can be exploited to help appointing authority and facilitate pending cases of their clients where he acts as lawyer or pleader.[655]

Van Den Berg observed, after on the analysis of 150 concluded arbitration of ICSID tribunal till 2010, that presiding arbitrators appointed by Chairman Administrative Council in majority cases rarely dissent.[656] The first point of disagreement appears when the party appointed arbitrators fail to build consensus to appoint their presiding arbitrator of three member tribunal. In that case, the Chairman Administrative Council has the authority to appoint president of the ICSID tribunal from the ICSID panel.[657] The research has concluded that all the dissenting arbitrators in 34 decided cases belonged to party appointed to constitute the ICSID tribunal. At the same time, 100% of these dissenting opinions by the member of the tribunals are in favour of the party appointed them.[658] This ratio of dissenting question the fact whether it is coincident or violative of neutrality. The results have raised question about the transparency of selection or arbitration process.[659]

[653] Van Den Berg, "Dissenting opinions," 823.
[654] Ibid., 829.
[655] Van Den Berg, "Dissenting opinions," 831.
[656] Ibid., 824.
[657] Art. of ICSID Convention, 1965
[658] Van Den Berg, "Dissenting opinions," 824.
[659] Ibid., 825.

4.4.2.3 Fallacy of Supervisory Review of ICSID Awards

The decisions of the ICSID tribunals are not appealable. There is no effective mechanism to review the ICSID judgments but the party can apply for annulment of an award. The annulment procedure is limited in scope, in the context of effectiveness, to set aside judgment of tribunal. On the registration of application of annulment within 120 days of the judgment the Chairman of ICSID Administrative Council appoints three members of ad hoc committee from the panel of ICSID arbitrators to decide the fate of the judgment by ICSID tribunal.[660] The grounds or annulment are limited in their scope. The ICSID Convention has provided following five grounds annulments:

a) The Tribunal was not properly constituted;

b) The Tribunal has manifestly exceeded its powers;

c) There was corruption on the part of a member of the tribunal;

d) There has been a serious departure from a fundamental rule of procedure; or

e) The award has failed to state the reasons on which it is base.[661]

The Annulment Committee has the authority to annul the award partly or fully.[662] The annulment of award shall not deprive the aggrieved party to register a new request with Secretary General ICSID to constitute new ICSID tribunal for the claim. The mandate of the ad hoc committee is limited. The committee has no authority to decide the determinations of law or facts which was the base of judgment.

[660] Art. 52(2) of ICSID Convention 1965.
[661] Art. 52(1) of ICSID Convention 1965.
[662] Art. 52(3) of ICSID Convention, 1965.

Limited scope of supervisory review has shocked the sense of fairness or rule of law and barely any effective relief for a blatant violation of rules of law.[663]

The ICSID system lacks appeal mechanism and judicial review of arbitral award in national courts. ICSID convention provides annulment mechanism by virtue of articles 52. The Annulment Committee is guardian to the finality of the ICSID Awards. The convention has no impediment to the appointment of tribunal member to be a member of the Annulment Committee. At the same time, the members of arbitrator panel for ICSID can participate as the member of the committee and the council for any party to any other litigation proceedings before ICSID tribunals. Apart from the question of credibility Annulment Committee member can temp to develop case law that would benefit their pending litigations and potential ICSID arbitrations. The dual face of the arbitrators as member of ad hoc committee in one side of the spectrum and council of litigant parties give rise the perception of bias at least on the ground of disclosed mind set.[664]

Contrarily, The ICSID tribunals are bias in favour of foreign investors. The decisions does not build upon the precedents. The legal principles provided in other cases of ICSID are not considered as relevant to decide a multimillion dollars dispute. The ICSID Convention provide for the annulment of the ICSID award under Article 52, which has very limited scope. The legitimacy concerns emerged logically when the there is no appeal or review mechanism to correct the ruling of the ICSID tribunals.[665]

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[663] Chung. "Lopsided international investment law regime," 968.
[664] Gharavi, "ICSID annulment committees," 4.
[665] Ibid.

4.5 Legitimacy Analysis of ICSID Jurisdiction

The repetition of arbitrators in more than one ICSID litigations of identical facts with the same outcome has raised the questions of impartiality and fairness. The procedure of appointment has become questionable on the appointment of same arbitrator in identical cases against the same respondent. These repeated appointments of arbitrators by the president Administrative Council can hardly satisfy the standards of legitimacy of ICSID jurisdiction.

The fairness of ICSID mechanism can be questioned on the touchstone of inherent bias in constitution of ICSID tribunals. Constitution of ICSID tribunals facing criticism of conflict of interests when the appointment of tribunal members reserve 'Elite Arbitrators Club' with the background of their disclosed mind and interests of their reappointment. There repeated appointments have relation with heavy financial gains out of ICSID litigations. ICSID regime delegate an authority to private referees from the elite law firms of the developed capital exporting nations to define regulatory limits of their sovereign powers in their respective states.[666]

The fair and neutral system of dispute resolution promote rule of law in the final adjudication of claim. Lack of security of the tenure as a safeguard of judicial independence, is non-existent ISDS mechanism which brought adverse effects to its fairness, impartiality and autonomy.[667]

The security of tenure and salary insulate judges from undue pressures, affecting their decisions. On the other hand, the arbitrators are seen to encourage the

[666] Harten, "Investment treaty arbitration," 7.
[667] Harten, "Five justifications," 14.

filing of litigation as lawyer or consultant for the wealthy multinational corporations.[668]

The crisis of determinacy and coherence can be inferred from unpredictable rather inconsistent, standards of interpretations by the ICSID tribunals while determining foreign investment disputes. These incoherent and indeterminable standards have generated a legitimacy crisis to ISDS mechanism.

4.6 Conclusion

ICSID has been established to provide a fair, independent, and impartial alternate dispute resolution mechanism for foreign investment disputes. The ICSID system of adjudication of foreign investment dispute settlement was adopted by majority of states after 1990s. Consequently, rise in the number of ICSID litigations between foreign investor and host states has been reported. This rise of frequency of litigations has been witnessed in post-cold war era unleashed in the last decade of 20th century. The obvious reasons for the rise of litigations embedded in fault lines inherent to the mechanism since incorporation stage of the treaty and exercise of jurisdiction by the tribunals.

A visible divide and hasty efforts for the realization of ICSID Convention had been apparent since the beginning of incorporation process of the treaty. To protect foreign investment in the host states, conflicting stances of capital exporting and capital importing nations entangled in deadlock while negotiating the treaty in 1964. LDCs resisted conferring ICSID tribunal with highly flexible and unaccountable jurisdiction, which was beyond the control of host states. The reasons include disregard of right to compliant of the host states against foreign investors. On the

[668] Ibid., 15.

other hand, host states hooked for usually ten to fifteen years subject to the terms of investment treaty as permanent respondent of expected litigations. The host states even surrendered their sovereignty to regulate vital public interest such as health or environment. The concerns of LDCs relating to nature of ICSID jurisdiction and super status of foreign investors were not addressed at incorporation stage of ICSID. Therefore, 'Tokyo No' appeared on behalf of 21 states including 19 Latin American nations out of a total 61 negotiating participants rejected the 'Proposed Draft' of the treaty.

Notwithstanding the resistance from Latin American and Asian economies, ICSID Convention was adopted finally in 1965. Nine richest capital exporting nations[669], three Asian[670], seventeen poorest[671] economies of Africa and one Caribbean[672] states signed final draft of the Treaty, in order to complete membership for incorporation. A further of nineteen nations[673] joined the treaty within a year of its incorporation. In post-Cold-war era, majority of developing economies of Asia and Africa consented for the ICSID jurisdiction with desire to grab additional economic advantages and flow of foreign investment under the umbrella of World Bank. The number of LDCs joined ICSID Convention with its little realization of the inherent fault lines of ICSID jurisdiction of ISDS. These fault lines include open ended privilege of ICSID tribunal to define vires of foreign investment, irrevocability of ICSID consent, unpredictability of decisions and lack of transparency in the absence

[669] United Kingdom, USA, Japan, Sweden, Luxembourg, Denmark, Italy, Belgium and France.
[670] Pakistan, Nepal and Malaysia.
[671] Tunisia, Cote d'Ivoire, Nigeria, Mauritania, Niger, Central African Republic, Liberia, Dahomey (now Benin),Upper Volta (now Burkina Faso), Ethiopia, Gabon, Cameroon, Sierra Leone, Somalia, Morocco, Ghana, and Congo-Brazzalle
[672] Jamaica.
[673] Which include eight rich economies of Europe i.e. Germany, Cyprus, Greece, Austria, Netherland, Ice Land, Norway and Ire land. Three Asian nations: China, Korea and Afghanistan. One more Caribbean nation Trinidad and Tobago. And seven countries of Africa Togo, Chad, Kenya, Malawi, Uganda, Senegal and Malagasy (now Madagascar).

of any effective review option. The ICSID jurisdiction has been created where host states are permanent respondents with no opportunity to file any complain against foreign investors. Host states have no right to file any compliant or object to the illegalities and corrupt practices of foreign investment. The contemporary regime of foreign investment protection has debarred states of certain vital national interests in the presence of expensive interpretations of the 'Expropriations' or 'Fair and equitable' clause of the investment treaties.[674] States some time could not anticipate the financial and economic implication of treatification of clauses relating to expropriation or fair and equitable measures which has its potential economic impacts.[675] *Gus Van Harten* has disagreed with the signaling effect of BITs and concluded that "There is no empirical evidence that they served this stated purpose. Most states therefore committed themselves to what are arguably the most financially risk laden international obligations in the world today without a credible empirical basis for the claim that the treaties would achieve their stated purpose."[676] Substantive and procedural indeterminacy about the rights of foreign investors and asymmetric position of host state has contributed to engender legitimacy crisis for ISDS. These inherent fault lines of ICSID mechanism have contributed to generate legitimacy crisis of the ICSID regime and vulnerability challenges for contracting host states.

[674] The stabilization clause of investment contract has the effect of freezing up of domestic laws of disputes resolution. The international tribunals have relied upon the resolutions of the international institutions and publications of the highly publicist writers. There are large majority of highly publicist writers which is shaping the international investment law and the part of the arbitration fraternity as well. The arbitration tribunals have choices to apply any source of international investment law even to exclude the resolution of international organization by the writing opinion of highly publicist writer to develop or resolve an investment dispute.[674]

[675] Harten, "Five justifications," 3.

[676] Ibid., 11.

CHAPTER NO- 5

ICSID SYSTEM: IMPACT OF LEGITIMACY CRISIS

5.1 Introduction

ICSID mechanism evolved to protect foreign investment and to promote inflow of capital into the capital importing states. The right to protect foreign investment has grown beyond the scope of rights of property of civilly advanced countries of the world. The exercise of ICSID jurisdiction has affected 'squeezing effect' for the regulation of public and national interests of the member states. The inherent imbalances of ICSID mechanism provide opportunities for the constitution of lopsided ICSID tribunals.

The authoritative constitution of ICSID tribunals has engendered unpredictability of ICSID jurisprudence. The unpredictability appears for the application of sources of law and interpretations of issues relating to foreign investments. These unaccountable tribunals have produced certain pro-investors interpretations and conflicting judgments in ISDS.

The asymmetric constitution and exercise of ICSID jurisdictions provided basis for experiencing compelling conditions by the host states. These compelling conditions are appearing due to roaring frequency of ICSID litigations and their consequent outcomes. The proliferation of hefty claims against fragile economies and costly experience of ICSID tribunals have generated a challenge of legitimacy rhetoric of ICSID mechanism. These incoherent and indeterminate experiences of ICSID mechanism have caused a suffocative environment for some LDCs. Therefore, accumulative of strangulated breathing space for LDCs have impacted to produce of

legitimacy crisis which appeared by the responses of host states. These host states have expressed their responses of reluctance for further obligations under ICSID system, deviations from the prevalent normative practices of ICSID jurisprudence and backlash against the ICSID arbitrations. One the aggravated backlash response appeared in the form of jurisdictional conflict in Pakistan.

5.2 ICSID Mechanism: Legitimacy Crisis in Making

Different aspects of legitimacy play its role to evaluate the investment arbitration mechanism. The exercise of jurisdiction by arbitral tribunals has increasingly debated for appointments of arbitrators, professional ethics and interpretational inconsistencies in treaty base investment arbitrations have generated a debate of legitimacy crisis for investment arbitration.[677] At the same time, the inconsistent interpretations of BIT clauses, questionable appointments of arbitrators and narrow down the scope of treaty clauses which have prompted legitimacy concerns of ICSID jurisdiction. Such eroded flexibility of states have contributed to generate legitimacy crisis for ICSID jurisdiction. Charles N Brower was the first who used the notion of 'crises of legitimacy' for investment arbitration by identifying lopsided exercise of jurisdiction by ICSID tribunals and lack of accountability mechanism over arbitrators.[678]

5.2.1 Contributory Factors for ICSID Legitimacy Crisis

There are some contributory factors which have resulted legitimacy crisis for the ICSID mechanism. Brower and Schill have identified three root causes for the legitimacy crisis for such institutional ISDS: Firstly, the existence of inherent

[677] Schill, "Conceptions." 2.
[678] Ibid., 2. See also Brower, C. N. (2002). A crisis of legitimacy. *National Law Journal*, 7, 1-3.

imbalance of rights and liabilities of foreign investors and host states. Secondly, pro-investor procedural bias which allow only to file claim of rights, but denying such option for host states regarding the liabilities of investor. Thirdly, ad-hoc appointments of arbitrators, other than permanent judges of the announced panel from ICSID casts doubts on the legitimacy of the ISDS mechanism.[679]

Broadly, these factors can be categorize in two categories: Firstly, general factors, which can be infer from jurisprudence of the exercise of ICSID jurisdiction. Secondly, specific factors, which have directly affected the affairs of specific states. The general factors are affecting the ICSID mechanism as a whole. The litigation standards of ICSID mechanism engendered an impartial, free and transparent adjudicatory choice for the capital importing nations in particular. The general factors have given rise the legitimacy crisis for ICSID mechanism. On the other hand, specific factors are affecting states from inside. The emergence of these specific factors are the consequent of general factors. In most of the cases, strangling burden of compliance has caused a virtual suffocation for the capital importing host nations. Thus, the resentment against ICSID mechanism has been emerging on the political and economic canvases in backdrop of proliferation of ICSID litigation among weak economies in particular. Some of the states, under the impact of specific factors, have opted the non-conformity responses towards ICSID system of settlement of foreign investment disputes.

5.2.1.1 General Factors

The general factors have generated a global debate for improvement of ICSID mechanism. The global leaders in politics, economy and law have identified and

[679] Brower and Schill, "Is arbitration a threat," 475.

discussed the issues hurting the mechanism of institutional ISDS from inside. Some of the factors appeared to be challenges since inception of the ICSID system of adjudication. On the other hand, there are some factors which have been surfaced on the exercise of ICSID jurisdiction. These general factors include:

i. Inherently imbalanced system of ISDS

ii. Strangling regulatory space for vital national interests or global objectives

iii. Lopsided Constitution of ICSID tribunals

iv. Unpredictable judgments of ICSID tribunals

v. Lack of supervisory review

5.2.1.1.1 Inherently Imbalanced System of ISDS

It is asserted that BIT has created a reciprocity of rights and the obligations between the foreign investor and the host state but the matter of the fact is that there is massive inequality exists in favour of foreign investment protection.[680] The ICSID mechanism and obligations for the protection of assets of foreign investors, under BITs in realism, do not create obligations against foreign investors except a preamble statement to promote and encourage investment related activities in the host countries.[681]

The preferred protection under investment treaties of foreign investment for the non-investment related interests of foreign investors over the public right has been

[680] Kaushal, "Revisiting history"497.
[681] Ibid., 499.

widely contributory factor for legitimacy crisis of ICSID mechanism.[682] Prevalent investment treaty regime has institutionalized pro-investor bias for ISDS.[683]

Apart from unpredictability of rights and obligations under investment treaties interpretations, institutional influence upon investment importing nations i.e. host states with the unequal rights of the foreign investor have also contributed for the legitimacy crisis of ICSID regime.[684] Empirical analysis shows that majority of ICSID litigations are between foreign investors from the developed country and the developing host states which have mostly been initiated after the year 2000.[685]

The combination of World Bank policies and obligations under BITs has established certain constrains on the capacity of the states even to regulate the macroeconomic policies of the sovereign states.[686] The expensive interpretations by the ICSID tribunals have maneuvering tendency of contracting states undermined the framework of international investment law for the promotion of capital flow into the host states.[687] The tension has grown too much among the host states to privilege unilateral action, to take unfair advantages and manipulation of the system, in order to influence the host states.[688]

5.2.1.1.2 Strangling Regulatory Space for Vital National Interests or Global Objectives

The recalibration of rights and liabilities of the stakeholders was between public interests of the states and the private interests of foreign investors.[689] These

[682] Brower and Schill, "Is arbitration a threat," 474.
[683] Ibid., 474.
[684] Ibid., 474.
[685] Waibel and Wu, "Are Arbitrators," 14 & table 1.
[686] Kaushal, "Revisiting history" 497.
[687] Harten, "Five justifications," 9.
[688] Klett, "National Interest," 218.
[689] Hindelang and Krajewski, *Shifting Paradigms*, 5.

instruments to recalibrate to manage the political risks in host states which is referred as ill-camouflaged attempt to maximized regulatory arbitrariness.[690] The backlash has been on the rise with the object to ease burden of compliance with lopsided investment agreements.[691]

ICSID regime has delegated an authority to private referees from the elite law firms of the developed capital exporting nations to define regulatory limits of their sovereign powers in their respective states.[692] The question of legitimacy of interpretation arise when three awards CMS, Sempra and Enron vs Argentina, have limited the BIT base of freedom of the host state to respond an emergency situation in the country despite presence of NPM clauses of the treaty. [693]

Even the legitimate expectations principle of administrative law has been treated to compensate foreign investment claims which has significantly reduced the regulatory space of vital public interests of host states.[694]

5.2.1.1.3 Lopsided Constitution of ICSID Tribunals

The constitution of ICSID tribunal is primarily joint privilege of both parties. The members of ICSID tribunals are appointed as man of unimpeachable professional credibility. Majority of arbitrators belong to elite law firms of capital exporting nations i.e. more than 60%.[695] Divid Schneiderman has identified pro-investor 'disclosure of mind' on the award has been the apparent reasons for earning repeated appointment for ICSID tribunals on behalf of foreign investors.[696]

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[690] Hindelang and Krajewski, *Shifting Paradigms*, 2.
[691] Chung. "Lopsided international investment law regime," 955.
[692] Harten, "Five justifications," 7.
[693] Burke-White, "Argentine financial crisis," 25.
[694] Sornarajah, "Power and Justice," 35.
[695] Waibel and Wu, "Are Arbitrators," 15.
[696] Schneiderman, "Judicial politics," 399.

Their participation to constitute ICSID tribunals for ISDS resulted in large number of pro-investors awards.[697] Predominant reasons for inclined approach of ICSID arbitrators referred as their background of practicing commercial contractual law and lack of experience to deal with issues of public interests.[698] It is not alone the law which determine outcome of ISDS but arbitrators and the procedure of arbitration process produce the product of mechanism in shape of award.[699]

Appointment procedure has its impact on outcome of arbitration proceedings because of its bias inclinations in favour of appointing party.[700] The role of litigant party for selection of arbitrator to constitute tribunal has tendency to influence independent of arbitrator. Selecting party avoid to choose an option perusing his opinion as expressed in his writings or decisions unfavorable for his case. Thus, overlapping appointment of arbitrators for similar cases has questioned fairness of procedure in ICSID proceedings.[701] The bias arbitration mechanism has generated a debate of legitimacy of arbitrators for deciding investment disputes.[702]

5.2.1.1.4 Unpredictable Judgments of ICSID Tribunals

Widely agreed factors contributed to legitimacy crisis are bias and unjust exercise of ICSID jurisdiction because of wrong reasons and violation of fundamental values of administrative law. These rule of administrative law serves as necessary preconditions to legitimacy.[703] The legitimacy gap is due to improper application of standards of review for the questions of public law in ISDS.

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[697] Strezhnev, "Detecting Bias," 23.
[698] Burke-White, "Argentine financial crisis," 285.
[699] Waibel and Wu, "Are Arbitrators," 3.
[700] Ibid., 23.
[701] Burke-White, "Argentine financial crisis," 23.
[702] Waibel and Wu, "Are Arbitrators," 2.
[703] Bodansky, "Concept of legitimacy," 7.

economic and political concerns for the states. The political and economic framework in LDCs have been debating to recalibrate the rights and obligations under investment treaty regime. Since 1990s LDCs have been facing some unpredictable consequences while dealing with the institutional settlement of investment disputes. The factors which have directly and specifically affected politico-economic fabric of the states from inside include:

i. Roaring Frequency of ICSID litigations

ii. Hefty claims against fragile economies

iii. High Cost of ICSID litigation

iv. Heavy weight awards: Liability for Tax payer

v. Lack of supervisory review

5.2.1.2.1 Roaring Frequency of ICSID Litigations

The investment agreements between the developed and the developing nations resulted in majority of litigations against developing and transition economies.[708] Rarely, developed countries have the background of faced ICSID litigations. There are few incidences when any developed country has faced any ICSID litigation which resulted in the award against the developed country. By June 2019 the twelve richest[709] economies of the world[710] have faced twenty one (21) out of the total 652 ICSID litigations including six of the USA and nine of Canada under the NAFTA

[708] Chung. "Lopsided international investment law regime," 956.
[709] USA(6), China(3), Japan(0), Germany(3), UK(0), France(0), India(0), Italy(0), Brazil(0), Canada(9), Russia(0), South Korea(0)
[710] *Investopedia,* "Richest Economies of the World," accessed October 15, 2019. https://www.investopedia.com/insights/worlds-top-economies.

agreement. [711] These developed economies of the world despite of having more than 75% of the total world economy, have rarely faced ICSID litigations. On the other hand, the poorest nations of the world like Burundi, Gambia and Republic of Congo[712] have faced four, eight and 14 ICSID litigations respectively, from the multinationals of developed economies.[713]

In the history of ICSID jurisdiction countries from Eastern Europe[714] and Central Asian have been the most respondents in ICSID litigations i.e. 32%. The foreign investors approached ICSID mechanism against most Least Developing Countries (LDCs) of the world. The LDCs which faced the most litigations belong to South America (23%), Mideast and North Africa (16%) and Sub-Saharan Africa (11%).[715] Contrarily, the developed capital exporting nations of the world are rarely happened to respondent in ICSID litigations i.e. Western Europe (8%) and North America[716] (4%) cases.[717]

US trade representative (USTR) fact sheet report of 2015 has provided that USA has faced fifteen ISDS arbitration proceedings without losing any case out of those. The case decided in favour of USA are ten where rest of the proceedings were settled amicably or discontinued. Three of the settled ISDS against US were of

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[711] *ICSID*, "Case details," accessed October 15, 2019 https://icsid.worldbank.org /en/Pages/cases /casedetail.aspx?.

[712] The per capita income of: Burundi (290 $), Gambia (709 $) and Congo (473 $) per Annum.

[713] *ICSID*, "Case details," accessed October 15, 2019. https://icsid.worldbank.org /en/Pages/cases/casedetail.aspx?

[714] Bulgaria, Hungary, Czech Republic, Ukraine, Moldova, Belarus, Russian Federation, Slovakia, Romania, and Poland Montenegro, Serbia, Albania, Croatia, Bosnia and Turkey are countries in **Eastern Europe** and **Central Asian** nations includes: Kazakhstan, Kyrgyzstan, Uzbekistan, Turkmenistan and Tajikistan

[715] *ICSID*, "Caseload 2019". **South American** are **12** sovereign countries: Colombia, Bolivia, Argentina, Chile, Peru, Uruguay, Brazil, Paraguay, Venezuela, Guyana, Suriname, and Ecuador. There are **14** countries in **Middle East**: Bahrain, Qatar, United Arab Emirates, Yemen, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman and Syria. These 7 countries belong to **Northern Africa** : Algeria, Egypt, Libya, Morocco, Sudan, Tunisia, and Western Sahara

[716] The **seven** countries are categorized as **Western European** nations, those are France, United Kingdom, Ireland, Netherlands, Belgium, Luxembourg and Monaco and North America includes USA, Canada & Mexico

[717] *ICSID*, "Caseload 2019".

Canadian foreign investors under NAFTA. On the other hand, the US corporations have initiate ISDS claims against other host states 138 time.[718]

In first thirty years of ICSID, there were only 35 case, wherein first of them got registered in 1972. In last two decades, foreign investors have challenged the host states measures of environment, health, public safety and ban on toxin in other 650 cases before ICSID forum. This campaign of litigation is so strong that in 2015 only 70 new case were registered against the host states.[719] The frequency of the ICSID litigation shows that South America is the region faced the most as respondent to the hefty claims from foreign investors. More than thirty percent (30%) which are 131 ICSID cases out of 549 of ICSID litigations, have been filed till December 2015 against these South American nations. In 2012, out of 149 pending cases before ICSID tribunal 24 were against Argentina.[720]

The litigation trends show that majority of ICSID litigations have been initiated between multinational corporation of the developed world and LDCs. The high cost of ICSID litigations has burdened the weak respondents. The fragile economic conditions of those LDCs have not been able to sustain such heavy claims and its high cost of defense in most of the cases. Michael Waibel has pointed out in his empirical analysis that 633 ICSID cases have been filed before ICSID to constitute arbitration tribunals. After excluding pending case there have been 353 cases out of which only 231 decisions have taken by the ICSID tribunals, rest were compromised by parties at earliest stage even before the exercise of jurisdiction to proceed with the

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[718] Fact Sheet: Investor State Dispute Settlement (ISDS), Off. U.S. Trade Representative, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015 .

[719] *ICSID,* "List of Pending Cases," accessed http://www.worldbank.org/icsid/cases/pending.htm.

[720] *Kluwer Arbitration,* "New Investment Arbitration Center in Latin America: UNASUR, A Hybrid Example of Success or Failure? Accessed November 11, 2019. http://arbitrationblog .kluwerarbitration .com/2016/05/27/unasur.

case.[721] The vulnerable economies forced to settle those investment disputes on the terms of multinationals after realizing the burden of compliance. Such heavy burden of compliance for hefty claims have stir political and economic resentment among those LDCs.

5.2.1.2.2 Hefty Claims against Fragile Economies

A large majority of ICSID litigation have been filed which contained heavy claims against fragile economies. These multibillions claims create high risks for their economic sustainability of the countries. In recent past, in case of occidental petroleum corporation vs Republic of Ecuador[722], the multinational corporation filed a claim of US$ 3.4 billion in 2006. This has not been the single instance where Ecuador experience such hefty claim for the measures taken by the government before ICSID forum. Other claims include Perenco Limited vs Ecuador[723] in 2008 of US$ 3 billion and Burlirgton Resources vs Ecuador[724] of US$ 2 billion in the same year in 2008. The Republic of Ecuador have had experienced fourteen ICSID litigations of hefty claims in addition to other US$ 19 billion claim investor-state under UNCITRAL in case of Chevron corporation and Texaco petroleum corporation vs the Republic of Ecuador[725] in 2007.

The Republic of Venezuela experienced thirty six ICSID claims until 2012 when she served notice of withdrawal from icsid. These ICSID claims include multibillion dollars claim. In cases of Conocophillips Petrozualta vs Bolivarian

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[721] Waibel and Wu, "Are Arbitrators," 12.
[722] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11.
[723] Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6.
[724] Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.
[725] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

Republic of Venezuela[726] and Venezuela Holding Vs Bolivarian Republic of Venezuela[727] multinational petroleum corporations filed US$ 31.7 billion and US$ 16.8 billion respectively. The other multibillion dollar claims include US$ 3.2 billion Crystallex Corporation, US$ 3 billion Rusoro Mining, US$ 2.5 billion Gold Reserve, US$ 1.5 billion CEMEX Caracas and US$ 1.2 billion Vannessa Ventures Vs Bolivarian Republic of Venezuela[728]. The fragile economies like Venezuela to deal with the pressure of such multibillion dollars claims to fear an existential threat to their economic sustainability. Even the last claim of 2020 has been registered against Albania to make its fifty-forth (54) of the year. A total of 825 ICSID litigations have been filed till final Day of December, 2020. [729]

Another Latin American state Republic of Peru have experienced twenty-four (24) litigations till June 2019, including two multibillion claims. In 2010 in case of Renée Rose Levy de Levi v. Republic of Peru[730], a claim of US$ 7 billion is filed as a result of a banking dispute before ICSID by a French corporation. A year later in another case of Renee Rose Levy and Gremcitel S.A. vs Republic of Peru[731], French construction company filed its US$ 50 billion claim against Peruvian government on the violation of France-Peru BIT of 1993. Both multibillion claims were decided in favour of foreign investment company for which the award were announced in 2014.

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[726] ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30.
[727] Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27.
[728] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/11/2; Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/12/5; Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/09/1; CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15; Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/04/6.
[729] Arka Energy B.V. v. Republic of Albania, ICSID Case No. ARB/20/54. Accessed December, 2020, https://icsid.worldbank.org/cases/case-database.
[730] Renée Rose Levy and Gremcitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17.
[731] Ibid.

Republic of Argentine has been the country which have experienced highest number of ICSID litigations i.e. 56 despite its late joining of the treaty in 1991and its ratification in 1994. In 2019, out of 487 concluded case 48 belong to Argentine Republic.[732] In the backdrop of financial crisis of 2001-02 the Argentinian government took emergency measures for the economic stability in the country. The multinational foreign corporations invoked ICSID jurisdiction for the claim of damages for treaty violative actions of the state. The ICSID litigations against Republic of Argentine include US$ 10.5 billion of Repsol, S.A. vs Argentine Republic[733] by a Spanish oil and gas company for the violation of Argentine-Spain BIT 1991. Other multibillion ICSID claims were filed against the Argentine include the case of Total S.A. v. Argentine Republic US$ 1.292 billion, Suez and Vivendi vs Argentine Republic of US$ 1.2 billion, Teinver S.A., Transportes de Cercanías S.A vs Argentine Republic of US$ 1 billion and claim of one billion US dollars in Urbaser S.A. vs Argentine Republic.[734]

The poorest economies of the world have experienced multibillion dollars ICSID litigations. The weak countries like Uzbekistan and DR Congo[735] have been respondents in eight and ten ICSID litigations until the year 2019. In Mobile Telesystems vs Republic of Uzbekistan[736] the multinational Telecom Company filed claim of US$ 2.5 billion. At the same time the DR Congo and South Sudan faced

[732] Out of total of 758 registered ICSID claim on 18th October 2019. Accessed October 18, 2019, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx.
[733] Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38.
[734] Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1); Suez &Vivendi v. Argentine, ICSID Case No. ARB/03/19; Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26.
[735] As per World Bank data 2019, the total size of GDP of Uzbekistan and Congo are approximately 50.5 and 47.2 billion US$ respectively. Where the Gross National Income i.e. GNI of Uzbekistan and DR Congo are 2020 and 460 dollars per Annum.
[736] Mobile TeleSystems OJSC v. Republic of Uzbekistan, ICSID Case No. ARB (AF)/12/7.

multibillions claims in International Quantum Resource Ltd. vs DR Congo[737] and Sudapet Company Ltd. Vs South Sudan[738]. In both cases the weakest economies of the world have to face the claims of more than a billion dollars where the total size of GDP of South Sudan is 3 billion dollars with its GDI of 460 $ in the year 2019.[739]

5.2.1.2.3 High Cost of ICSID litigation

The high cost of litigation has been another economic burden for the medium and small scale foreign investors. The large multinational companies have the capacity to bear such huge cost of ICSID litigations. The ICSID arbitration cost includes arbitrators' fee, administrative and representation fee of the expert witnesses. The ICSID arbitration rule provides that after registration of ICSID dispute, the parties to select one arbitrator each to constitute ICSID tribunal. The third member as president is selected by the mutual consent of appointed members tribunal by the parties. Otherwise, Secretary General ICSID who can appoint the third member as president at its discretion from the ICSID panel of arbitrators or otherwise.[740] The ICSID center charge one time registration fee of US$ 25000 at the time of registration of the ICSID dispute and US$ 32000 per year as administrative charge from the parties to the ICSID litigation.[741]

ISDS regime has burdened the LDCs with large legal bills for the respective tax payers when the cost of litigation is on average $ 8 million in ISDS. This cost some time increase up to $ 30 million to prosecute the case. Arbitrators are also charging at the rate of $ 1000 per hours per lawyer as member of the team. The

[737] International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo, ICSID Case No. ARB/10/21.
[738] Sudapet Company Limited v. Republic of South Sudan, ICSID Case No. ARB/12/26.
[739] Diana Rosert, "The Stakes Are High: A review of the financial costs of investment treaty arbitration,"*International Institute for Sustainable Development* 8 (2014).
[740] ICSID Convention, 1965.
[741] Ibid.

example of Philippine government can be cited, which spent $ 58 million to defend the investment dispute against the German airport operator. The arbitrators on average earn $ 1 million in a reported ICSID case. In mining extraction dispute, the host state spent over $12 million.[742] According to ICSID arbitrators are entitle to claim $375 per hour i.e. $3000 per day while performing their functions relating to litigations of ISDS.[743] This cost is eventually lifted by the tax payers of the LDCs who, mostly, have no access of basic necessities of life.[744]

The excessive cost of litigation for ISDS of an average of US$ 8 million, which some increased up to US$ 40 million occasionally may cause inability for some foreign investors.[745] In Abaclat vs Argentine[746] , the claimant disclosed its cost of US$ 28 million and the respondent as US$ 12 million. The litigant parties spent more than 40 million on representing lawyers, administrative fees of ICSID and other expenses to deal with the ICSID litigation. The high cost of ICSID litigation is one of the reasons for the third parties funding for ICSID litigations.[747]

The option of ISDS through transnational international forum unlikely accessible for every foreign investor. The high cost of litigation precludes large majority of medium and small scale foreign investors from bringing their claims before the ICSID forum. The reasons referred of their financial impact on such corporation are hefty claim of damages,[748] high cost of litigation with its damaging

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[742] Broad, "Corporate Bias," 866.
[743] *ICSID,* "Fee and Expenses," Accessed https://icsid.worldbank.org/apps/ICSIDWEB /arbitrators/ Pages/Claims-for-Fees-and-Expenses.aspx. According to the ICSID site, arbitrators are entitled to "a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings (corresponding to US $375 per hour)." Claims for Fees and Expenses,
[744] Olivet and Eberhardt, "Profiting from injustice," 2.
[745] Klett, "National Interest," 225.
[746] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5. (formerly Giovanna a Beccara and Others v. The Argentine Republic).
[747] Rosert, "Stakes Are High,".
[748] Harten, "Five justifications," 13.

impact on the poor economies of the world to defend the ICSID litigations filed by the large multinational corporation.[749]

A largescale claim and its heavy cost of defending such litigations before ICSID forum has changed the bargaining positions of fragile economies of the world. These heavy weight law suits have generated a fear of compliance of such costly obligations for the host state respondents. The dissuasive effect of such costly litigations sometime compels the LDCs to accept a compromise to the dire advantage of the complainant foreign investors.[750]

5.2.1.2.4 Heavy weight awards for Tax payer

The remedy which is available for violation of treaty obligations is in the form of damages. The amount of damages are awarded at the discretion of the ICSID tribunal. Investment tribunals have awarded damages for expensively interpreted clauses of direct or indirect expropriation and breach of fair and equitable treatment of the investment treaties. The amount of damages are calculated for market value of actual damage, loss of profitability even in future without considering any balancing factors taken by the host state.[751]

International forums have settled some very heavy weight award, which have generated reactive attitude of the states. The largest ever in the history of investment treaty arbitration has been the Yukos award against Russian Federation in which ad hoc tribunal under UNCITRAL awarded US$ 50 billion for expropriatory measures of the host state.[752] Large amount of damages were awarded to a petroleum consortium

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[749] Klett, "National Interest," 225.
[750] Rosert, "Stakes Are High,".
[751] Ibid.
[752] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227.

working in Russia. The Cairo Regional Centre for international commercial arbitration decided the case of Mohamed Adulmohsen Al-Kharafi & Sons Co. vs Libya and others in 2004. This investment dispute settled by ad hoc arbitration tribunal by awarding an amount of more than US$ 935 million.[753] In another case of CME vs Czech Republic the ICSID tribunal awarded of $ 350 million for the control of US based media calculating even of the future profits with interest. In CME vs Czech Republic, majority of the three members' tribunal decided heavy damages against the respondent, despite of the fact that the third member write a separate opinion by filing his dissent on the amount of damages award against a developing economy of Europe. The tribunal awarded penal damages without considering capacity of Czech Republic to bear the burden of financial liabilities.[754] In recent past, it may be alleged that such a heavy amount of damages could not be awarded for crime against humanity after a war of aggression against such a fragile economy.[755]

In ICSID system of ISDS, the largest ever amount of damages were awarded in the case of Occidental vs Ecuador i.e. US$ 1.7 billion.[756] In another ICSID case of Československa obchodní banka, a.s. v. Slovak Republic, the ICSID tribunal awarded an amount of more than US$ 867 million in a banking investment dispute to Czech foreign investor bank on the proof of violative action of Slovakian government under Czech-Slovak BIT of 1992.[757] The Republic of Argentine has received multimillion dollars awards in Siemens (238.8), Azurix (165), CMS (133), Sempra Energy (128) and Compania de Aguas &Vivendi (105).[758] The payment of interest is another

[753] Rosert, "Stakes Are High,".
[754] Chung. "Lopsided international investment law regime," 965.
[755] Ibid., 965.
[756] Occidental v. Ecuador, ICSID Case No. ARB/06/11.
[757] Československa obchodní banka, a.s. v. Slovak Republic, ICSID Case No. ARB/97/4.
[758] Siemens v. Argentine, ICSID Case No. ARB/02/8; CMS v. Argentine, ICSID Case No. ARB/01/8; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12; Sempra v. Argentine, ICSID Case No. ARB/02/16; Suez &Vivendi v. Argentine, ICSID Case No. ARB/03/19.

additional burden on the respondents and on the vulnerable economies LDCs. Some of the investment treaties have provided provisions including interest in case of award of damages against the respondent host state. The interest may be calculated as simple or compound[759] unless otherwise provided in investment treaty.[760]

There are ICSID cases where the amount of damages have exceeded even from the amount of damages. In Wena vs Egypt the tribunal announced US$ 8 million compensation for foreign investor and provided additionally amount of US$ 11 million as interest as part of compensation.[761] In another case, Republic of Georgia received an award of US$ 15.1 million for taking measures violative of Greece-Georgia BIT 1994. At the same time, ICSID tribunal ordered to pay US$ 30 million in addition to the amount of award which is almost double of the amount of actual compensation awarded.[762] The calculation of compound interest have aggravated the financial impact for vulnerable economies of the world. ICSID tribunals decide the amount of damages at their discretion by considering the actual loss of investment and the future economic loss of the corporation. The calculation of damages and award of amount of interest and its nature is highly unpredictable for the parties to realize. The ICSID tribunals have assumed the authority to decide pre-award and post-award interest and its nature even without considering the compelling circumstances of the vulnerable economies of the respondent host states. There is no coherence and predictability at the time of awarding damages in ICSID litigations. At the same time, most of these awards are not available publically to analyze the real impact of their

[759] Simple interest mean same net value of owed to the claimant calculated over the several year time. The compound interest is charged on the net value plus already accrued interest i.e. interest upon interest.
[760] Rosert, "Stakes Are High,"
[761] Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4.
[762] Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18.

financial implications. This lack of fairness and transparency has generated legitimacy crisis for the ICSID regime.

5.3 Impact of Legitimacy Crisis

The accumulative effect of ISDS regime has been to stir the politico-economic debates among the member states. In backdrop of expensive litigations and their failure to meet legitimacy standards of ICSID mechanism of ISDS, reform in ICSID system has become an important agenda of international community. The host states have realized their incapacity to protect their vital interest of the states under the effect of an unpredictable system of compromised fairness. This has generated a debate of economic implication of ISDS. This eruption of ISDS litigations have weaken confidence of host state on ICSID jurisdiction in the presence of multibillion pro-investor judgment of ICSID tribunals. Former Secretary General, Hamid Ghardavi, has concluded that ICSID arbitration is like an elephant which was born and has outgrown the room and has caused suffocation for capital importing nations in particular.[763] The frequency of cases, hefty claims and heavy weight awards in result of ICSID litigation against capital importing countries, specifically, South American nations have had stir the resentment to their deviated approach. During 2002 – 2012 Bolivia, Ecuador and Venezuela decided to denounced ICSID convention and relinquish their BITs, which provide for ICSID jurisdiction for ISDS. The discussions of the establishment of alternative mechanism in Europe and South America have its roots in legitimacy crisis of ICSID system of ISDS.

[763] Gharavi, "ICSID annulment committees," 6.

5.3.1 General Global Debate

The above mentioned determinant factors have generated general issues of global are reflective of:

I. Global political and economic debates

II. Politico-economic drives in states

ISDS played an important role for the development of the perception of illegitimacy about transnational arbitration. In Ecuador legal battle of Lago Agrio between an American Oil Corporation and Ecuador. In a highly publicized case of 17 years of domestic litigation by amazon indigenous were awarded with the compensation of US$ 18 billion against the Chevron Corporation, an American petroleum company. The Chevron Corporation through its subsidiary Texaco Petroleum Company (Taxpet) was held liable for the environmental damages to the Amazon rain forest area and contaminations of crude oil while exploitation of several Oil fields during 1990s.

The Chevron Corporation challenged Award of US$18 billion before UNCITRAL for international investment arbitration under US-Ecuador BIT. The ad hoc tribunal issued an order for provisional measures to the effect of maintaining status quo regarding execution of US$18 billion award against the Petroleum Company. The tribunal held that the respondent Ecuador to take all measures necessary for the suspension of the enforcement of the US$ 18 billion judgment. The tribunal ordered to preclude to issue any certification form to the respondent for the enforcement of the award and to keep inform constantly the tribunal of any

development in the domestic case.[764] Chevron Corporation challenged the US$18 billion which later reduced to 9.5 billion before the US federal court in New York that declared the award a product of fraud and racketeering hence unenforceable. This judgment of US federal court confirmed by US Court of Appeal of Second Circuit in August 2016. The UNCITRAL litigation is still pending. The Ecuador as respondent challenged the legitimacy of the UNCITRAL jurisdiction in the litigation of Chevron Corporation on the assertions of unequal right to invoke jurisdiction of transnational tribunals denied such right to host state. This perceived inequality is further provided with the investor right to approach international forum without intervention of home state. The right to invoke ISDS jurisdiction denied by the host state.[765]

This litigation has created perception of economic hegemony by the capital exporting nations. The president of Ecuador termed United Nations as an agent in drafting a legal barbarity, in order to aid Chevron and to promote interest of the great capital.[766] The controversial proceeding in the eye of Ecuadorian government a backlash against ISDS in politico-legal history of Ecuador. The Latin American nations have been respondents in large number of ICSID litigations for last two decades. The Argentine, Venezuela and Peru have been respondent in 56, 49 and 14 ICSID litigation till October 2019. The Latin American political debates surrounds around transnational litigation. Even the voices from United States of America have been high to criticize the ISDS mechanism of transnational forum.

In 2007, Bolivian President Evo Morales, a hardline opponent of investment treaties, announced its withdrawal from ICSID mechanism. He touted that he has rejected a major institution of the World Bank by asserting that this system has been

[764] Chevron v.Ecuador, UNCITRAL, PCA Case No. 2009-23.
[765] Santiago Garces Jaramillo, "Is the Legitimacy Crisis in the Eye of the Beholder?" (2012): 5.
[766] Ibid., 4.

protecting foreign investors' rights without providing any mechanism for the enforcement of any rights of the host states.[767] The multinational corporations always win in case of dispute with the host state by generating harsh damages against respondents.[768]

In USA, a democrat senator, Elizabeth Warren, in 2015 led a campaign against of ISDS mechanism. The senator from Massachusetts state accused the system as "rigged and pseudo court". This arbitration mechanism has potential to put heavy burden on the US tax payers in case of dispute with the multinational corporations.[769] US Trade Representative, in response to the opposition campaign, have pointed out that foreign investors have rarely pursue any arbitration against USA and remained unsuccessful.[770]

In USA, President Barack Obama signed Trans-Pacific Partnership (TPP) treaty with 11 Pacific nations. The USA senate ratified the treaty among of heated controversial debates about ISDS jurisdiction of transnational forums.[771] US presidential candidate Donald Trump, during his election campaign, in 2016 promised with American public that his administration would withdraw from TPP, TTIP and NAFTA which has imposed heavy cost on tax payer. After the US election of 2016, President Donald Trump announced withdrawal of USA from TPP, TTIP and NAFTA in 2017.[772]

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[767] Clint Peinhardt and Rachel L. Wellhausen, "Withdrawing from investment treaties but protecting investment," *Global Policy* 7, no. 4 (2016): 573.
[768] Nolan, "Challenges," 433.
[769] Elizabeth Warren, "The Trans-Pacific Partnership Clause Everyone Should Oppose," *Washington Post*. Accessed February 25, 2015. https://www.washingtonpost.com/opinions.
See also, Nolan, "Challenges," 435.
[770] *USTR*, "Fact Sheet: Investor-State Dispute Settlement (ISDS), accessed May 11, 2015. https://ustr.gov/about-us/policy-offices.
[771] Nolan, "Challenges," 435.
[772] Accessed June 12, 2019. "https://www.asiatimes.com/2019/05/opinion", *Asia Times*.

In Europe, public debates have been motivated to adopt series of recommendations regarding replacement of ISDS provisions in Transatlantic Trade and Investment Partnership (TTIP).[773] One of the important agenda items for the negotiation process between US and EU is ISDS mechanism reform for the new Transatlantic Trade Investment Partnership (TTIP) propose agreement.[774]

The NGOs and the civil society of some host states have reacted to the decisions of the ICSID tribunals.[775] In September 2016, more than 220 law and economics professors has urge the US Congress to reject the inclusion of ISDS provision in Trans-Pacific Partnership (TPP)[776] and Transatlantic Trade and Investment partnership (TTIP).[777] A collectively signed letter has emphasized that the system of ISDS undermine the domestic constitutional institutions and state sovereignty. Foreign investors are able to bypass democratic legal framework by raising domestic constitutional questions as treaty claim before panels of private arbitrators. These foreign investors can re-initiate their investment disputes which have already been lost in domestic courts.[778] The letter stressed that two centuries old US court system has gained its legitimacy through fairness of procedures and reliability of the lawsuits. This democratically refined and independent judicial system ensures non-interference on the part of judges for policy decisions of the executives to maintain a confidence of impartiality. On the other hand, the ISDS system has the potential to dilute constitutional protections and outsource domestic

[773] Nolan, "Challenges," 436.
[774] Klett, "National Interest," 214.
[775] Kaushal, "Revisiting history" 492.
[776] USA and Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam Pacific Rim Countries (i.e. 1+11). TTIP has been a propose agreement on trade and investment between US and European Union (28 members) but negotiations are on halt as the president Donald Trump has announced the policy of quieting of negotiation of TTIP under the propose framework.
[777] Accessed June 12, 2019. https://www.citizen.org/wp-content/uploads/isds-law-economics-professors -letter-sept-2016.
[778] Ibid.

legal system to a deficiently accountable mechanism of transnational institutional arbitration.[779] The letter highlighted that the NAFTA treaty covers 10% shares of investment, protected under NAFTA and TPP, which would cover double of it if passed with ISDS provisions of the agreement. The impact coverage of TTIP would reach about 70% of total foreign investment which has an estimate of 7 time increase of cost of litigation in USA.[780]

5.3.2 Specific Responses of the States

The politico-economic debates about ISDS has prompted number of LDCs to their unconformable response to the ICSID mechanism to reduce chances of exposure of multimillion claims before ICSID tribunal by eliminating a forum in the direct access of foreign investor or by cancelling their rights under investment treaties.[781]

In three Argentinian cases, the flawed interpretations and problematic reasons of awards have generated 'chilling effect' on states to join for BIT obligations for ISDS.[782] The states have realized that the contradictory awards and dominance of western arbitrators and their financial interests have adversely affected legitimacy discourse of the ISDS mechanism.[783] The expansive scope of ICSID mechanism has reduced regulatory authority to deal with vital interests of the states even during extraordinary crisis.[784]

In the last two decades, ICSID regime have generated suffocation of financial sustainability under legitimacy crisis of ISDS mechanism. This legitimacy crisis of

[779] Ibid.
[780] Ibid.
[781] Lavopa, Barreiros, and Bruno, "How to kill a BIT," 871. See also, See *UNCTAD*, "World Investment Report 2012: Towards a New Generation of Investment Policies."
[782] Burke-White, "Argentine financial crisis," 22.
[783] Schill, "Conceptions." 9.
[784] Burke-White, "Argentine financial crisis," 13.

ISDS mechanism has offered an unconformable response of reluctance, deviation and sometime backlash to the prevalent ICSID mechanism. This deviated response generated backlash against ICSID mechanism. The states have responded some time radically to the extent of jurisdictional conflicts between ICSID tribunal in its most radical form. It is believed that member states adopted such radical approach of compliance under apprehension of financial implications of ICSID awards under reduced regulatory sovereignty and unfair treatment of the adjudicative forums.[785]

5.3.3 Nuances of Global Response to ISDS Legitimacy

The ISDS mechanism has been established on one of the objectives to enhance flow of foreign investment into signatories' member nations. This is still a debatable myth and looking for any empirical evidence to prove the assertion. Contrarily, assertion on the basis of facts have raised questions on the alleged claim. The world's largest trade partners USA and China have not yet signed any BIT. Brazil, one of the most important recipients of foreign investment, signed number of BITs but did not ratify any of such instrument which provide for ICSID jurisdiction.[786] At the same time, there are countries which have signed BITs in large number, but have had received moderate inflow of foreign capital. The studies have shown unprovable results for the assertion of increase of capital inflow into the countries which have assumed ICSID jurisdiction through BITs. But the assertion which is provable from the empirical results that the countries with more BIT have been facing more litigations as respondents before ICSID litigations.[787] The fact that most of the BITs appear in the last decade of the 20th century, which can be a dramatic proliferation

[785] Clint Peinhardt and Rachel L. Wellhausen. "Withdrawing from investment treaties but protecting investment." *Global Policy* 7, no. 4 (2016):571.
[786] Kaushal, "Revisiting history"510.
[787] Ibid., 517.

with mostly contained provisions to assume ICSID jurisdiction. The start of new millennium of 21st century, the signs of discomfort emerged with increase of litigations against the LDCs as respondent.[788]

Notwithstanding China's reluctance to full accession of the ICSID jurisdiction, is a recipient largest chunk of foreign investment inward flow of foreign investment from last three decades.[789] Wang Guiguo has identified friendly traditional Chinese culture, business friendly government policies an effective Administrative Review system as responsible for low number of litigations before transnational dispute settlement forums.[790] On the other hand, more than half of the pending disputes in 2003 were against the Latin American respondents i.e. 30 out of 59.[791] But Brazil, which is largest recipient of foreign investments in the Latin American region, is not respondent in any ISDS, despite of its refusal to ratify any treaty to accept ICSID jurisdiction for such disputes.[792]

Lack of transparency of decision, with poor legal reasoning, pro-investor bias of arbitrators, controversial treaty interpretations and contradictory holding of the ICSID judgments have contributed to develop unconformable responses of the host state.[793] This unconformity of attitude reflected sometime by reluctance of state to assume obligations under ICSID mechanism or deviation from prevalent practices of ISDS. This unconformable behavior got worsen when a backlash appeared in consequent of denunciation of obligation of ICSID or BITs. The most aggravated

[788] Lavopa, Barreiros, and Bruno, "How to kill a BIT," 872.
[789] Wang Guiguo, "Chinese Mechanisms for Resolving Investor-State Disputes," *Jindal Journal of International Affairs* 1, no. 1 (2011): 205,222.; See also, In 2011, first ever ICSID case filed by a Malaysian corporation i.e. Ekran Berhad vs China suspended within three months of its filing due to the agreement between the parties.
[790] Ibid., 222.
[791] ICSID, List of Pending Cases, accessed December, 2020 http://www.worldbank.org/icsid/cases/pending.htm.
[792] Garcia, "Dirty little secrets," 338.
[793] Lavopa, Barreiros, and Bruno, "How to kill a BIT," 873.

form of this backlash appeared when jurisdictional conflict emerged Pakistani superior court take a stand to deny ICSID jurisdiction in its investment disputes pending before ICSID.

The inherent substantive and procedural crisis of ICSID jurisdiction engender unconformity responses of states impliedly and expressly. The unconformable attitudes of the states expressed by reluctant and avoidance behavior of member states for future transactions. The legitimacy crisis grew to develop a response of backlash among the member states of ICSID other than those not opted for ICSID convention. These unconformity attitudes have been evidenced from non-ratification of ICSID convention, non-ratification of investment treaties, denouncing ICSID convention, withdrawal from investment treaties and consequent diversion to other mechanism.

5.3.3.1 Reluctance

Reluctant response of the states started since the establishment of ICSID convention. Majority of negotiating states were not agreed to join ICSID in its existing format. Latin American states did not join ICSID convention in its first thirty years period of time. Some important economies of the world were not interested to join icsid. The reluctance response of international community has been reflective from non-joining, delayed joining, signed ICSID but not ratified and signing but its late ratification. At the same time, some states have shown their reluctance to accept ICSID jurisdiction for the sake of protection of their vital public interests.

The international investment law regime has witnessed of such experience realization of financial implications of the treaty obligations. NAFTA states have started their reform program for the purpose of controlling economic damage of such treatification. South Africa and Pakistan reported their concern about BIT

implications.[794] Some states remained reluctant to adopt such binding obligations. One of the options is to renegotiate expiring treaties. States expressed their concerns on the negotiating agenda for inclusion of new exceptions to gain some freedom to regulate some vital public issues.

In China, two enactments, Chinese-Foreign Joint Venture Law of 1979 and Chinese Foreign Cooperative Venture Law of 1989, have opened the doors foreign investment for the country. Multinational corporations of the world in large number brought much needed capital and skills to transform the state owned economy to an attractive investment friendly state of the world.[795] China remain reluctant to joined WTO till 2000. But, finally joined dispute settlement understanding (DSU) of WTO in 2001 in furtherance of its commitment to peruse its investment friendly policy objectives in the changing environment cold war era.[796] Prior to WTO, China joined ICSID in 1993. Despite of late joining of ICSID, the Chinese administration has been reluctant to give unregulated privilege to foreign investors to invoke ICSID jurisdiction against the county. China filed its reservation regarding ICSID jurisdiction under Art 25(4) of the ICSID Convention, 1965. The reservation of ICSID jurisdiction says that China would only consider submitting to jurisdiction of the ICSID over compensation resulting from expropriation and nationalization.[797]

Brazil never join the efforts for the establishment of the ICSID jurisdiction. Brazilian governments signed few BITs which the legislature rejected to ratify later on. Brazil also refused to ratify ICSID Convention by considering the system at the

[794] Harten, "Five justifications," 3.
[795] Guiguo, "Chinese Mechanism," 204.
[796] Ibid., 208.
[797] Ibid., 217.

Constitution of the country. Brazilian government has no any practice of incorporating ISDS provisions in their contracts of foreign investment.[798]

Malaysia has adopted the policy of go slow with the ISDS regime and have signed few investment treaties to include ISDS of icsid.[799] Sri Lanka did not sign any BIT to assume obligations for ICSID jurisdiction until the socialist government remained in power. After the socialist regime Sri Lanka signed seven BITs in the short span of three years of ICSID based ISDS.[800]

On the other hand, the EU has been reshaping its policy since 2014. This shift of paradigm has included renegotiation of FTAs with the provisions for the investment protection. The Treaty of Functioning of the European Union (TFEU) provided for the exclusive competency of European Union to negotiate for the Investment protection treaties. EU has started its move to replace the existing framework of investment treaties for the EU member states. EU has successfully completed its renegotiation process in Canada-EU Comprehensive Economic and Trade Agreement (CETA) in September 2014 and EU-Singapore Free Trade agreement (EUSFTA) in October 2014.[801] The governments in EU has started its policy to scale back the rights of foreign investors. EU has decided to oppose inclusion of ISDS clause for any investment agreements.[802]

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[798] Broad, "Corporate Bias," 856.
[799] Muthucumaraswamy Sornarajah, "State responsibility and bilateral investment treaties," *Journal of World Trade* 20, no. 1 (1986): 82.
[800] Ibid., 82.
[801] Press Release, "Joint statement -Canada-EU Comprehensive Economic and Trade Agreement (CETA)," European Council, accessed February 29, 2016, http://www. trade.ec.europa.eu.
15 December 2015. EU and Singapore conclude Investment talks', European Commission press release, Brussels, 17 October 2014.
[802] Cécile Barbière and Anne-Claude Martin, "French government will not sign TTIP agreement in 2015," *EURACTIV,* accessed November 17, 2014, http://www.euractiv.com /sections/trade-society/french-government-will-not-sign-ttip-agreement-2015-310037. (illustrating that some European Union countries oppose ISDS clauses).

The reluctant behavior of the member nations some time appeared to readjust their rights and obligations under investment treaty regime. Some states have renegotiated treaties and carved out a policy of creating exceptions to protect their vital public interests. Norway has introduced the new BIT to avoid expensive interpretations for inclusion of corporate social responsibility, labour rights, environment, public health and human rights exceptions for enforcement of foreign investors' claims.[803] Sweden and Austria have been reluctant to terminate their BITs. But negotiating for providing an alternative structure, specifically, for the ISDS and investment protection generally.[804] India renegotiated its treaty with Singapore to remove fair and equitable treatment clause of the India-Singapore BIT instead of omitting the whole protection for foreign investments.[805] USA has also revised its Model investment treaty to include recognition of labour rights, environment protection, and public health and safety measures for the subjects of the state.[806]

5.3.3.2 Deviations

The other nuance of the response towards ICSID dispute resolution mechanism is the deviated positions adopted by the member nations. The deviated stance of the states show that firstly, some states are not interested to go further with existing framework of ICSID regime. Those states have subscribed their policy of 'No More ICSID'. Secondly, the deviating states are on the way to encourage an alternative option to deal with the existing disputes and for the disputes to come.

Some developed countries decided to shed some dangerous aspects of their BITs and progressively replace with some Model BITs. The main aim to change

[803] Kaushal, "Revisiting history" 494.
[804] Carter, J. H. (Ed.). (2017). *International Arbitration Review*. Law Business Research Ltd..P-188
[805] Ibid., 493.
[806] Ibid., 494.

policy regarding BIT focus to exclude expensive impacts of their ISDS provisions.[807] The chilling effect to regulate public interests has been the major cause of deviated responses of the states. Philip Morris vs Australia[808] was a first ever case filed against Australia. The case appeared when Philip Morris a multinational corporation filed its multibillion claim for damages against Australia on cigarette packaging restrictions by Tobacco Plain Packaging Act 2011. The state legislations-imposed restrictions of mentioning health warnings, plain packaging and limited branding to regulate public health.[809] Foreign investor asserted its claim by relying upon fair and equitable clause of Hong Kong-Australia BIT 1993. The foreign investor corporation alleged that the host state's restrictions have expropriated foreign investment. Restrictions imposed for the sake of regulating public health are violative of Hong Kong-Australia BIT, 1993.[810] The treaty provides for the institutional arbitrational settlement of investment claims by Permanent Court of Arbitration under UNCITRAL Arbitration Rules, 2010. The issue discussed in the case that whether ISDS system can interfere with the democratic authority to regulate the public interest in a state?[811]

After the announcement of award on jurisdiction in case of Philip Morris vs Australia[812], the Australian government announced its policy on trade and investment of not including ISDS clause in investment treaties. Australia adopted its policy to consider ISDS clause on case to case basis. In Korea-Australia 2014, FTA included refers ICSID jurisdiction for ISDS, but the clause was not available in Japan-Australia

[807] Lavopa, Barreiros, and Bruno, "How to kill a BIT," 874.
[808] Philip Morris v Australia, UNCITRAL, PCA Case No 2012-12; See also Nolan, "Challenges," 429.
[809] Brower and Schill, "Is arbitration a threat," 483.
[810] Art.2 (2) of Hong Kong-Australia BIT 1993.
[811] Philip Morris v Australia, UNCITRAL, PCA Case No 2012-12, See also Nolan, "Challenges," 430.
[812] Ibid.

FTA 2014. Australia has discontinued its practice to incorporate ISDS provisions in their agreements.[813]

In 2019, China has been the 2nd largest recipient of foreign investment after USD.[814] In spite of tremendous foreign investment activities in China, there are few incidents in which foreign investors have approached transnational ISDS. China has adopted Administrative Reconsideration Law in 1999 to provide an alternative mechanism for ISDS. The foreign investors can approach local administrative bodies and complain centers at local level in case of infringement of any right due to any actions of the government agency. The Administrative Reconsideration Law provides that in case of dissatisfaction with decision of local administrative agency, foreign investor can approach people's government level administrative body at next vertical hierarchy. Foreign investor can file its review of administrative bodies' decisions before People's Court or State Councils for their rulings whose decisions would be final.[815] Additionally, the Chinese Ministry of Commerce in 2006 has introduced National Complain Centers to deal with complaints of foreign investors and to take interim measures in case of their infringement of legitimate rights.[816]

The post-apartheid period in South Africa moved to participate for the prevailing trends of ISDS regime in 1990s and signed number of treaties to commit to assume ICSID jurisdiction for the settlement of investment regime. After a rally of cases before transnational forum of ISDS, the South African government announced

[813] Press Release, "Gillard Government Trade Policy Statement: trading our way to more jobs and prosperity," *Australian Government, Department of Foreign Affairs and Trade,* April 2011, accessed http://www.acci.asn.au/ .
[814] *UNCTAD,* "World Investment Report 2019,"--.
[815] Art. 30 of the Administrative Reconsideration Law 1999. See also, Guiguo, "Chinese Mechanism," 206.
[816] Guiguo, "Chinese Mechanism," 209.

that all 23 BITs pose a risk to the constitutional commitments of transformation agenda in post-apartheid period in 2010.[817]

In 2008, the twelve South American nations have decided to introduce an alternative mechanism to ICSID, in order to resolve the investment disputes. In consequent to campaign of political leadership of Latin American state, the establishment of UNASUR[818] came into being as a new hybrid forum for the resolution of investment disputes.[819] UNASUR was originally established as a political and economic integration of the region. After five years of its establishment its scope has extended and introduced its Rules of Arbitration for resolution of investment and trade disputes. UNASUR Rule of Arbitration introduced hybrid mechanism for settlement of investment disputes. The Code of Conduct of Arbitrator, exhaustion of local remedies and appeal mechanism so as to correct the errors of law on the pattern of WTO appellate body.[820]

EU has demanded to introduce reform process for their ISDS protection and safeguard of their public interests of outsourced decision making under interpretation of elite law firm. In 2015. European Union has approved in a plan to introduce Investment Court System for their future investment negotiations including TTIP. EU has officially sent such proposal to US for their ongoing negotiation on new TTIP.[821] In response to the criticism on ICSID arbitrations, in 2016, Canada-EU Free Trade Agreement has opted for an alternative forum by establishing standing investment

[817] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 574.
[818] UNASUR stands for Unión de Naciones Suramericanas, i.e Union of South American Nations, is an intergovernmental organization originally created on the political and economic pattern of European Union in 2008 Brazil and compose of **12 South American Nations** including Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. It came into force in 2011 after the deposit of its ratification by nine countries.
[819] "New Investment Arbitration Center in Latin America: UNASUR, A Hybrid Example of Success or Failure?" Accessed July 11, 2019. http://arbitrationblog.kluwerarbitration.com/2016/05/27/unasur.
[820] Ibid.
[821] Klett,"National Interest," 227.

tribunals to settle their disputes relating to trade and investments under CETA, 2016 agreement. The standing tribunal is consists of 25 jointly selected Canada and EU from EU, Canada and third country. The judges are required to disclose their interests and experiences under the code of conduct for arbitrators under Annex 29-B of the CETA 2016. The member of the standing tribunal are barred to participate any arbitration proceedings in case of any direct or indirect conflict of interests.[822]

5.3.3.3 Backlashes

The politico-economic resentment of states has been instrumental to generate an unconformity response among the ICSID member states. The nuances of backlash appeared in response of 'No more ICSID obligations' or unilateral or some mutually termination of treaties or withdrawal from ICSID convention. One of the aggravated form of backlash appeared in the form of jurisdictional conflict. The attitude of jurisdictional conflict appeared when the CJEU held the incompatibility of obligation for ISDS as envisaged in bilateral investment treaties of EU members states. CJEU has assumed the jurisdiction for investment disputes despite of treaty provisions for ISDS of transnational forums. This backlash response appeared when the superior courts in Pakistan ordered to deny ICSID jurisdiction of the foreign investment disputes in the backdrop of legitimacy concerns of foreign investment contracts.

The backlash response of nations have recently emerged phenomenon. The states have not only backlash against the ICSID regime, but also other transnational mechanism for the settlement of investment disputes. The politico-legal resentment of states emerged in the background of hefty damages for the measures of public interests. In 2009, Russian government announced to cancel Energy Charter Treaty

[822] Waibel and Wu, "Are Arbitrators," 25.

(ECT), which provides for the ISDS before transnational forums. The Russian administration took such radical step in the backdrop of US$ 50 billion awards against the host state. In 2015, president Putin announced that the Russian government will not pay the amounts of award and proceeded to challenge the enforcement of such awards in domestic courts. Thus, Russian government won the case in the domestic court of Netherland which made it difficult to enforce the award.[823]

5.3.3.3.1 No More ISDS Obligations

The backlash response of the states started when some states promulgated its policy of 'No More ISDS Obligations'. Australia and South Africa can be cited as an examples in pursuance to this policy. After the announcement of ISDS award on jurisdiction in the case of Philip Morris vs Australia[824], when a multinational corporation file a multibillion claim for taking measures for public health. But the transnational ISDS forum rejected the stance of Australian government that such measures were taken in interest of the public health and in pursuance of international standards. In response to the arbitration award on assumption of jurisdiction, the Australian government announced its revised policy on trade and investment of not including ISDS clause in every investment treaties. Australia adopted its policy to consider ISDS clause on case to case basis. In Korea-Australia, 2014 FTA, includes ICSID jurisdiction for ISDS, but the clause was not available in Japan-Australia FTA 2014. Australia has discontinued its practice to incorporate ISDS provisions in their agreements.[825]

[823] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 574.
[824] Philip Morris v. Australia, Award on Jurisdiction and Admissibility, PCA Case No. 2012-12, 588.
[825] Press Release, "Gillard Government" *Australian Government, Department of Foreign Affairs and Trade,* April 2011, accessed http://www.acci.asn.au/ .

In 2012, South Africa conducted a detail review of ISDS obligations under BITs and result of arbitrations of investment disputes against the state. The Review Report 2012 recommended for the termination of existing investment treaties. In 2013, South Africa announced its policy of 'not to renew the exiting BITs with ISDS clause but to renegotiate for new model of BIT without any direct invocation of transnational forum for ISDS.[826] In pursuance of such policy of non-participation for ISDS, South Africa in 2015, passed a legislation which does not allow foreign investors to approach for international arbitrations.[827]

5.3.3.3.2 Termination of Investment Treaties

There are number of other states which responded to terminate their existing BITs and reluctant to renew it. These states have sometime initiated mutual negotiation of the other contracting state to terminate such treaty or take steps for the unilateral termination of BIT to exonerate themselves from the ISDS obligations. Some authors have defended the existing prevalent mechanism of investment dispute settlement and do not believe about the existence of legitimacy crisis for ISDS regime. The termination of convention and treaties are exercised and advocated by limited number of states. This radical stance of the states is often the result of internal politics and lack of legitimacy. In 1970s, such steps were prompted by socialist block to undermine submission to ICSID jurisdiction. [828]

But the survey of responses for ISDS obligation have suggested otherwise results for the conformity responses of the states.

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[826] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 575.
[827] Norton Rose Fulbright, "Bilateral investment treaties in South Africa," accessed July, 2014, http://www.nortonrosefulbright.com/knowledge/publications. See also, "New Treatment of Foreign Investors in South Africa," *LEXOLOGY*, accessed March 26, 2016, http://www.lexology.com /library/detail.aspx.
See also, Nolan, "Challenges," 434.
[828] Brower and Schill, "Is arbitration a threat," 496.

The paradigm shifted from conformity treatment of ICSID regime. Some Latin American states decided to withdraw from binding contractual obligations for ISDS. Some for these countries terminated their existing BITs to exonerate from the ICSID jurisdiction for future claims by considering it harsh system where foreign investors mostly remained successful to put obligations on respondent host states.[829]

The President Morale's government in 2007 has introduced the constitutional provisions, which discourage the negotiation of any BIT. The constitutional binding has made it difficult for future administrations to opt for any renegotiation of the investment treaties to restrict sovereign authority of state.[830] In June 2011, Bolivia denounced its bilateral investment treaty with USA.[831]

Ecuador raised her concerns on the legitimacy of international investment law regime. She slapped a backlash by introducing a constitutional provision to restrict such treaties or international agreements which surrender the sovereignty of the Ecuadorian state in disputes with multinational corporations. The only exception of regional Inter Latin American arbitrations.[832] The Occidental oil and gas mining case has caused major resentment when billion dollar award was pronounced against the fragile economy of Ecuador.

The president Rafael Correa of Ecuador formally introduced Art. 422 of Ecuador's 2008 Constitution. This constitutional provision prohibits the state to enter into any agreement to affect to 'cede sovereign jurisdiction to international arbitral tribunals in contractual or commercial matters between the state and the individuals or

[829] "The Arbitration Game," *The Economist*, accessed October 11, 2014. http://www.economist.com. (Expounding that some countries are withdrawing from treaties with ISDS clauses because of problems in the arbitration process).
[830] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 573.
[831] *UNCTAD*, "World Investment Report 2012: Towards a New Generation of Investment Policies" 87.
[832] Art. 422 of the Constitution of the Republic of Ecuador, 2008.

corporations'. Thereupon, President Rafael administration terminated eight bilateral investment treaties with Latin American states[833] in 2008 by declaring these treaties failed to add economic benefits but bring huge cost of ISDS to the country.[834] In 2009, Ecuador announced to withdraw from majority of its remaining BITs with other thirteen states of the world.[835]. In 2013, a national commission was constituted to review that the remaining BITs on the touchstone that; firstly, whether these are violative of the sovereign authority of the Ecuadorean state. Secondly, whether the BITs are beneficial for the country. Thus, in 2014, the report of the commission highlighted the politico-economic implications of such treaties and recommended the termination of remaining BITs.[836]

The governments in Venezuela signed 26 BITs with the hope of inflow of foreign investment in 1990s with ISDS clauses. The investment disputes of Multinational Corporations gave rise multibillion claims against host state which was followed by immense domestic political resentments. The rise of political sentiments in response to number of hefty claims before ICSID forum motivated the Chavez government to withdraw unilaterally from Netherland- Venezuela BIT in 2008 and from ICSID finally in 2012. However, the BIT remained effective till 2013 because of its sunset clause.[837] President Hugo Chavez government announced withdrawal from ICSID convention thus its jurisdiction calling these agreements 'thorn on the side'. Venezuela has had faced 37 ISDS litigations before ICSID tribunals when the ten (10) of these cases were registered in 2011 alone. The country had been respondent in

[833] Ecuador's BITs with Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic and Uruguay. See also, Peinhardt and Wellhausen, "Withdrawing from investment treaties," 573.
[834] Ibid.
[835] This included investment treaties with the US, UK, Netherlands, Germany, France, Canada, Switzerland, Finland, Sweden, China, Argentina, Chile and Venezuela. See also, Peinhardt and Wellhausen, "Withdrawing from investment treaties," 573.
[836] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 573.
[837] Ibid., 573.

more than twenty multibillion dollars litigations pending in 2012 at the time of withdrawal announcement from ICSID convention.[838]

Indonesia, in 2015, terminated its BIT with Netherlands on the expiry of the date of the treaty. Indonesia after review of its treaty framework, announced its policy to end the automatic renewal of BITs. In effect, the remainder BITs shall be finished on the last day of the treaty.[839] In 2016, Indonesian government in response to emergence of internal political resentment announced unilateral withdrawal from 'nine' of its BITs[840] and rest of 'Eleven' in 2016-2018.[841]

Even the termination trend was on the rise in 2018 when termination of 20 investment treaties were terminated. The Ecuador and India terminated 12 and 5 BITs respectively in single year of 2018. Resultantly, since 2010 there are 309 investment treaties have been terminated.[842]

5.3.3.3.3 No More ICSID

The states with background experience of facing multibillion dollar claims before ICSID tribunals and owing to their fragile economic conditions some states decided to quit the ICSID system. The substantive and procedural vulnerability of ICSID mechanism have engendered some radical approach to withdraw from ICSID convention. Bolivian president Evo Morales a hardline opponent of the investment treaties expressed his government policy of withdrawal from ISDS system. In 2007,

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[838] Ibid.
[839] Leon E.Trakman and Kunal Sharma, "Why is Indonesia terminating its bilateral investment treaties? *E. Asia Forum* (September 20, 2014), accessed http://www.eastasiaforum.org. See also, Matthew J. Skinner and Zara Shafruddin, "Turning Tides: What Indonesia's Reconsideration of Bilateral Investment Treaties Means for Foreign Investors, *Jones Day Publications, Oct. 2014*, accessed http://www.jonesday.com. (Explaining that Indonesia is not renewing its bilateral treaty with the Netherlands).
See also Nolan, "Challenges," 435.
[840] With China, Laos, Malaysia, Netherlands, Italy, France, Slovakia, Bulgaria and Egypt.
[841] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 574.
[842] *UNCTAD*, "World Investment Report 2019."

Bolivia was the first ever country which submitted its notice of withdrawal from ICSID Convention under Art. 71 from the binding obligations of the convention.[843]

Another Latin American nation that is Ecuador notified such withdrawal from ICSID in 2009 under Article 71 of the Convention. This was another radical step as the part of series of measures which made a challenge to the current state of affairs of ISDS mechanism.[844] Ecuador finally withdrew from ICSID Convention in 2010.[845]

In 2012, Venezuela also opted for the same policy of withdrawal from ICSID jurisdiction and terminated some of the exiting BITs to relieve itself from the binding obligations in future ISDS claims.[846]

5.3.3.3.4 Jurisdictional Conflict: A Consequent Fall out of Unconformable Responses of States

In recent years European Commission (EC) has consistently raised various arguments in support of incompatibility of intra-EU investment arbitration and EU law. EC has intervened in some intra-EU arbitration proceedings by holding view that settlement of investment disputes is exclusively reserved to the institutional bodies of the European Union. European commission has requested for termination of their intra-EU treaties the member states. EC has initiated "infringement proceedings" in 2015 against some EU member states[847] for their failure to comply with the request.[848]

Court of Justice of EU (CJEU) has authority to exercise its function as the guardian of EU legal system which considered the ISDS system of existing intra-EU

[843] Nolan, "Challenges," 433. See also, ICSID News Release, 'Bolivia Submits a Notice under Article 71 of the ICSID Convention', 16 May 2007, available at: http://icsid.worldbank.org/ICSID/.
[844] Jaramillo, "Legitimacy Crisis," 6.
[845] Peinhardt and Wellhausen, "Withdrawing from investment treaties," 573.
[846] 'Venezuela officially withdraws from ICSID', El Universal (Caracas), 25 January 2012, at: http:// www.eluniversal.com/economia/120125/venezuela-officially-withdraws-from-icsid.
[847] Romania, Slovakia, Austria, Netherland and Sweden
[848] *International Arbitration Review. Ed. J. H. Carter,* (Law Business Research Ltd, 2017): 189.

BITs as incompatible with the EU law which contravened with the Art. 344 of TFEU.[849] In Achmea vs Slovakia[850], Court of Justice of European Union (CJEU) declared that provisions of BIT which confer jurisdiction on the institutional tribunals (i.e. SCC) for the resolution of investment disputes are contrary to the EU law. The EU member states have foreclosed from evading the role attributed to the Court of Justice of European Union (CJEU) and intra-EU arbitral award by investment tribunal, which can be submitted to the CJEU for the review of the award. The court further held that an arbitral tribunal formed for Investor-state Dispute Settlement (ISDS) under BIT is not a court nor a tribunal of the EU member state, and can be called upon to interpret under EU law.[851]

The investment dispute appeared in 2004 when a Dutch insurance company Achmea made an investment in Slovakia after EU member country introduced liberal investment policy in public health sector. In 2007, the measures were Adopted which prohibit distribution of profits made from the insurance activities. The Dutch company filed an investment dispute with investment tribunal (Investor-State tribunal) in Frankfurt Germany under UNCITRAL rules of arbitration by invoking Art.8 of Netherland-Slovakia BIT 1991(then Czechoslovakia). The investment tribunal in 2012 declared in its award that Slovakia has violated treaty obligations and held liable for damages of EUR 22 million.

Slovakia challenged the award before German Federal Court of Justice (Bundesgerichtshof, BGH) to set aside the decision by asserting argument that the investment tribunal lack jurisdiction. The Slovakia pleaded incompatibility of

[849] Ibid., 188
[850] Court of Justic S. e, judgment of 6 March 2018, case C-284/16, Achmea BV [GC].
[851] Ibid. See also, S. Gáspár-Szilágyi, "It Is Not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV." *European papers: a journal on law and integration*, 3(1) (2018): 357-373.

investment treaty provisions with the EU law.[852] German Federal court of justice made reference of the matter to the CJEU.

CJEU ruled that international agreements such as bilateral investment treaties cannot effect autonomy of the European Union legal system and CJEU has the authority to ensure autonomy of the law of EU member states. International law justified the constitutional structure of EU law, which emerged in consequent of international treaties and has primacy over the laws of the member states. The EU treaties have established judicial system to ensure consistency and uniformity in the interpretation of EU laws. A tribunal for the settlement of investment disputes under SCC and institutional arbitration under UNCITRAL Rules of arbitration is neither a court nor tribunal of a member state within the meaning of Art. 267 TFEU.

In another case of Micula vs Romania, Micula filed claim for damages before ICSID against the host state for withdrawing its subsidies under new legislation in the country. A Swedish company Viorel Micula were running a food supply business by availing subsidies on the business. Micula challenged measure of abolishing subsidies before ICSID tribunal on the grounds of indirect expropriation and violation of fair and equitable treatment clause of Sweden-Romania BIT. Respondent Romania challenged the jurisdiction of the tribunal that such change of competition law and withdrawal of subsidies were introduced as a compulsory requirement for the EU membership. ICSID tribunal rejected the plea and proceeded to announce its final

[852] Article 267 and Article 344 of The Functioning of the European Union (TFEU).
Art. 267 regulates referrals by "any court or tribunal of a Member State" to the CJEU to give a ruling on questions regarding "the interpretation of the Treaties; or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union"; Art. 344 provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the [EU] Treaties to any method of settlement other than those provided for therein";

award of $250 Million for the violation of the BIT in 2013. The ad hoc committee on annulment also refused to annul the award against Romania in 2016. [853]

Romania filed its complaint with European Commission (EC) that legislation to change of competition law and measures thereunder have caused to pronounce award of damages against member states of EU. EC accepted the plea and issued an injunction to enjoin the enforcement of ICSID award against Romania by declaring that such enforcement of award is violation of EU law which prohibit subsidies. EC prohibited to implement ICSID award and ordered Romania to recover back money already paid to the claimant in pursuance of ICSID award.[854]

In the decisions of EC and the Court of Justice of EU have declared the principle to the revival of the disconnection clause for intra-EU arbitrations. The judgment has the overriding effect for the awards for Investor-State Dispute Settlement. The litigations pending before ICSID tribunals of intra-EU states would have constitute the excess of jurisdiction. At the same time, the rejection of the CJEU judgment might have unenforceable ICSID awards in EU states.

The most radical approach of backlash emerged in the form of jurisdictional conflict with the ICSID adjudicative process. Pakistan has rejected US model BIT which contain ISDS provisions. The model BIT drafted for the purpose does not encourage private investors to directly hold liable.[855] The judicial organ of Pakistan

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[853] Micula v. Romania, Final Award, ICSID Case No. ARB/05/20.

[854] The decision of EU Commission prohibiting implementation of Arbitral Award of 11th December 2013, EU Commission Decision 2015/1470 of 30 March 2015, on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania Arbitral award Micula v Romania of 11 December 2013 (notified under document C(2015) 2112 Official Journal of the European Union), (L 232/43 4.9 April 9, 2015), Accessed https://www.italaw.com.

[855] Mehtab Haider, "Pakistan refuses to accept US model on investment treaty," *The News International,* March 13, 2015, accessed http://www.thenews.com.pk. See also, Amin Ahmed, "Bilateral investment treaty model," *Dawn New*, March 2, 2015, accessed http://www.dawn.com. See also, Nolan, "Challenges," 434.

showed its conflicting response to restrict the state to participate for icsid proceeding and insist to decide the investment disputes in some of its decisions.

The legality and propriety determinants appear to generate conflicts of jurisdiction for ISDS can be termed as most deviating rather conflicting with the prevalent normative standards of international investment regime. The unconformity response of Pakistan has been emerged from conformity to conflict in the backdrop of legitimacy discourse of international law.

5.4 Conclusion

The fault lines of ICSID jurisdiction has generated legitimacy crisis in the backdrop of strangulated regulatory space for vital national interests and global objectives. ICSID obligations impacted to regulate public and national interests of the host states. Host states have compromised their sovereignty and diplomatic protections under international law. The fairness rhetoric of ICSID mechanism has been affected by the patterns of constitution of ICSID tribunals. The ICSID administration has authority to constitute ICSID tribunals unaccountable in their decisions and interpretations by relying upon principles of any national, public international or private international law in the exercise of their jurisdiction. The unaccountable arbitrators of elite commercial lawyers group have been the 'judges of their own cause'. The elite arbitrators have decided cases to generate pro-investor interpretations. ICSID arbitrator can be a pleader of his client in any other investment arbitration. And there is no bar to refer his own or his colleague's interpretation of any issue in any other case. The bias interpretations of investment issues sometime remain helpful to secure repeated appointments as arbitrators in high cost litigations. In cases unevenly constituted ICSID tribunals exercised its jurisdiction to produce

contradictory judgments and expensive interpretations issues relating to investment disputes. Additionally, lack of effective review system for such unpredictable judgments of ICSID tribunals has adversely affected the contracting states as perpetual respondents.

Majority of the capital importing contracting states received shocks in consequent of roaring frequency of ICSID litigations. LDCs experience of facing hefty claims as perpetual respondent for the 'measures' taken in the vital national and global interests. These hefty claims in majority of cases resulted in heavy weight awards against fragile economies of LDCs. The financial obligations of these awards and high cost of ICSID litigations have persuaded fragile economies to lead a deviated response. The exercise of ICSID jurisdictions has adversely affected legitimacy rhetoric of ICSID system of ISDS. For the first time, *C N Brower* has correlated distrust of the ICSID jurisdiction and trust deficit of arbitrators. This declining trust of contemporary regime of ICSID base ISDS have negatively impacted perceived legitimacy of the ICSID. Therefore, the experience of the mechanism have contributed to engender legitimacy crisis for the regime and a consequent reluctance and backlash for the system.

Apart from general international political debate about the legitimacy of ICSID regime, the contracting states have expressed their deviated responses through to adopt further obligations under the ICSID mechanism. Under the circumstances, incoherent, indeterminate and unpredictable approach of ICSID regime has persuaded some contracting nations to take steps otherwise to conformity approach for ICSID mechanism. The nuances of responses appeared when states announced their policies to abandon their obligations under ICSID Convention. Some states have decided to withdraw from the BITs to relinquish ICSID jurisdiction. There are contracting states

adopted alternative mechanism to relinquish ICSID regime. One of the radical approach of backlash to ICSID regime appeared in Pakistan. The executive organ of the state has opted the policy of 'no more ICSID obligations' of ISDS mechanism. The Superior Judiciary in Pakistan decided to restrict mandatorily the state executives to participate in ICSID litigations, which led to jurisdictional conflict with supranational adjudicative forum.

CHAPTER NO- 6

INSTITUTIONAL INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN PAKISTAN

6.1 Introduction

Since its inception in 1947, Pakistan participated for free market economic model in pursuit of nation building objectives and to overcome economic crisis. As the successor of British style of parliamentary system, Pakistan adopted legal framework of British India. Pakistan also adopted regulatory framework for trade and investment of British India. The economic goals of the newly established state have been dependent on private participations for the economy. The constitutional and legal frameworks in Pakistan have been supportive for the development of liberalized economic regime in the country. The political declarations, economic strategies and corresponding legal framework have been the reflective of Pakistan's commitments for international obligations for trade and investment.

The successive governments in Pakistan, during last seventy-two years, have adopted the policies for the promotion and protection of foreign investments in the country. The governments and political parties have born the consensus view for the protection of foreign investments in the country. The five years economic plans and future economic strategies have been formulated to facilitate private sector from inside and outside the country for investment. The three organs of the state have reinforced the policies of promotion and protection of foreign investment in Pakistan. Pakistan has developed a facilitative legal framework for the foreign investments. This remained the part of efforts to attract investment from private investors.

Constitutional provisions have been incorporated for the superior protection of the economic goals of the country. The governments in Pakistan have owed its commitments to international institutions to the effect of promoting and protecting foreign investments in the country. In pursuance to the protection of foreign investment, Pakistan has owed its commitment for an impartial and independent investment dispute settlement of international mechanism. The country introduced policies to facilitate foreign investors for the preservation and protection of their investment. Pakistan accepted ICSID jurisdiction as dispute settlement mechanism on the bases of international instruments including bilateral and multilateral investment treaties. A large number of investment treaties have been signed in the last decade of 20th century. Majority of these instruments have introduced the ICSID mechanism for the settlement of investment disputes.

The stakeholders of international economic regime have established a transnational mechanism for ISDS with the objective to create a balance between flow of foreign investment and its protection. Pakistan as international economic community has adopted the ICSID convention for its impartial and independent mechanism with hope to attract foreign investment. Pakistan signed ICSID convention on 6th July, 1965 and deposit its ratification on September 15, 1966. The ICSID convention came into force after 30 days i.e. 15th October, 1966.[856] The first ever ICSID litigation against Pakistan was filed in 1987 i.e. Occidental vs Pakistan.[857] Out of the eight total complaints filed till December, 2019[858] Secretary General ICSID constituted the tribunal for the seven claims. The claim was withdrawn by the

[856] https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.
[857] Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan, ICSID Case No. ARB/87/4.
[858] Ibid.; SGS v. Pakistan, ICSID Case No. ARB/01/13.; Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/02/2.; Impreglio S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3; Bayindir v. Pakistan, ICSID Case No. ARB/03/29. ; Agility v. Pakistan, ICSID Case No. ARB/11/8; Tethyan v. Pakistan, ICSID Case No. ARB/12/1; Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1.

complainant in Impregilo S.p.A. vs Pakistan.[859] The three out of seven claims ended up in compromise between investor and host state before pronouncement of final award.[860] The ICSID tribunals rendered their final awards of damages in four investor state investment disputes.[861] Pakistan, as respondent, challenged jurisdiction of the ICSID tribunals in six of these investment disputes. The matter of fact is that in all six proceedings respective ICSID tribunals have rejected such objections to its jurisdiction. At the same time, there were three incidences when the domestic courts in Pakistan have assumed jurisdiction in conflict with the ICSID jurisdiction. Two of these jurisdictional controversies ended up with pronouncement of billion dollars awards as the serious blow to the fragile economic conditions of Pakistan. [862]

6.2 Pakistan's Affirmative Approach for Foreign Investment Protection

Pakistan's participation to international economic regime has been reflective through its joint venture agreements, MOU, and several joint declarations with other countries of the region. The investment policies of government indicative of its consistent commitment to attract foreign investment in the state. The statutory framework of the country has recognized foreign investors' rights and protection of their interests. The statutory framework of the country has introduced standards of treatment for foreign investors during their stay and ensured for the repatriation of their assents from the country. Pakistan is a country that signed first ever BIT in 1959, and up till now has been the signatory of 52 bilateral investment treaties, regional and

[859] The case of "Impregilo v. Pakistan, ICSID Case No. ARB/02/2" was withdrawn under Rule 44 of the ICSID arbitration on the request of the claimant.
[860] Occidental v. Pakistan, ICSID Case No. ARB/87/4; SGS v. Pakistan, ICSID Case No. ARB/01/13.; Impreglio v. Pakistan, ICSID CASE No. ARB/03/3.
[861] Bayindir v. Pakistan, ICSID Case No. ARB/03/29; Agility v. Pakistan, ICSID Case No. ARB/11/8.; Tethyan v. Pakistan, ICSID Case No. ARB/12/1; Karkey v. Pakistan, ICSID Case No. ARB/13/1.
[862] Tethyan v. Pakistan, ICSID Case No. ARB/12/1; Karkey v. Pakistan, ICSID Case No. ARB/13/1.

international treaties. Free trade agreements and other bilateral investment contracts have been indicating affirmative approach for the new economic order for foreign investment protection.

Pakistan has shown its consistent commitments for the promotion of international investment with an inconsistent behavior for the settlement of investment disputes. This inconsistent response of Pakistani constitutional institutions has surfaced a conflict of jurisdiction with international investment dispute settlement institutions. Certain decisions of superior courts of Pakistan surfaced a debate about unpredictability of state of Pakistan for investment jurisprudence. The unconformity response of Pakistan has emerged under the impact of legitimacy crisis of ICSID regime.

Pakistan participated with international community for the promotion and protection of global economic efforts. These efforts were undertaken with the vision to facilitate international inward and outward flow of capital for foreign investment in the countries. The United Nations played its role for the establishment of global economic system. The UNO also build a consensus for addressing concerns of capital importing nations of the world to preserve their sovereignty over natural resource and the private foreign investors.[863] The charter of 1975, the world community has reaffirmed their commitment to establish new economic order based on sovereign and economic equality. The charter was an attempt to accelerate economic growth of developing countries by overcoming main obstacles.[864] The campaign for the

[863] United Nations (1963). "General Assembly Resolution 1803 (XVII): Permanent sovereignty over natural resources", Official Records of the General Assembly: Seventeenth Session, Supplement No. 17 (A/5217) (New York: United Nations): 15-16.
[864] United Nations (1975). "General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States", Official Records of the General Assembly: Twenty-Ninth Session, Supplement No. 31 (A/9631) (New York: United Nations): 50-55.

promotion and protection of investment regime, Pakistan remained part of efforts of international community.

The Organization of Islamic Countries (OIC) also participated for the promotion of foreign investment among the member states. Members of Islamic development bank decided to establish a subsidiary of Islamic corporation to undertake guarantee for foreign investments and export credit for trade among the OIC states. The corporation got protection of their investments against risks of currency transfer, expropriation or related measures, breach of contracts, war and civil disturbances. This was an effort for protection of foreign investment and enhance volume of trade among members of organization of Islamic conference.[865]

In 1985, Pakistan signed the MIGA convention to become the part of multilateral guarantee investment agency of the World Bank Group. The MIGA convention 1985 provides for the issuance of guarantees against commercial risk for the flow of capital in developing states. Foreign investors can seek guarantee for their investment capital against risk factors, including currency transfer, expropriation, breach of contracts, war and civil disturbance.[866]

Pakistan has also signed the convention for the recognition and enforcement of arbitral awards of international arbitration tribunals. It was an effort to recognize the legitimacy of the decisions of the international adjudication regime. The convention

[865] Islamic Development Bank (1992). Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit, (LD133/A:01/RI/MH, C:2212/RI) (Jeddah: Islamic Development Bank)

[866] Multilateral Investment Guarantee Agency (1985). "Convention Establishing the Multilateral Investment Guarantee Agency", Convention Establishing the Multilateral Investment Guarantee Agency and Commentary on the Convention (Washington, D.C.: MIGA), pp. 1-34.

has harmonized the comparative relationships of diversified legal relationships without imposing conditions for its acceptance.[867]

Additionally, Pakistan has been the part of South Asian Regional Free Trade Agreement (SAFTA). SAFTA has incorporated provisions for the promotion of investment among the member nations.[868] The agreement was originally to establish a free trading regime among the SAARC countries with the object of preferential trading arrangements. The contracting parties have concluded to take measures for the removal of barriers to intra-SAARC investments. The agreement does not provide dispute settlement mechanism for the investment dispute but for trade dispute.[869] In pursuit of such affirmative approach to the new global economic regime Pakistan has taken measures through its three organs of the states: the executive actions, legislative backing and judicial conformity for the international obligations.

6.2.1 Legal Framework for Foreign Investment in Pakistan

The conduct of a state has been reflective through government actions and declaration from the executives. The policy framework of the country has incorporated the vision for promotion and protection of foreign investments in Pakistan. The political regimes in Pakistan have contributed to establish a dependable policy framework to attract and protect foreign investment in the country. Pakistan has been the part of multilateral investment agreements, free trade agreement and investment treaties. Participation for a comprehensive international framework for the flow of foreign investment and its protection has encouraged state to accept an

[867] United Nations (1959). "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", United Nations Treaty Series, vol. 330 (New York: United Nations), pp.38-48.
[868] Agreement on South Asian Free Trade Agreement 2006 is agreement among the member of SAARC (South Asian Association for Regional Cooperation) organization. The SAARC was established in 1993 in Dhaka by its contracting member; Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka (7 members).
[869] Article 20 of SAFTA.

impartial and independent mechanism for investment dispute resolution. Pakistan has acknowledged the ICSID jurisdiction in number of investment treaties and agreements for ISDS.

6.2.1.1 Policy Framework in Pakistan for Foreign Investment

Political regimes in Pakistan have encouraged policies to promote and protect foreign investment in the country. The policy framework agreements with the capital exporting nations has been part of efforts to encourage and strengthen economic ties with the developed world and consequent increase of flow of foreign capital into Pakistan.

In 2001, Pakistan and European Community signed an agreement of cooperation for creating favourable conditions for enhancing cooperation in commercial, economic, investment, science and technology and cultural sectors. One of the principle object of this agreement was to promote mutual links to build economic capability for investment in Pakistan. The contracting parties agreed to take measures in order to facilitate contacts between economic operators to promote commercial exchange, market development and investment by private or joint ventures. The parties undertook to establish favourable conditions for transfer of capital to increase mutually beneficial investments.[870] A joint commission was established with the authority to form specialize sub-group for the proper functioning and implementation of different projects, including foreign investments.[871] The

[870] Article 6 of The Cooperation Agreement Between the European Community and The Islamic Republic of Pakistan On Partnership and Development 2001.
[871] Art.16 of the EC-Pak agreement 2001.

agreement provides a saving clause for bilateral investment treaties of member states of European Union and Pakistan.[872]

Pakistan signed another policy framework agreement with USA in 2003 to identify and encourage opportunities for trade and investment.[873] The framework agreement was an effort to establish bilateral mechanism, attract investment by taking measures and raise the process of consultation between the two countries. The parties agreed upon to establish a council on trade and investment with the provision to hold regular meetings to monitor trade and investment relation and to work for the removal of impediments for the flow of investment from private sector.[874] The US-Pak framework agreement was an effort in the backdrop of an ally in war against terrorism, to approach US capital market and to attract foreign investments. The eight clause document has been of great potential to strengthen economic ties between USA and Pakistan. The political development later on, could not prove to be the facilitator for the furtherance of relationship under the agreement.

Different provisions relating to investment measures, which were incorporated in various agreements by Pakistan were efforts to promote foreign direct investment from capital exporting nations of the world. The framework agreement with USA and cooperation agreement with European Community provide investment related provisions' but not providing any procedure for dispute resolution. It is alleged that such policy framework agreements were signed with Pakistan as a reward to participate in the war against terrorism in Afghanistan as Non-NATO ally. Apart from

[872] Art.18 of the EC-Pak agreement 2001.
[873] The Trade and Investment Framework Agreement Between the Government Of The United States of America and The Government of Islamic Republic of Pakistan concerning the development of trade and investment relations 2003.
[874] Article 2 of the USA-Pak framework agreement.

the policy framework agreement, Pakistan has also executed multilateral investment agreement for the protection of foreign investments.

6.2.1.2 Multilateral Investment Agreement (MIA) of Pakistan

Pakistan signed multilateral of OIC and ECO to strengthen its regional economic ties. These agreements proved to be an endeavor to promote investment activities and establish a multilateral consensus for the investment dispute settlements. The agreements for the promotion and protection of investments among Organization of the Islamic Conference (OIC) and Economic Cooperation Organization (ECO)[875] are two comprehensive multilateral agreements which provide investment protection provisions along with dispute settlement procedures for investors in case of investment dispute.[876] Pakistan participated in both agreements as a member of the organizations.

The investment protection agreement by OIC countries was signed in 1986 by member countries with the understanding to develop a climate for investment for optimum utilization of resources of the member countries. The members undertook commitment to provide necessary facilities for entry, residence, working and exit of private investor through this multilateral agreement.[877] The members agreed to refrain from adopting any measures which may deprive the investor from utilization and management of investment.[878] This multilateral agreement provides a procedure for the settlement of investment disputes.[879] According to Article 17 of the agreement,

[875] Organization of The Islamic Conference, 1986.
[876] The Agreement on Promotion, Protection and Grantee of Investments among Members State of the Organization of The Islamic Conference 1986. And Agreement on Promotion and Protection of Investment S Among Eco Member States 2005.
[877] Art.2-16 of The Agreement on Promotion, Protection and Grantee of Investments among Members State of the Organization of The Islamic Conference 1986.
[878] Art.10 of the OIC agreement 1986.
[879] Article 17 of the OIC agreement 1986.

any party to the agreement can opt for reconciliation, process and file a request with Secretary General of OIC to appoint reconciliatory in case the disputing parties failed to appoint with mutual consent. Where two parties failed to appoint and accept solution of the dispute reported by the reconciliatory then each party has the right to resort to the Arbitration Tribunal for the final settlement of the dispute.

Arbitration tribunal is constituted by appointment of one member by each party to the dispute and third umpire with the power of casting vote for the dispute resolution mechanism to be appointed because of consensus of two appointed members. Where any party failed to appoint the member to complete the composition of the arbitral tribunal, the Secretary General OIC has the authority to appoint the member on the request of the aggrieved party.[880] The decision of the tribunal shall be final and shall have the effect of judicial decision of the host state.

The dispute settlement clause of OIC has some distinctive characteristics in comparison with the ICSID jurisdiction: any party to the dispute is entitled to approach the dispute settlement mechanism through reconciliation or arbitration. The decision of the arbitration tribunal shall have the effect of the judgments of the court of the host country and executable as such in the territorial jurisdiction of the state.[881] The decision can be pronounced against investor as well, which is not possible in case of ICSID arbitration. The decision of the arbitral tribunal cannot be challenged before any forum whereas ICSID procedure provides for the annulment proceeding to review the award of the ICSID tribunal.[882] The agreement has made it as prerequisite to approach reconciliatory process before resorting to arbitration.[883] The arbitration

[880] Article 17 of the OIC agreement 1986.
[881] Article 17 of the agreement 1986.
[882] Article 52 of the ICSID convention 1965.
[883] Article 17 of the agreement 1986.

procedure, under this agreement, shall start after non-acceptance of the report filed for the solution of the dispute. Resort to reconciliation is not a prerequisite for the ICSID procedure of arbitration.[884]

In 2005, the members of Economic Cooperation Agreement (ECO)[885] concluded an agreement for promotion and protection of investment among ECO members' states. The objectives of this agreement are to build a favourable climate for the investment by setting up minimum standards of its promotion and protection.[886] Pakistan signed the multilateral agreement as member of the organizations.

The multilateral agreement deals with admissions, entry residence, treatment and repatriation of investment. The contracting members have agreed to take all necessary measures for creating favourable conditions for the protection of interests of investor from other member states.[887] The members states have guaranteed to refrain from taking any measure discriminatory or detrimental to the investment relating interests of the investors.[888] The members have undertaken the obligations to pay a prompt, effective and adequate compensation in case of expropriation, nationalization or any other loss of investment suffered by the investor.[889] The agreement provide for dispute settlement in case of violation of the rights of investor from the member states.

[884] Article 25, 26 of the ICSID convention.
[885] This is a 10 members organization with the objectives to establish strong economic ties among the states; Afghanistan, Azerbaijan, Iran, Kyrgyz Republic, Kazakhstan, Tajikistan, Turkmenistan, Uzbekistan, Turkey and Pakistan.
[886] Preamble of the agreement on promotion and protection of investments among ECO member states 2005.
[887] Article 2 of the ECO agreement of investment protection 2005.
[888] Article 2 of the ECO agreement of investment protection 2005.
[889] Article 5, 6 of the ECO agreement of investment protection 2005.

The agreement provides that in of dispute between investor from a contracting state and host member country, two options are available unless otherwise agreed by the parties through their investment contract: the investor is entitled to file dispute with the domestic courts of the host state or to opt for ad hoc arbitration under UNCITRAL rules of arbitration.[890] The domestic court or ad hoc tribunal has no jurisdiction to interfere each other's proceedings during pendency of the litigation before the arbitral tribunal, constituted under the agreement or Vis versa.[891]

Three members' arbitration tribunal constituted by appointing one member, each from the disputing parties. The third umpire arbitrator is appointed through consensus of already appointed members. In case the appointed members are not agreed for the third umpire appointment, which can be appointed by the president of Arbitral Tribunal of the International Chamber of Commerce on the request of any of the parties to complete the constitution of the arbitral tribunal. The decision of the tribunal shall be final and binding on the parties.[892] The disputing parties also have options to invoke any other jurisdiction under bilateral investment treaty (BIT). The multilateral agreements have been provided with the provisions of investment dispute settlement among the member states. These dispute settlement clauses have been the part of other Free Trade Agreements and Investment Treaties.

6.2.1.3 Free Trade Agreement (FTA) of Pakistan

Pakistan has signed two bilateral Free Trade Agreements (FTA) with China and Malaysia.[893] The agreements were adopted to promote bilateral ties with China

[890] Article 9 of the ECO agreement of investment protection 2005.
[891] Ibid.
[892] Ibid.
[893] Free Trade Agreement between the government of Islamic republic of Pakistan and the government of the people's republic of china 2006. Agreement between the government of the Islamic republic of Pakistan and the government of Malaysia for the closer economic partnership 2007.

and Malaysia in the field of trade and investment. Both agreements established framework of transparent, predictable and facilitative ties to regulate trade and investment for protection of investment and investment activities.[894] Pakistan undertook to adopt policies for facilitation of these FTA.[895]

Chapter 9 of China-Pakistan FTA[896] with the treatment of investor by host country and introduced a dispute settlement mechanism of investment disputes i.e. ISDS.[897] Article 54 of the FTA provides that where any investment dispute, which is not resolved within 6 months through negotiation, the investor is entitled for two option: the investor either can approach domestic courts or to go for ICSID jurisdiction for the settlement of the dispute. The investors are barred to invoke jurisdiction of ICSID where the investor has approached the host state court for the settlement of investment dispute.[898] In that case, the choice of domestic court shall be final. Foreign investor is required to approach administrative agencies of the host state before preferring for these investment dispute resolution forums. The award of these forum shall be final and binding for the parties. China-Pak FTA introduced additional procedures for the settlement of investment disputes for the investor in presence of bilateral investment treaty between the two countries.[899] The consolidated effect of FTA and BIT between China and Pakistan is that foreign investors from both the countries have choices to resolve their investment disputes by availing either procedures under BIT or FTA.

The free trade agreement between Malaysia and Pakistan provide dispute resolution mechanism for the investors who incurred loss due to an alleged breach of

[894] Art.1 of Malaysia Pakistan Free Trade agreement (FTA) and Article 47 of Pakistan China FTA.
[895] Art.4 of Malaysia-Pak FTA and Art.47 of China-Pak FTA.
[896] Signed on November 24, 2006.
[897] Art.54 of the FTA.
[898] Art.45 of the FTA.
[899] BIT 1989.

rights conferred under this agreement.[900] Article 98 of the FTA provides three options for the international arbitration mechanism: The investor can choose to file its investment dispute before Kuala Lumpur Regional Centre for Arbitration or ad hoc arbitration under UNCITRAL rules of arbitration or to invoke ICSID jurisdiction.[901] The investor and host state can be agreed for any rules of arbitration or forum through their investment contracts. Investor has the option to file dispute with the domestic administrative or judicial forums of the host state. Art.98 barred foreign investors to approach any international arbitration procedure if the case has already submitted before the domestic forums. The FTA has introduced two rare provisions in the agreement regarding the limitation for filing of the claim and restitution as another choice of remedy for the tribunals other than damages. The FTA provides that the investor whose investment is violative of the laws and policies of the host state shall not be entitled to claim redress of their claim by availing these options. The FTA, for the first time, introduced this rule in any of the instrument relating to Pakistan. The provision has the background perspective for the investment dispute. This seems to be a conscious effort to achieve greater transparency and predictability in international investment law. Free trade agreements of Pakistan with China and Malaysia provide a comprehensive mechanism of investment dispute settlement. In effect, the bilateral investment treaty with Malaysia was also terminated but China-Pakistan treaty is effective at the simultaneously.

6.2.1.4 Bilateral Investment Treaties (BIT) of Pakistan

Pakistan has been the first country to sign first ever bilateral investment treaty i.e. BIT with Germany on November 25, 1959. Pakistan took a pause of nineteen

[900] Chapter 12 of Malaysia-Pakistan FTA 2007.
[901] Art.98 of the FTA 2007.

years, till 1978, when she signed her second BIT with Romania. The BITs have been considered to be the impetus to the growth of international investment law for the capital importing nations in the era of 1990s. Pakistan signed 53 BITs until December 2020 with 48 nations including less-developing, developing and developed economies of the world.[902]

Before 1990s, Pakistan signed only eight treaties with leading and developed economies of the world.[903] The treaties with all those eight countries are still enforceable. In the last decade of 20th century, Pakistan signed 30 new BITs with thirty new economies of the world and one replacements of old versions of the previously BITs.[904]

The treaties signed by Pakistan before 1990s are between the developed economies of the world.[905]These all 8 treaties were signed and got its ratification as well. There is no example of any treaty with such countries which got terminated or withdrawn, but after their expiry were replaced over the time.[906] The dispute resolution mechanism for investor disputes remain the part and parcel of bilateral investment treaties signed and ratified before 1990s. A diversified and mix approach was adopted by Pakistan for the dispute resolution of investment disputes of foreign investors with contracting parties. The ICSID was not opted for dispute resolution mechanism in majority of the BITs executed till 1990s.

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[902]UNCTAD, Investment policy hub, accessed December, 2020 https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan?type= bits

[903]BITs with Germany (1959), Romania (1978), Sweden (1981), France (1983), Kuwait (1983), South Korea (1988), Netherland (1988), China (1989)

[904] Romania (1995) by replacing 1978 version of the BIT.

[905] Germany 1959, Romania 1978, Sweden 1981, France 1983, Kuwait 1983, South Korea 1988, Netherland 1988, China 1989, accessed October 28, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan?type= bits.

[906] With Romania BIT 1978 replaced with BIT 1995 and for Kuwait BIT 1983 terminated and replaced by BIT 2011.

The BIT adopted by Pakistan and Germany in 1959, introduced no provision for the settlement of investment disputes between investor and the host state. The investor has no option to approach directly to any forum for the resolution of investment disputes. After 19 years of its first ever treaty, Pakistan-Romania 1978 was the first wherein jurisdiction of ICSID tribunal was recognized for investment dispute settlement. The jurisdiction was introduced with the condition that if the award of compensation by national arbitration tribunal remained unsatisfactory for the investor then ICSID forum can be approached. The next three BITs[907]were executed in 1983 wherein Pakistan consented for the ICSID jurisdiction in the treaty where investment dispute could not be resolved amicably between disputing parties. The investor can approach the ICSID jurisdiction without any intervening procedures in the host country. According to the language adopted in these treaties, the investor need not to prove the requirement of consent by the host state to invoke the ICSID jurisdiction.[908] An additional provision was also adopted which prohibit the exercise of diplomatic channel to resolve the investment dispute in Pak-Sweden BIT.[909] In 1988, in the BIT of Pak-Netherland, the jurisdiction of ICSID was consented by the contracting parties for their investors to invoke ICSID jurisdiction without any intervening procedures by the investor. But in the next two BITs, Pakistan opted for different procedure, which has to be adopted for the resolution of the investment disputes. In 1988, the treaty which was finalized with Republic of Korea without involving any international dispute resolution mechanism for the settlement of investment disputes. The Pakistan-Korea BIT provides only compensation in case of expropriation of assets of a foreign investor and declares the arbitration tribunal of the host state of a competent forum for the resolution of an investment disputes. The

[907] France 1983, Kuwait 1983, Sweden 1983.
[908] Art 8 of Pak-Kuwait, Art 8 of Pak-France, Art.7 of Pak-Sweden BITs.
[909] Art 7(2) of Pak-Sweden BIT.

treaty requires an adequate compensation according to the market value of the assets by applying the laws of the host state.[910] The bilateral investment treaty between Pak-China, 1989 also provides that investor can only claim compensation in case of expropriation under the treaty. The options available for the investor under the treaty are: firstly, the investor can claim adequate compensation for expropriated assets, secondly, investor can challenge the legality of expropriation, thirdly can file a review of the amount of compensation before the appellate tribunal of the host country. If the matter is not resolved within a period of one year then the investor has the option to approach any international arbitral tribunal.[911] The investor can approach international tribunal where the amount of compensation is not adequate and the matter is not resolved after filing of complain with the competent authority.

In the last decade of 1990s, Pakistan signed 32 bilateral investment treaties. The majority of the BITs provide the dispute resolution i.e. ICSID mechanism. [912] The treaties have recognized ICSID jurisdiction where means of amicable settlement, including negotiation or consultation failed to resolve the investment dispute. Foreign investors are given the freedom to invoke ICSID jurisdiction for the settlement of investment disputes. Four treaties of the decade have suggested a procedure of constituting an ad hoc tribunal. The ad hoc tribunals are constituted by appointing one member, each by the litigant parties, and the third chairman of the 3 members' tribunal is to be appointed by those two members.

[910] Article 5 of Pak-Korea BIT 1988.
[911] Article 10 of Pak-China BIT 1989.
[912] Fifteen BITs.

In case these two members failed to appoint the chairman, then such chairman to be appointed by an international authority.[913] Whereas, the treaty Pak-Uzbekistan 1992, investor is entitled to approach an international institutional arbitration forum by following the arbitration rules of UNCITRAL.

The first decade of new millennium, clear shift of pattern has been observed regarding the adoption of the bilateral investment treaties. During last nineteen years, Pakistan has only signed and adopted thirteen new were signed and three[914] others to replace the old treaties[915] up till 2019. Pakistan has signed and ratified only one BIT, Pak-Bahrain 2014, in last seven years.[916] These treaties have introduced a time bound option for the settlement of investment disputes. The bilateral investment treaties finalized and ratified after the year 2000 introduced multiple option for resolution of investment disputes. These treaties incorporated the adjudication forums including courts of host state as an option for ISDS. The treaties which were signed to replace the olden version[917] of the bilateral agreements during the years 2000-2017 incorporated ICSID jurisdiction along with other options for the dispute settlement mechanism. On the other hand, only two treaties[918] out of five signed and ratified by Pakistan during 2000-2010 contained ICSID jurisdiction as an option for the settlement of investment disputes. The three other BITs[919] preferred to introduce ad hoc arbitration tribunal for investment dispute settlement. Pakistan has signed and

[913] In case of Iran the parties agreed that the appointing authority is chairman permanent court of international arbitration. The chairman shall appoint the third member to complete the constitution of ad hoc tribunal where any of the party remain fail to appoint her member for the tribunal. In case of Pak-Oman BIT and Pak-Mauritius the appointing authority are president ICJ and chairman International arbitration institute of Stockholm chamber of commerce.
[914] Pakistan-Germany 2009 and Pakistan-Turkey 2012. Pakistan-Kuwait 2011 has been ratified and in effect terminated the old version of BIT 1983.
[915] Two out these three are not yet ratified.
[916] Up till 31st of December 2017.
[917] Germany 1959, Turkey 1995, Kuwait 1983.
[918] Lebanon 2001 and Bosnia 2001.
[919] Lao 2004, Tajikistan 2004 and Kazakhstan 2003.

ratified only one bilateral investment treaty during last seven years i.e. 2010-2017 between Pakistan and Bahrain in 2014. The contracting parties have preferred ICSID as forum for ISDS.

Pakistan was the first contracting state with Germany for introducing BIT a new trend in the jurisprudence of international investment law. Pakistan actively supported development of bilateral investment treaties up till the year 2000 and preferred to select ICSID as dispute resolution forum as a part of instrument. The behavior of Pakistan has been significantly retreated and defused to incorporate ICSID as preferential forum for investment dispute settlement. Pakistan has clearly shifted his choice for ICSID jurisdiction during last seventeen years. Pakistan signed 45 bilateral investment treaties after 1990s, but 25 out of those got its ratification and in forced, which reflects diversion from the prevailing investment regime of international investment law.

6.2.2 Constitutional and Legislative Protection of Foreign Investment in Pakistan

The affirmative approach for foreign investment protection yielded from powers available under the written Constitution of Islamic Republic of Pakistan, 1973. The Constitution provided trichotomy of powers among three organs of the state: Legislature, Executive and judiciary. The Constitution vests the executive and legislative powers with the federal government and the parliament respectively. Parliament has the authority to make laws and the executives of the state put the laws into execution.[920] The executives have the authority to take actions or measures not prohibited under the Constitution to implement the policies of the political government.

[920] Art. 70, 90 of the Constitution of Islamic Republic of Pakistan, 1973.

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[920] Art. 70, 90 of the Constitution of Islamic Republic of Pakistan, 1973.

Federal government consists of the Prime Minister and Federal Ministers. The Prime Minister being chief executive of the state has the authority to exercise its authority at its own or through Federal Ministers under delegated authority by the Prime Minister.[921] The executive authority of the federal government is exercised in the name of the President as the head of executive in Pakistan.[922] Federal Ministers discharge their delegated functions through respective Federal Secretaries in accordance with the procedures provided by the Rules of Business.[923] The governments in Pakistan adopted a policy of promotion and protection of foreign investments in the country. The five years plans, MOUs, joint declarations with other countries, adoption of conventions, bilateral investment treaties, and multilateral investment treaties have been reflection of affirmative approach of governments for the protection of foreign investment in the country.

Parliament has been vested with the legislative authority on the subjects provided in the Constitution.[924] The federal legislative list enlisted subjects for federal legislature. Parliament of the state has the authority to make laws for the implementation of international treaties, conventions and agreements with other states.[925] Pakistan, for the implementation of global vision, adopted an affirmative approach for international economic order under the auspices of World Bank. The successive governments of Pakistan incorporated laws and provisions with the effect to promote and protect foreign investments in the country.

[921] Art. 90 of the Constitution of Islamic Republic of Pakistan, 1973.
[922] Art. 99 of the Constitution of Islamic Republic of Pakistan, 1973.
[923] Federal government Rules of Business, 1973.
[924] Fourth Schedule of the Constitution of Islamic Republic of Pakistan, 1973.
[925] Entry no. 3 and 32 of the legislative list, in fourth schedule of the Constitution of Islamic Republic of Pakistan, 1973.

6.2.2.1 Statutory Framework of Pakistan to Foreign Investment

Pakistan since its independence in 1947, has adopted a liberal economic approach based on free market economy. This approach was built on the foundations of international trade and foreign investments. The policies were adopted to encourage foreign investment activities. The initiatives were adopted for a corresponding legal framework for the implementation of those policies. The statutory laws enacted to promote and protect foreign investments in the host state. These efforts were aimed to achieve global economic goals by protecting foreign investment through its legislative measures.

Pakistan have taken conformity measures in the backdrop of UN Resolutions[926] passed for the objectives of international investment law. The Foreign Private Investment (Promotion and Protection) Act 1976 was passed to pave its way for the liberalization of Pakistan's economic profile. The Act of 1976 authorized the Federal government to allow for the opening of new categories for foreign investment in the country.[927] The FPIA 1976 has allowed foreign investors to open foreign currency accounts for the purchase of any assets relating to any investment transaction. By the virtue of this law, the Federal government permitted foreign private investments for the production, distribution, providing of services and extraction of mineral resources.[928] This statutory law was an effort to revive the policy of liberalization after a failed result of nationalization of industries in Pakistan in early

[926] United Nations (1974). "General Assembly Resolution 3201 (S-VI).
New International Economic Order", and "General Assembly Resolution 3202 (S-VI): Program of Action on the Establishment of a New International Economic Order", Official Records of the General Assembly: Sixth Special Session, Supplement No. 1 (A/9559) (New York: United Nations), pp. 3-12, United Nations (1975). "General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States", Official Records of the General Assembly: Twenty-Ninth Session, Supplement No. 31 (A/9631) (New York: United Nations), pp.50-55.
[927] The Foreign Private Investment (Promotion and Protection) Act 1976.
[928] S.3 & 4 of the Foreign Private Investment (Promotion and Protection) Act 1976.

1970s. The Act of 1976 allowed foreign investors to be entitled for the repatriation of original investment, its profits and appreciation of assets at their discretion. The employee or the affiliates of foreign investments transaction can make remittances freely for their dependents. Foreign investors were entitled for concessions in income and wealth taxes. Foreign investors were also entitled for any exemptions available under avoidance of double taxation agreements with the other countries.[929] The state is bound to treat foreign investment with the similar treatment which is available for any other investment in Pakistan.[930]

Apart from international commitments of Pakistan in the last decade of 20th century, statutory law has been introduced for economic reforms, privatization and denationalization of public owned enterprises in Pakistan. The Protection of Economic Reforms Act 1992 was promulgated to introduce fiscal incentives to foreign investors and deregulation of their investments in the country.[931] Foreign investors have been encouraged to bring in or out foreign capital in the country without any restrictions and accountability by simplest possible procedural requirements. The Protection of Investment Act 1992 has created for the foreign investors a freedom to open foreign currency account without declaring the source of money. These foreign currency accounts were protected with the assurance of a compulsory maintenance of secrecy by banks.[932] Furthermore, foreign investment accounts were immune from any Tax deductions including wealth and income taxes

[929] S.6, 7 & 8 of The Foreign Private Investment (Promotion and Protection) Act 1976.
[930] S.9 of The Foreign Private Investment (Promotion and Protection) Act 1976.
[931] S.2, The Protection of Economic Reforms Act 1992.
[932] S.2, The Protection of Economic Reforms Act 1992.

and zakat.[933] The foreign investment made for the purchase of privatized enterprise cannot be taken over or acquired by the government for any reason.[934]

In 2001, Board of Investment Ordinance was promulgated with the object to provide one window operation for the foreign private investors. The Board of Investment (BOI) was established to facilitate foreign investors for their investment transactions. BOI maintain a data and liaison with private sector for their active participation.[935]BOI is responsible to identify investment opportunities and initiate investment categories with the assistance of provincial board of investments. BOI coordinates with the relevant ministries, agencies and department for the formulation of investment policies of the country. Other functions of the Board ensures a transparent and simplified investment procedures for the foreign investors.[936] BOI coordinates with relevant ministries and departments regarding implementation of investment policy decisions. These administrative, financial, and management decisions are communicated to foreign private investors to keep them informed.[937] BOI is authorized to review investment projects and submit recommendations of special incentives or relaxations to the cabinet committee on investment (CCOI).[938] The matters relating to the progress of investment projects are dealt by the BOI in the interest of the investors.

Pakistan has adopted the Special Economic Zones Act, 2012 to incentivize regime for the foreign investors. The SEZs Act authorized the Federal government to establish geographically defined special economic zones, territories, outside jurisdiction of customs for imposing tariff on the products. These SEZs can be

[933] S.5, The Protection of Economic Reforms Act 1992.
[934] S.7,8 The Protection of Economic Reforms Act 1992.
[935] S.9, Board of Investment Ordinance 2001.
[936] S.9, Board of Investment Ordinance 2001.
[937] Ibid.
[938] Ibid.

established with the collaborations of private investors. The developers and private foreign investors are entitled for tax exemptions for their products and machineries[939] These SEZs are established to provide an opportunity to foreign investors to incentivize their investments in the country. The High Court of the province has jurisdiction to resolve any disputes of civil nature which arise with the local authorities.[940] This provision is incorporated to build confidence and dependability on a patent system of dispute resolution in Pakistan.

The statutory laws of Pakistan provide for the protection of foreign investment in the country. The protection is provided for the original capital, its profits and related interests of foreign investor relating to its investment transaction. The statutory provisions of laws provide an assurance to protect interests of foreign investors through its settlement of investment disputes procedures. The Act of 1976 provided that in case the Federal government is required to take over the undertaking of foreign investment, it is mandatory for the Federal government to adopt a due process of law. The Federal government is bound by law to pay an adequate compensation to investor in the currency of the origin of investment.[941] BOI is authorized to negotiate and finalize the international bilateral or multilateral agreement on investment. The Board is responsible to negotiate for the disputes settlement with the foreign investors and monitor any such mechanism for the protection of investment in Pakistan.[942]

6.2.2.2 ICSID Jurisdiction in Pakistan

Pakistan signed the international convention on the settlement of investment disputes between states and national of other states July 06, 1966 and deposit her

[939] S.34, 36, 37, The Special Economic Zones Act, 2012.
[940] S.38, The Special Economic Zones Act, 2012.
[941] S.5 of the Foreign Private Investment (Promotion and Protection) Act 1976.
[942] S.9, Board of Investment Ordinance 2001.

ratification on September 15, 1966.[943] Pakistan adopted this international convention by incorporating it in the national legal framework through enactment of The Arbitration (International Investment Disputes) Act, 2011. Pakistan consented for ICSID jurisdiction for the settlement of investment disputes in its majority investment treaties. The Act of 2011 is the part of commitments regarding the implementation of international obligations. The enactment has made it mandatory through the High Court to enforce award announced by the ICSID tribunal. The pecuniary obligations under the award are executable like judgment of the High Courts.[944] This National law is the reassurance of the state to protect the investment interests of foreign investors.

6.2.2.3 ISDS of Pakistan: Exercise of ICSID Jurisdiction

Pakistan has ratified ICSID Convention in 1966. There have been eight ICSID litigations were filed against Pakistan. The first ever was registered for Occidental vs Pakistan[945] in 1987. The Occidental disputes was registered in Oil and Gas Mining sector under ICSID arbitration rules for alleged breach of contractual obligation on behalf of the host state. The ICSID tribunal declared its discontinuation due to the arising of the settlement of dispute between parties.[946] Another case Impregilo vs Pakistan was registered in 2002 for the breach of Pakistan-Italy BIT of 1997. The case was withdrawn after the five months of its registration even before the constitution of ICSID tribunal on the request of the complainant.[947] The complainant file another claim against the host state in 2003. Pakistan participated for the remaining six ICSID litigations. Two of the six litigations emerged for the violation of the terms of

[943] Accessed November, 2020, https://icsid.worldbank.org/about/member-states/database-of-member-states.
[944] S.4, The Arbitration (International Investment Disputes) Act, 2011
[945] Occidental v. Pakistan, ICSID Case No. ARB/87/4.
[946] This case is not consultable for the researcher due to non-availability of any relevant material of the case from any source.
[947] Impregilo v. Pakistan, ICSID Case No. ARB/02/2.

construction contracts.[948] The other two were registered for the violation of service contracts.[949] The remaining two cases belong to Mining and Energy generation sectors.[950]

The executive and legislative measures adopted in Pakistan have reflected a conformity approach for the global regime of investment protection under the auspicious of World Bank group. The bilateral and multilateral investment treaties of Pakistan have recognized ICSID jurisdiction for providing an impartial and independent assurance for the settlement of investment disputes of foreign investors. The legislative measures have recognized the ICSID award to show the conformity attitude of Pakistan to ICSID jurisdiction. Thus, Pakistan participated to all its ICSID litigations. At the same time, Pakistan as respondent has challenged the ICSID jurisdiction in these six litigations. The matter of fact is that ICSID tribunal rejected such objections in all six litigations and pronounced jurisdictional award against Pakistan. In the construction and service contract cases Pakistan challenged ICSID jurisdiction by alleging: firstly, the breach of contract obligations cannot be treated as treaty violation. Secondly, the construction or service contracts do not qualify as foreign investment. Thus, ICSID jurisdiction cannot be invoked for the construction or service contracts in pursuance to Art.25 of the ICSID convention.

In the cases of Tethyan copper and Karkey, the Supreme Court of Pakistan took an extreme position of declaring the investment contracts null and void and restrict the respondent to participate for further proceedings before ICSID tribunals. The Supreme Court of Pakistan gave its final verdict to bind the respondent, Pakistan,

[948] Impreglio v. Pakistan, ICSID Case No. ARB/03/3.; Bayindir v. Pakistan, ICSID Case No. ARB/03/29.
[949] SGS v. Pakistan, ICSID Case No. ARB/01/13.; Agility v. Pakistan, ICSID Case No. ARB/11/8.
[950] Tethyan v. Pakistan, ICSID Case No. ARB/12/1.

for the non-participation to ICSID litigations. On the other hand, ICSID tribunal rejected the position taken by the superior courts of Pakistan regarding the nullity of investment contracts. The conflict of ICSID jurisdictions finally result in the awards for damages of millions of dollars in both litigations. The response of jurisdictional conflict was also appeared in SGS vs Pakistan when the supreme court of Pakistan restricted the respondent host state to participate for the ICSID litigation.

6.3 Emergence of Deviated Approach in Pakistan for ISDS

The change of conformity response of Pakistan has its relation with the legitimacy rhetoric of ICSID exercise of jurisdiction. The rhetoric of ICSID legitimacy crisis has contributed for the emergence of deviated response of some number of ICSID members states. This deviated response appeared in Pakistan in its radical form that is jurisdictional conflicts to deal with investment disputes resolution. The jurisdiction of ICSID tribunals were objected in cases of construction or service contracts.

The responses of reluctance, deviations and backlashes gradually grow up to jurisdictional conflict in Pakistan. The executive and legislative organs in Pakistan showed deviated stances to follow the foreign investment law regime prevalent in the world economic communities. The deviated response aggravated when the judicial organ of Pakistan took cognizance of foreign investment disputes by declining the ICSID jurisdiction.

6.3.1 Deviated Approach by Executives for ICSID Mechanism

A total of 21out of 53 signed BITs have not been the part of legal framework for investment law in Pakistan either due to lack of ratification or terminated by the

parties.[951] Seven of these BITs were terminated by the parties of which five were replaced by the parties with new version of the treaties. Pakistan signed the new versions[952] of bilateral investment treaties with Germany (2009) and Turkey (2012) but pending to be in forced. The 14 treaties did not become the part of Pakistani legal framework after signing their pending status and unenforceability.

The new millennium started with the declining trend in BIT for Pakistan. Pakistan signed only 10 BITs in first decade of 21st century as compare to 32 in 1990s. A total of five out of ten have been pending and 5 got the status of applicable BIT for the legal framework in Pakistan. After 2010, Pakistan has signed only three BIT in last seven years wherein two have been replaced of previous version and one new BIT with Bahrain in 2014.[953] Presently, Pakistan has 33 applicable BITs as a part of legal framework on international investment law.[954] There is a shift of structural paradigm in ISDS clause of Pakistani BITs adopted before 1990s and after the year 2000.

Pakistan signed 32 new BITs with the thirty new economies of the world and one replacements of old version of the previously BITs.[955] Out of these 32 in 1990s 11 have not yet gained applicable status as not in forced. Two others were terminated by the parties.[956] The decade of 1990s were the time where the most BITs were signed by Pakistan but number of these BITs cannot become the part of legal framework of Pakistan.

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[951] Seven BITs between Pakistan and Germany (1959), Romania (1978), Turkey (1995), Kuwait (1983), Tajikistan (1994), Indonesia (1996), Malaysia (1995) were terminated for replaced by new versions of the treaties except for Indonesia and Malaysia.
[952] BY replacing the previously enforced treaties of Germany (1959) and Turkey (1995) but the new version treaties have been signed but not in force till December 2017.
[953] Kuwait (2011), Turkey (2012) and Bahrain (2014).
[954] January 01, 2018.
[955] Romania (1995) by replacing 1978 version of the BIT.
[956] Indonesia (1996), Malaysia (1995) BITs.

6.3.2 Objection to ICSID Jurisdiction in Construction Contracts

There were two cases where ICSID jurisdiction was challenged before ICSID tribunals without the emergence of jurisdictional conflicts. These ICSID litigations include Impregilo and Bayindir Insaat vs Pakistan. Both the cases i.e. Impregilo and Bayindire Insaat vs Pakistan belong to construction contracts between foreign corporations and agencies of host state. The disputes arose for the controversies for the implementation of contractual guarantees. The aggrieved parties invoked ICSID jurisdiction by relying upon breach of investment treaties. Pakistan as host state respondent objected the assumption of ICSID jurisdiction for contractual obligations. The host state respondent challenged jurisdiction and argued that the contractual obligations are untenable as violative of investment treaty. The contractual obligations have no mandate to be treated as foreign investment. The challenge to ICSID jurisdiction of Impregilo and Biyindir Insaat have been argued that: firstly, construction contracts do not qualify as treaty violation to invoke the ICSID jurisdiction. Secondly, construction contracts do not constitute foreign investment in the host state.

6.3.2.1 Ghazi Brotha Contractors' Dispute[957]

In 2003, the first case wherein Pakistan challenged the ICSID jurisdiction was registered with ICSID for alleged violation of Italy-Pakistan BIT 1997.

The case appeared against Pakistan when Impregilo S.P.A filed its request before the Secretary General of ICSID in January 21, 2003 against the Respondent (Pakistan). The claim was registered for an alleged violation of treatment clause of Bilateral Investment Treaty (BIT) between Pakistan and Italy 1997 and breach of

[957] Impreglio v. Pakistan, Award on Jurisdiction, ICSID Case No ARB/03/3, 101.

terms of joint venture investment contract. The construction contract was executed in December 1995 between GBC (Ghazi Brotha Contractors) and WAPDA for the construction of Ghazi Brotha hydro power project. The joint venture agreement consisted of two contracts including construction of barrage and a 52-km tunnel for diverting water from Indus River downstream Tarbela Dam to the power house at Ghazi Brotha. The construction of other supporting infrastructure was also part of the joint venture agreement. The construction project was time bound to be completed in the year 2000. The performance of time bound contract was controlled by engineers. The construction project was delayed and the WAPDA refused to release the payment further and claimed damages for delayed performance, which required to be fulfilled under the joint venture agreement.

The leader of joint venture agreement Impregilo SPA filed its case with ICSID for the alleged violation of Italy-Pakistan BIT 1997 and breach of investment contract. The claimant alleged that the performance of the contract was hampered by the delayed release of funds for the construction project and change of engineering details by the controller engineers. The additional constructions designed were added for the project completion. Other reasons for the delay were the security alert for the Italian, Germen and British staff working on the site after September 11, 2001 attacks in USA. Senior staff of foreigners went back to their countries due to security reasons. Impregilo applied for the extension of time which was denied by the WAPDA. Later on, in result of renegotiations the time was extended through a supplementary agreement between the parties.

The complainant, foreign investor, has legitimate claim for foreign investment in the host state. The respondent has breached the contract by causing obstructive and disruptive measures through their acts or omissions regarding the performance of the

contract. These obstructive acts include delayed handing over of land, failure of making timely payments, delayed shipment of equipment and adding additional cost due to extra construction work. GBC, despite of these difficulties, completed first phase of contract before the renewed date of completion date. The Claimants alleged that an agency of the respondent host state has violated the fair and equitable treatment clause of Italy-Pakistan BIT 1997.[958] The respondent took discriminatory measures to expropriate the foreign investment by limiting the right of enjoyment and control of the assets relating to investment which amount to violation of Art.5 (1) of the BIT 1997.

Pakistan as host state respondent challenged ICSID jurisdiction of the construction contract. Pakistan raised objections on the jurisdiction of ICSID tribunal. Firstly, Impregilo has no locus standi to claim damages on behalf of other investors. Impregilo with its limited construction assignment has no local standi to claim expropriation of foreign investment. Secondly, the respondent asserted that the BIT was entered into force on 22nd June 2001, it has no application in respect of the acts or omissions of breaches prior to that date. The non-retroactivity of a treaty has been articulated in Article 28 of VCLT. Thirdly, ICSID tribunal has no jurisdiction over the contract claims. The contractual claim does not qualify as a treaty claim and the alleged violations involved contractual implementations for which detail procedure of resolution of dispute has been provided as part of the construction contract. The claim is already pending as contractual claim, which has to be resolved through contractual mechanism. It is impracticable and inappropriate for the tribunal to hear such a claim has been till contract claim resolved by the contractual mechanism. The contractual

[958] Article 2(2) of the Italy Pakistan BIT 1997.

dispute resolution clauses of the investment contract bars ICSID jurisdiction by invoking BIT 1997.

The ICSID tribunal did not accept the argument of respondent and concluded that the participant has acted jointly in past, the joint partner has suffered the loss jointly so the tribunal is disagreeing to the argument that they should act distinctly. The tribunal held that Impregilo is not prevented from pursuing the claim as the breach of BIT on the basis that it is acting alone. The tribunal hold a view that it has no jurisdiction over the contract claimed and the question of binding effect of BIT would be dealt along with the merits of the case. The tribunal further concluded to advance its considerations for the 'plausibility test' of Ambatielos case[959] which states that where a claim is sufficiently plausible character to warrant a conclusion that the claim is based on treaty. The prima facie criteria[960] for violation of international instrument. And where the facts alleged by the claimant fairly raise a question of breach of the provisions[961] of the BIT. The tribunal has jurisdiction without going to the merits of the case. The ICSID tribunal accepted the assertion made claimant that the breach constitutes the single and continue dispute. The acts of breach attributed to the respondent have consequences after entering of the BIT.

The tribunal invited the parties to submit their cases on merit after pronouncing award on jurisdiction on 22nd April 2005. On 25th July 2005, the claimant informed the tribunal that an amicable settlement has been finalized between the parties. The claimant affirmed the tribunal that he has received the agreed amount of US$ 98 million and requested to discontinue proceedings against the respondent (Pakistan). On September 25, 2005, the ICSID tribunal issued its procedural order for

[959] Ambatielos, Merits Judgment, I.C.J. Reports 1953, p. 18.
[960] Legality of Use of Force (Yugoslavia v. Italy), I.C.J. Reports I (1999): 490, para. 25.
[961] SGS v. Pakistan, Award on Jurisdiction, ICSID Case No. ARB/01/13.

2001, the claimant informed the respondent that due to reasons beyond its control it had been unable to complete the priority sections till October 2001 and requested for the further extension of time from 'Engineers'. Thereupon, NHA served a notice of termination of contract and to hand over the site within 14 days which was secured later through security forces.

The contracting parties of construction contract initiated different legal proceedings in consequence of termination of the construction contract. In April 2001, the contractors filed constitutional petition to seek injunction against the notice of termination of the construction contract which was refused by the Lahore High Court. The revived contract of 1997 incorporated performance of construction to be supervised by the 'Engineers'. A multi-tier dispute settlement mechanism through the Engineers and local arbitration procedure under the Arbitration Act 1940 was introduced as the part of the contract. An arbitration claim of liquidated damages was filed by NHA against the contractors for non-fulfilment of terms of contract regarding timely completion of construction. In January 2004, NHA initiated arbitration proceeding in the civil court of Islamabad under the Arbitration Act 1940 for which an arbitrator was appointed by the court. The NHA further called for bank guarantee in Turkey for Mobilization Advance against which the contractors obtained an injunction order from Turkish court which was lifted in September 2003.

In April 2002, Bayindir Insaat (claimant) submitted its request to register the claim against Pakistan for the alleged violation of Turkey-Pakistan BIT 1997. The claimant alleged the violation of BIT for restricting outstanding payments and causing loss of profits by the acts or omissions by the host state respondent. Therefore, the respondent has violated the fair and equitable clause of the BIT 1997 and expropriated the foreign investment. Secretary General ICSID notified registration of the claim in

December 2003.The respondent (Pakistan) challenged jurisdiction of the ICSID tribunal in December 2004. The Respondent challenged the jurisdiction of ICSID tribunal and raised the objections: Firstly, that the claimant fails to comply with the requirement of Article VII of the BIT. [964] Secondly, that the claimant has not made an investment to fall the case within the definition of Art.1 (2) of the BIT and Article 25 of the ICSID.[965] Respondent asserted that a straightforward highway construction project does not constitute foreign investment. Thirdly, that the claimant's treaty claim is dependent upon the breach of terms of the construction contract. The contract itself provides a dispute settlement mechanism from local forums according to the laws of Pakistan. Bayindir's claim is a breach of contract rather breach of treaty is beyond the scope of the ICSID jurisdiction. The ICSID jurisdiction is available for treaty claim rather for breach of contract claims. The ICSID tribunal has no jurisdiction for the alleged breach of contract. The claimant has skillfully repackaged it as treaty claim to invoke the jurisdiction of the ICSID tribunal.

The ICSID tribunal rejected the objections raised by the Respondent and declared that the tribunal has jurisdiction over the dispute and held that: the

[964] Article VII of the BIT contains the following dispute settlement clause:
1. Disputes between one of the Parties and an investor of the other Party, about his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavor to settle the disputes by consultations and negotiations in good faith.
2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:
(a) the International Centre for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and nationals of other States'; [in case both Parties become signatories of this Convention]
(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Law (UNCITRAL), [in case both Parties are members of UN]
(c) the Court of Arbitration of the Paris International Chamber of Commerce,
provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.

[965] Article 25(1) of the ICSID Convention provides that: 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.

requirement of 'Notice' does not constitute a prerequisite for the exercise of ICSID jurisdiction. The ICSID tribunal agreed with assertion of claimant that the respondent had sufficient notice of the dispute under the circumstances of the case. The respondent at a stage was willing to engage in negotiation with the claimant regarding settlement of the dispute. The tribunal adopted the view that the requirement of 'notice' does not constitute the pre-requisite to invoke ICSID jurisdiction. Non-compliance of this requirement is not fatal to the case of the claimant. The ICISD tribunal agreed that Bayindir made an investment which requirement of Article 25 of ICSID by applying the 'Salini Test'966 to qualify contribution of the claimant as investment. The claimant contribution in terms of equipment, personnel and financial, for long-term service commitments fulfill requirements of the investment. These long-term financial contributions inherently attach the risk of loss. These contributions represent for the host state development. Finally, the ICSID tribunal resorted to some broad consideration of facts criteria as adopted in the Impregilo case. The treaty claim is sufficiently substantiated for jurisdiction by relying upon the prima facie standard as the claimant alleged the facts violative of the BIT 1997. The tribunal held that it has jurisdiction to see what facts do sustain the violative of the treaty without going into the merits of the dispute.

The ICSID tribunal declared its award on jurisdiction on 14th November 2005 and made necessary order for continuation of the proceedings on merits. On 27th August 2009, the ICSID tribunal announced its final verdict on merits by holding view that Pakistan neither has breached fair and equitable treatment clause nor

[966]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of Accessed July 23, 2001, http://www.worldbank.org/icsid/cases/salini-decision.pdf. The Tribunal in Salini held that the notion of investment presupposes the following elements: (a) a contribution, (b) a certain duration over which the project is implemented, (c) sharing of the operational risks, and (d) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality, 48 and will normally depend on the circumstances of each case.

expropriated assets of the corporation. The ICSID tribunal dismissed all the claims of the claimant in its final award.

6.3.2.3 Evaluation of Exercise of ICSID Jurisdiction in Construction Contracts

The large scale time bound construction contracts were executed between entities of the host state and the construction consortiums in Pakistan. The performance of the contracts ware linked with the completion of the projects. Concessions were given to the contractors for the completion of the projects. These investment contracts were provided with the dispute settlement mechanisms before dispute resolution forums of engineers. These engineers' forums were required to implement arbitration procedures in case of dispute.

The construction contracts were terminated for the non-performance of the contract obligations to complete the projects in time. The host state alleged violation of contractual obligations by the contractors. The host state invoked the engineers' forums for settlement of disputes. The foreign investors joined the proceedings of engineers' forums. At the same time, these foreign investors initiated their claim before the ICSID forums in response to violation of the treaty obligations. The host state challenged the jurisdictions in both the cases on the ground of inapplicability of bilateral investment treaties and choice of law of investment contracts.

The autonomy of contractual parties for the choice of law and forum is recognized in the international law. The contracting parties are free to choose any set of applicable law including UNCITRAL and UNIDROIT for the settlement of investment disputes or through modified version of the set of these rules. The freedom to contract inherently entailed freedom to choose contents of contract and respect thereof. The parties are free to structure those contracts for their purposes and

circumstance. [967] The terms of the original contract were modified of original contract to seek concessions from the host party. The novation of contract was executed with the consent of the parties and has to be performed according to the new version of the contractual obligations. The parties selected the applicable procedural law for resolution of investment disputes. The choice of law clause of the contract and applicable procedure can be resorted on the basis of *Pacta Sunt Servanda* principle of international law.

The claimant asserted retrospective application of BIT 1997. The foreign contractor invoked ICSID jurisdiction on the ground of termination of contract as expropriation and violation of fair and equitable standards of bilateral investment treaty. The host state resisted the proceedings by challenging its jurisdiction on the ground that there were contractual obligations on the parties to avail local arbitration as agreed process of law with its specificity. The treaties were signed later in time than construction contract so, the contractual obligations have precedence over the treaty claim.

The opposite positions of the parties on the questions were: firstly, whether the contractual obligations agreed by the parties has precedence over the treaties signed between contracting states. Secondly, whether a later in time treaty can prevail over the agreed terms of the investment contracts. Thirdly, whether the contractual breach qualifies as treaty breach. The affirmative answers to these questions provide foreign investors an opportunity to use fair and equitable treatment clause as umbrella clause and consequently elevate the contractual breach as breach of treaties.[968] Foreign

[967] Mert Elcin, "Lex mercatoria in international arbitration theory and practice." PhD diss., (2012): 81,101.
[968] Christoph Schreurer, "Fair and equitable treatment in arbitral practice," *J. World Investment & Trade* 6 (2005): 357-386.

investors expect from the host government to respect the contracts and treatment clauses of the investment treaty. The government which commit willful breach of investment agreement can be treated as the violation of the fair and equitable clause of the investment treaty.[969] The ICSID jurisprudence has indeterminacy or unpredictable position on the issues thus contributed for legitimacy crisis of ICSID jurisdiction.

In Waste Management vs United Mexican States[970] the respondent state willfully refused to pay the part of the concession agreement was recognized as the violation of fair and equitable treatment for the legitimate expectations of foreign investor. On the other hand, in an ad hoc arbitration Eureko Bv vs Republic of Poland award held that it is difficult to decide that type breach of contractual breach amounts to willful violation of treaty obligations. The standards of such abusive breach of contract are yet not available.[971] The contracts where foreign investors default for the performance of a contract to answer the question become more complex in the absence of a settled criteria for the determination of standards for willful breach of contract.[972]

The question whether that investment treaty covers the investments made prior to the investment treaty. The capital exporting nations plead that investment treaties are applicable because these are entered for the protection of foreign investment for the nationals of the other contracting states. The protection provided for the investment even retrospectively for already existing transactions.[973] The capital importing nations are inclining to protect the future nations. Those nations are reluctant to lift responsibility of unequal and unfair negotiations of the previous

[969] Ibid., 357-386.
[970] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2.
[971] Eureko B.V. v Poland, Partial Award, ICSID Case No ARB/01/11.
[972] Jeswald W. Salacuse, *The law of investment treaties,* 2nd ed., (Oxford: Oxford University Press, 2015), 144.
[973] Ibid., 50.

governments of those developing states. The less developing nation are not interested to carry the baggage of corruption and illegalities committed by their previous governments. The ICSID tribunals have treated the investment disputes as 'single continue' by its reliance upon 'prima facie criteria' and 'plausible test' recognized in Ambatielos case[974] for the assumption of jurisdiction. The ICSID tribunals' affirmative application of BIT for Pakistani construction disputes has engendered deviated approach for future assumption or application of ICSID obligations.

6.3.3 Emergence of Jurisdictional conflict for Service Contracts

The judicial organ in Pakistan has taken more radical position when ordered to deny the ICSID jurisdiction in the backdrop of heavy baggage of illegalities and bonded consent at the time of assumption of ICSID jurisdiction. Jurisdictional conflict has already been discussed in international investment law, but the position of jurisdictional conflict went to extreme in Pakistan. The conformity attitude of Pakistan shift to the extreme position of denial of ICSID jurisdiction embedded in the legitimacy analysis of ISDS mechanism.

6.3.3.1 Pre-Shipment Inspection (PSI) Service Contract Dispute

The case already litigated on the claimant's initiative before the Swiss courts in a commercial arbitration proceeding. The claimant initiated recovery proceeding before local Swiss courts based on contractual provision of dispute settlement. On the other hand, the consent for the local arbitration in Pakistan is asserted by the host state as part of the service contract. The host state asserted consent of the parties expressed in the contract as a party autonomy for the selection of procedure and applicable law

[974] Ambatielos case (merits: obligation to arbitrate), Judgement of May 19th, 1953: I.C. J. Reports 1953: 10. Accessed https://www.icj-cij.org/files/case-related/.

for the dispute settlement. The Swiss or Pakistani local courts assumed jurisdiction for breach committed by the parties at the time of entering into the agreement.

SGS and government of Pakistan entered into an agreement on 29th September, 1994 to hire services for pre-shipment inspection of all consignments to be imported into Pakistan. The agreement was to provide services for to inspection of goods imported for tariffs categorization and evaluation. The contract entered into force on 1st January 1995 initially for the period of five years. PSI contract provided that Pakistan has the right to terminate the contract after one year of appraisal of performance. Art.11 of PSI incorporated a dispute settlement clause which provide for the settlement of any dispute from the court of Islamabad by application of the Arbitration Act 1940. The government of Pakistan terminated the contract after one year with the effect from March 11, 1997. The termination of the contract was accepted by the SGS by reserving their legal rights.[975]

In January 1998, in consequence to the termination of contract, SGS filed 8.3 million US$ claim as invoiced balance due against government of Pakistan before the Swiss court and ICC tribunal.[976] The Geneva Tribunal of First Instance rejected the claim in June 1999 by declaring that the court has no jurisdiction in the matter.[977] The appeal filed by SGS before the Swiss Federal Tribunal was also dismissed on November 2000. In January 2001, The Islamic Republic of Pakistan filed an application before the civil court, the court of first instance for civil disputes in Pakistan for the appointment of an arbitrator under Section 20 of The Arbitration Act 1940. The application was filed on the basis of 'arbitration clause' of the pre-shipment

[975] SGS v. Pakistan, ICSID Case No. ARB/01/13; SGS vs Pakistan 2002 CLD 790 (Lahore); SGS vs Pakistan, 2002 SCMR 1694.
[976] SGS vs Pakistan 2002 CLD 790 (Lahore).
[977] SGS v. Pakistan, ICSID Case No. ARB/01/13.

agreement. The claim by the Government of Pakistan initiated its claim for the recovery of the kick back money which was paid to the offshore front man companies for taking Pre-shipment Inspection contract. The money was paid as kickbacks or commissions and SGS has connection with those off shore companies as per the claim of government of Pakistan. SGS raised preliminary objection on the petition and filed a counter-claim against the petitioner (Pakistan). SGS joined the recovery proceedings in the local court in Islamabad and filed a counter claim for the recovery of invoiced amount in consequent to termination of PSI contract.[978]

At the same time, SGS filed its formal request for the ICSID arbitration which was formally got registered on 21-11-2001 to constitute ICSID tribunal for the investment dispute. SGS filed its claim to seek damages for the alleged breach of Swiss-Pakistan BIT 1995 before the ICSID tribunal. The claimant alleged that respondent (Pakistan) has failed to protect foreign investment and to ensure fair and equitable treatment when Pakistan terminated the agreement after one year with the effect from March 11, 1997. The act of host state respondent regarding the non-payment of invoiced money deprived the claimant (SGS) from profits and opportunities of the 'foreign investment'. The respondent acts or omissions amount to expropriation of the investment made by SGS without providing effective and adequate compensation, constituted a blatant violation of its obligations under Article 11 of Swiss-Pak BIT.[979]

In January 2002, SGS filed an application with the local trial court of Islamabad (Pakistan) for the issuance of an injunction to maintain a status-quo till settlement of the dispute by ICSID tribunal. The application for injunction was

[978] SGS v Pakistan, ICSID Case No. ARB/01/13; SGS vs Pakistan 2002 CLD 790 (Lahore); SGS vs Pakistan, 2002 SCMR 1694.
[979] SGS v. Pakistan, ICSID Case No. ARB/01/13.

dismissed by the trial court on 7th January 2002 with the direction to proceed with the arbitration procedure i.e. to file the name of arbitrators. The SGS preferred an appeal against the dismissal order of the trial court dated 7th January 2002 before Lahore High Court (Rawalpindi Bench). The government of Pakistan also filed a civil miscellaneous application in the Lahore High Court with the pray that Appellant (SGS) be restrained from taking any step, action or measures to pursue or participate in the ICSID Arbitration.[980]

The Lahore High Court considered the following issues involved in the appeal: firstly, whether the dispute can be resolved by the Pakistani trial court in accordance with the Art 11(1) of the pre-shipment agreement (September 1994) or Article 2 of the Swiss-Pak BIT (July 1995).[981] Secondly, as argued by appellant that Pakistan has already consented for the jurisdiction of ICSID forum.[982] Article 9 of Swiss-Pak Bilateral Investment treaty[983] provides mechanism for settlement of investment disputes of ICSID arbitration. The choice of law clause of the service contract does not prevent the appellant (SGS) to file and pursue the ICSID jurisdiction for ISDS. The Article 2 of the BIT has been provided to cover all investment disputes that would have aroused after September 1954.[984]

The Respondent resisted the High Court appeal that SGS has made no investment as per defined terms in the BIT. The parties to the international contracts can choose the applicable law and its procedure as they did choose under the local

[980] SGS v. Pakistan, ICSID Case No. ARB/01/13; SGS vs Pakistan 2002 CLD 790 (Lahore); SGS vs Pakistan, 2002 SCMR 1694.
[981] The choice of law clause i.e. Art.11.1 refers The Arbitration Act, 1940 as applicable law for disputes settlement and choice of forum as the trail court of Islamabad, Pakistan. See also, Art.9 of Swiss-Pak BIT refers ICSID arbitration in case the dispute not resolved amicably between parties.
[982] Pakistan consented as signatory member in 1966 of the convention and ratified the same in 1996.
[983] The BIT signed in July 1995 and ratified in April 1996. Art.9 of the BIT provides that that where any dispute between contracting parties not resolved such can be submitted before the ICSID forum
[984] SGS vs Pakistan 2002 CLD 790 (Lahore).

arbitration law i.e. The Arbitration Act, 1940 to settle their contractual disputes. Therefore, the appellant has waived his right to invoke ICSID jurisdiction by availing the option for the Swiss trail court and filing of counter-claim before trial court in Islamabad. The Respondent further argued that Article 69 of the ICSID Convention required domestic measures for the provisions of the convention to be effective in the territory. International conventions cannot be enforced in states following dualistic approach of international law without incorporating these through municipal law.[985]

The Lahore High Court dismissed the appeal filed by SGS and declared it without merit and concluded[986] that: The dualism is an accepted international norm in Pakistan. The country has not yet taken any measure to give effect to the ICSID convention through its domestic legislation. The treaties signed remain the part of executive order and have no effect without national legislation. The proceedings taken by the courts cannot be washed away by the Article 2 of the BIT and held that BIT and the ICSID convention is not tenable as applicable law in Pakistan. Jurisdiction of trial court of Islamabad has not adversely affected by the investment treaty. The arbitration clause has a separate life in relation to the international agreements which cannot be superseded by BIT. The parties are bound by the same arbitration clause of the investment contract. The Court further held that an agreement to provide professional services does not constitute 'foreign investment'. The appellant approaches Swiss courts for the recovery of amount due under the service contract and filed a counter-claim before the local trail court without indicating the fact that the dispute referable to ICSID arbitration. The acts of the appellant amount to the

[985] Ibid.
[986] SGS vs Pakistan 2002 CLD 790 (Lahore).

waiver of the right to approach ICSID jurisdiction and acceptance of jurisdiction of local trial court according to the choice of law clause of the investment contract.[987]

The court further held that ICSID tribunal can exercise jurisdiction where there is a valid consent which is sin qua non for the institution of ICSID arbitration. The Swiss-Pak BIT does talk about the consent of the parties for the settlement of investment dispute from icsid. Miscellaneous application by the respondent (Pak) to restrain the appellant (SGS) from taking any step and participating in ICSID arbitration cannot be granted because no suit was filed by the respondent to this effect. And the appeal thereof was also rejected by the Lahore High Court on February 14, 2002.[988]

Both SGS and Federation of Pakistan preferred Supreme Court appeal against the judgment of the Lahore High Court dated 14th February 2002.[989] The Supreme Court of Pakistan directed to grant leave to consider the judgment of Lahore High Court for the issues: firstly, whether the arbitration agreement between parties was binding notwithstanding the coming into force of the Swiss-Pak BIT? Secondly, whether the trial court was right in holding that petitioner was not investor with the meaning of the BIT? Thirdly, whether it has been rightly held that petitioner had waived the right to seek remedy before ICSID?[990]

SGS argued that: the Fourth schedule of the Constitution 1973 extends the executive authority of the government for signing International treaty and

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[987] SGS vs Pakistan 2002 CLD 790 (Lahore).
[988] Ibid.
[989] SGS vs Pakistan 2002 SCMR 1694; civil appeal Nos 459 and 460 of 2002. The civil appeal no 459 was for not granting injunction against trial court and rejection of appeal filed by SGS (appellant) to dismiss the order of trial court by the High Court. The second appeal filed by the Federation of Pakistan for not granting relief on its application for restrain the respondent from participating in ICSID arbitration proceeding. The Supreme Court consolidated both the appeal because of their identical questions of law and facts and decided the case in July 2002.
[990] SGS vs Pakistan 2002 SCMR 1694.

implementation thereof. The acts of signing and ratification of the BIT amounts to give the same as status of law. The bilateral investment treaty executed after investment contract made it subservient to the ICSID convention when it declared applicable since 1954. The SGS has the right to make choice to invoke the arbitration clause (Art.9) of Swiss-Pak bilateral investment treaty, which refers ICSID procedures for the settlement of investment dispute. The provisions of the treaties are given preference over the arbitration clause of the investment contract by the parties which opted by the SGS. SGS further argued that the judgment of the Swiss Courts was not on merits of the claim therefore, not operate as Res-Judicata to bar the appellant to participate in arbitration proceedings. The allegations of commissions, kickbacks and bribery are not liable to be arbitrated under section 20 of the Arbitration Act, 1940 on the authority of Hubco vs Pak (PLD 2000 SC 841). The participation in the proceedings in local trial court under The Arbitration Act 1940 was in compliance of the order of the court to appear, therefore, constitute waiver of choice for ICSID jurisdiction. The court should refrain from expressing opinion on the question relating to the merits of ICSID arbitration. The question of ICSID its jurisdiction and the right of SGS to invoke that jurisdiction is to be decided by the ICSID tribunal.[991]

The Attorney General for Pakistan asserted that: the choice of law clause of the investment contract is determinative of the choice of governing law. The contracting parties have chosen local arbitration Act as governing law for their dispute settlement. The acceptance of termination of contract by the appellant in 1997, filing of non-payment claim in Swiss Court in 1998 and participation for local arbitration proceedings in April 2001 constitute waiver to seek ICSID jurisdiction. The appellate

[991] SGS vs Pakistan 2002 SCMR 1694.

courts of Swiss jurisdiction accepted the plea of sovereign immunity by declaring that a fair trial is possible in Pakistan under the local law of the land. The final judgment passed by the competent Swiss Supreme Court on merits attracts the principle of estopple.[992]

The Supreme Court of Pakistan dismissed the appeal filed by SGS. The Court has explained reasons for the non-applicability of the BIT: firstly, this transaction does not fall within the ambit of investment. And the SGS was not investor within the meaning of BIT. The Court scrutinized the terms and conditions of the agreement, held that the nature of agreement and services hired from SGS were in juxtaposition of the meaning of investment. The agreement was for hiring of professional services of inspection between the contracting parties wherein no element of laying of money is involved to acquire any specie of property.[993] Secondly, no court shall have jurisdiction to any right arise from a treaty unless incorporated into the municipal law of the country. The dispute settlement clause of Swiss-Pak BIT and the ICSID convention neither incorporated as local law through national legislation nor any preferential choice to invoke ICSID jurisdiction. Therefore, the courts in Pakistan are not vested with the power to enforce the treaty rights under the circumstances of the case.[994]

The Supreme Court held that the agreement has been executed in Pakistan. Islamabad (Pakistan) was selected as seat for local arbitration by the parties through the agreement is sufficient to hold the view about the intent of the parties that governing law of the arbitration would be local laws of Pakistan. The appellant

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[992] Ibid.
[993] According to the BIT definition of investment the laying out of money for the acquisition of some species of property was necessary ingredient to determine a transaction is 'investment' or not.
[994] SGS vs Pakistan 2002 SCMR 1694.

participated in the local arbitration proceedings and filed counter-claim to recover the same amount which were claimed before the Swiss courts. Therefore, the appellant has opted otherwise than ICSID arbitration and sufficiently constitute waiver of right to seek ICSID arbitration and estoppel by conduct. The Supreme Court held that the conduct of the appellant is not above board but is guilty of deliberate concealment of the material facts before ICSID tribunal due to the non-disclosure of Swiss decisions and participation for local arbitration proceedings. SGS has approached ICSID for arbitration the right which it had already waived and is no longer available to it.[995]

The Supreme Court dismissed the appeal filed by SGS. The Court allowed the proceedings of the trial court of Islamabad under The Arbitration act 1940 with the direction that his arbitration shall be confined to the terms and conditions of the agreement in question. The court further directed that Federation of Pakistan is neither allowed to file any claim based on the allegation of corruption, bribery, commission and kickbacks allegedly received in connection with the agreement. Federation may seek independent remedy for the allegations. The court accepted appeal of respondent (Pakistan) and parties were directed to restrain from taking any step, action or measures to pursue or participate or to continue to participate in the ICSID arbitration.[996]

The Secretary General ICSID constituted tribunal after the registration of SGS claim for investment arbitration in 2001. SGS alleged that the respondent, host state, has breach of Swiss-Pakistan BIT 1995 and failed to protect foreign investment. The act of termination of PSI contract and non-payment of invoiced amount have deprived

[995] Ibid.

[996] SGS vs Pakistan 2002 SCMR 1694. The case was decided on 3rd July 2002 (03-07-2002) for two appeals were filled appellants (i.e. SGS and Pak). The appeal of SGS was dismissed and Pakistan appeal was accepted by Supreme Court and issue a direction for not to participate in the ICSID proceedings. The Supreme Court further directed that trial court of Islamabad to appoint arbitrator and decide the dispute according The Arbitration Act 1940.

the foreign investor from its investment. The loss of profits and opportunities have been violative of fair and equitable treatment under the Swiss Pakistan BIT. The respondent acts or omissions amount to expropriation of the investment made by without providing effective and adequate compensation constituted a blatant violation of its obligations under Article 11 of Swiss-Pak BIT.[997]The respondent (Pakistan) filed its objection to jurisdiction of the ICSID tribunal by asserting that the ICSID tribunal has no jurisdiction.

The respondent objected the jurisdiction of the ICSID tribunal that: firstly, SGS claim is not an investment claim because it did not involve any investment of money in the territory of Pakistan. SGS was providing professional services for inspection and categorization of goods for tariff purpose which is not a revenue generating activities for the company in the purview of Article 2(1) of the BIT. Secondly, Pakistan invoked jurisdiction of local trial court for the recovery of amount misappropriated through kickbacks and commissions by the SGS. The SGS filed its reply to the petition and counter-claim for the recovery of the invoiced amount due from Pakistan on termination of the PSI agreement. The claimant when invoked ICSID jurisdiction was already participating for the similar cause of action before the domestic arbitration tribunal and Swiss court for the relief in same subject matter. The choice of forum by the claimant and pursuing the claim at multiple forums simultaneously amount to waiver of claim under ICSID. The claimant has not pleaded in last four years expropriation or failure to provide fair and equitable treatment or failure to protect investment before Swiss courts. The SGS relabeled the claim as BIT claim to submit it before the ICSID forum. Thirdly, the arbitration clause of the PSI agreement recognizes by the ICSID jurisprudence. The principle of *pacta sunt*

[997] SGS v. Pakistan, ICSID Case No. ARB/01/13.

servanda is widely recognized in international law. The arbitration clause provides for the application of domestic law in case of dispute between the parties. The ICSID tribunal has no jurisdiction when the parties have already contracted to submit their claim before domestic law of arbitration.

ICSID tribunal has no jurisdiction because SGS did not invest as per laws and regulations of Pakistan as required by the Article 2 of the Swiss-Pak BIT. The results of investigation describe that the PSI agreement was procured though bribery, commissions and corrupt practices in blatant violation of Pakistani laws. The acts and conducts of claimant had to have debarred the right to invoke jurisdiction of ICSID tribunal. The ICSID tribunal decided the objection to jurisdictions raised by in August 2003. The tribunal decided that it has jurisdiction over the SGS claim for the breach of Swiss-Pak BIT and denied Pakistan's request to stay the proceedings of the tribunal.

The tribunal rejected the objections made for the reasons that: firstly, the ICSID convention does not define the term 'investment', leaving for the contracting parties to define it in their specific context. The Swiss-Pak BIT contained a broad definition of 'investment', which include every kind of asset, claim of money or to every performance having economic value and concession under public law.[998]This non-exhaustive definition of the BIT is sufficiently broad to encompass the PSI agreement. SGS was granted public law concessions. The tribunal held that the expenditures made by in SGS in pursuant to the PSI agreement constituted an investment within the meaning of the BIT to satisfy the requirements of Article 25 of

[998] Art 2(1) of the Swiss-Pak BIT.

ICSID.[999] Secondly, the tribunal considered that if the facts asserted by a claimant are capable of being regarded as alleged breaches of a BIT it should be able to have them considered on their merits. The tribunal declared that the existence of an exclusive jurisdiction clause in a contract cannot operate as a bar to the application of the treaty standard. As there is no fork in the road provision for the applying Article 9 of the BIT. The BIT does not set any requirement of recourse to municipal courts of the contracting party involved. The jurisdiction over the BIT claim is not subject to arbitration in Islamabad court. The participation of claimant for local arbitration proceeding and before Swiss court is for different purpose and not for the violation of BIT provision.

The tribunal rejected the respondent's urge to dismiss or stay ICSID proceeding till the findings of the Pakistani court for the alleged breach of PSI contract. The ICSID tribunal declared that it has jurisdiction over the treaty claims which does not depend upon the findings of Pakistani court (arbitration) for the alleged violation of PSI agreement. The ICSID tribunal is bound to exercise its jurisdiction for the resolution of the BIT claim for which completion of the PSI agreement arbitration is not a necessary pre-condition. Finally, the ICSID tribunal decided to discontinue the proceeding under Arbitration Rule 43(1) on the request of the parties on May 23, 2004 after their reaching a settlement over the dispute.

The PSI dispute started due to the non-transparency in awarding the contract. The baggage of illegalities of governments gave rise multiple litigations before domestic courts and ICSID tribunal. The PSI dispute emerged around the unpredictable nature of foreign investment and treatment of contract dispute as treaty

[999] The Art.25 of ICSID convention require 'a legal dispute arising out of investment' between contracting parties and the national of other state to exercise its jurisdiction.

dispute. The domestic courts assume their jurisdiction by relying upon contractual obligations of the PSI service contract. On the other hand, the ICSID tribunal treated the same dispute as treaty breach for the same reasons. The indeterminacy of distinction between contract and treaty claim can be cited as embedded reason for jurisdiction conflict in consequence of different approaches of domestic courts and ICSID tribunal.

In another case of agility corporation appeared in the background of contract claim ascended to treaty claim before ICSID tribunal. The nature of foreign investment has been the second issue which provide reason for the objection to ICSID jurisdiction for the custom clearance contract.

6.3.3.2 Custom Clearance Service Provider Contract Dispute[1000]

The second investment dispute regarding service contract aroused out of an agreement regarding E-governance by Federal Bureau of Revenue with an Agility corporation. The Agility Corporation has been incorporated and listed company in the state of Kuwait. The company has been service provider for third party logistics, customs clearance and E. government solutions based on software.

In June 2004, the Agility Corporation and Federal Board of Revenue (FBR) entered into a contract for the establishment of efficient computerized services for custom clearance on its Karachi International Container Terminal (KICT). The Agility Corporation in 2004, granted a non-transferable License to Federal Bureau of Revenue (FBR) for the use of its proprietary software (MicroClear Software) to Karachi International Container Terminal (KICT). The software was subscribed for initial period of 7 months to provide an efficient solution for customs clearance on the

[1000] Agility v. Pakistan, ICSID Case No. ARB/11/8.

terminal. The lump sum remunerations were made for the Pilot Contract. After the expiry of initial 7 months contract term, Agility Corporation continued their services to allow to use the software along with the support services. The Agility Corporation alleged that such services were extended on the assurance of Pakistan government for further subscription. In 2006, FBR requested Agility Corporation for providing the same facilities for their two other International terminals Pakistan International Container Terminal (PICT) and Qasim international container terminal (QICT) for the period of 6 months. In September 2011, FBR issued a public notice for the abandonment of the software services on all three locations in Pakistan.[1001]

On the request of Agility Corporation, the Secretary General ICSID notified registration of a US$ 650 million claim against Islamic Republic of Pakistan on 28th March 2011. The corporation alleged the violation of obligation under Kuwait Pakistan BIT 1983.[1002] The respondent has shown the resistance to participate for the settlement of investment dispute. The respondent tried to exhaust local remedy under the domestic Arbitration Act of 1940. Three member ICSID tribunal was constituted following default procedure of Article 38 of ICSID Convention. The Chairman of Administrative Council appointed both the remaining arbitrators and the President of the tribunal to complete the formation.[1003]

The respondent objected to jurisdiction of the ICSID tribunal on the ground of lack of consent for ICSID jurisdiction, absence of foreign investment and exhaustion of local remedy. The claimant has not made the 'foreign investment'. The contracting

[1001] Agility v. Pakistan, ICSID Case No. ARB/11/8.
[1002] Article 8(1) of Kuwait Pakistan BIT 1983 provides, "a dispute arise between the nationals of a Contracting State and the other Contracting State, and in case the parties to the dispute do not agree to settle the dispute through another mode of settlement, the dispute will be submitted to the Center for the Settlement of Investments Disputes between States and Nationals of other States and will be settled according to the procedures of the Convention of the Settlement of Investments Dispute".
[1003] Agility v. Pakistan, ICSID Case No. ARB/11/8.

parties agreed for the provision of technical know-how and consultancy services professional solution to collect revenue for the government. Consultancy for technical services of an operating system did not left anything in Pakistan and had not taken any risk of market mechanism.

The terms of investment contract bar ICSID jurisdiction invoked under BIT. The respondent further objected that respondent has not consented for ICSID arbitration. The disputes settlement clause of the contract between parties provided for the application of local laws and selection of forum.[1004] Contractual agreement for the settlement of any dispute aroused under local law, despite the knowledge of the obligation of BIT and ICSID Convention, amounts to the waiver of its right to invoke ICSID jurisdiction. The contractual claim cannot be treated the treaty claim. The Article 26 of ICSID Convention allow exhaustion of local remedy in case of dispute of foreign investment. A litigation under section 20 of The Arbitration Act, 1940 is already pending before the Islamabad High Court for settlement of contractual dispute regarding payment of fee for use of software rather a treaty dispute under BIT.

The ICSID tribunal rejected objection to the jurisdiction and held that the definition of assets or funds not limited to monetary contribution, but includes intellectual property as well. The investor need not to transfer a commercial product to the host state to constitute foreign investment.[1005] The ICSID tribunal observed that the claimant has made the investment by providing considerable financial contribution through their technical support. The technical and financial contribution has employed number of employees. The intellectual property of the investor has participated for the

[1004] The Arbitration Act, 1940.
[1005] Agility v. Pakistan, ICSID Case No. ARB/11/8.

development of the host state by providing efficient revenue collecting system for large sum of money for the period of more than 7 years.

The ICSID tribunal further held that the set of fact constituting breach of treaty claim as well as arises from the contractual violation. The jurisdiction of ICSID can be invoked for the violation of BIT obligations despite of forum selection clause in the contract. The obligations under contract does not bar ICSID jurisdiction for the violative action of Fair and Equitable (FET) clause of the Kuwait Pakistan BIT 1983. The termination of the use of software in three container terminals and not to roll it over on further locations of Pakistan, is sufficient ground to invoke ICSID jurisdiction. The failure of the respondent to compensate for the termination of an investment contract has been the expropriation of the assets of the claimant.[1006]

ICSID tribunal accepted the averments made by the claimant and issued an injunction to stay the domestic arbitration proceedings. The respondent was enjoined to participate in the domestic arbitration proceedings. The tribunal held that the exhaustion of local remedy is not pre-requisite for the consent to ICSID arbitration under the BIT. The tribunal issued provisional order No. 1 for declaring that ICSID tribunal is proper forum for the determination of the current dispute. The claimant has met the prima facie burden of proof at jurisdictional stage.[1007]

6.3.3.3 Analysis of Service Contracts ISDS

ICSID tribunal in services contracts proceeded to determine the issue of contractual breach as violation of obligations of BIT. The nature of 'foreign investment' involved has been reason of objections to ICSID jurisdiction. The contractual obligation provided alternative mechanism for the investment disputes,

[1006] Ibid.
[1007] Ibid.

ICSID jurisdiction consented under BITs. The question of exhaustion of local remedy in the absence of fork in the road clause of the BIT remained the reason for indeterminacy. This indeterminacy for hierarchy and unpredictability of exercise of ICSID jurisdiction despite of contractual remedy has been the reason for the unconformity response of Pakistan.

ICSID tribunals in services contracts disputes did not accept the objection of the host state that investment is to be restricted to monetary contribution for duration of time with the risk of loss. ICSID tribunals approved the Salini Test to treat services skills as an economic contribution and be treated as 'foreign investment' when use to collect revenue for the host state. [1008] The ICSID tribunals for the service contract disputes in Pakistan has added for unpredictability to treat Contractual dispute as treaty breach in the availability of alternative choices for contractual dispute mechanism. The reliance of the awards by ignoring standard as explained in Vivendi vs Argentina[1009] case. The tribunal in Vivendi case concluded that the BIT claim and contract claim are to be determined in accordance to their own proper applicable law. In case of BIT, the international law and for contractual obligations the law of contract is the proper applicable law.[1010]

The exhaustion of alternative remedy clause of investment contracts has generated parallel proceeding for the investment disputes. In the absence of 'fork in

[1008] Agility v. Pakistan, ICSID Case No. ARB/11/8. The tribunal approved to apply Salini Test to constitute economic contribution to constitute investment to the requirement of Article 25 of the ICSID convention. The Salini vs Morocco provided requirements for the assets to qualify for investment. a) Contribution or commitment of resources, b) for a certain duration of performance in host state, c) risks the transaction d) contribution to the economic development of the host state.

[1009] Suez &Vivendi v. Argentine, Decision on Annulment, ICSID Case No. ARB/03/19.

[1010] Agility v. Pakistan, ICSID Case No. ARB/11/8. ICSID tribunal declared that

"A State may breach a treaty without breaching a contract, and *vice-versa*. Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract."

the road clause' of BITs and consolidation mechanism for parallel proceedings has caused indeterminacy. The local courts for contractual obligations assumed their jurisdiction by treating the disputes as contract claims. The ICSID tribunals ascended the contractual violation as breach of investment treaties thus ISDS. These contradictory positions of local courts and ICSID tribunals have been the cause of jurisdictional conflicts for the settlement of disputes in relation to service contracts of SGS and Agility Corporation in Pakistan.

The embedded indeterminacy regarding the exercise of jurisdiction for contract claims have provoked the local courts and ICSID tribunals to take radical position to cause jurisdictional conflicts for ISDS in Pakistan. In SGS case, the Supreme Court of Pakistan issued restrictive directions to the parties for not to take any action or step to participate for ISDS proceedings of ICSID.[1011] On the other hand, in Agility Corporation case, the ICSID tribunal assumed its jurisdiction by issuing an injunction order to enjoin the parties to participate for domestic arbitration proceedings.[1012] Later on, this conflicting response between domestic courts and international forum of ISDS remained controversial in other ISDS litigations of Pakistan.

6.3.4 Conflict of Jurisdiction in Mining and Energy Disputes

The radical attitude towards ICSID jurisdiction remain dominant for two other cases of ISDS of Pakistan for Mining and Energy disputes. The judicial organ of Pakistan took an extreme position to deal with the investment disputes. The extreme position adopted by the Supreme Court of Pakistan generated the conflict of jurisdiction by declaring the investment contract null and void. On the other hand, the

[1011] SGS vs Pakistan, 2002 SCMR 1694.
[1012] Agility v. Pakistan, ICSID Case No. ARB/11/8.

ICSID tribunals in both the ISDS Tethyan Copper Mining Company and Karkey Elektrik Ship assumed jurisdiction by rejecting the stance taken by the Supreme Court of Pakistan.

6.3.4.1 Copper & Gold Mines Investment Dispute

Copper & Gold Mines investment dispute appeared in consequent of Copper and Gold Mining agreement in Reko-Diq in Balochistan province. In 1993, the 'Chagai Hills Exploration Joint Venture Agreement' (CHEJVA) was entered between Balochistan Development Authority (BDA) and BHP Mineral Intermediate Exploration Inc.[1013] The Exploration License (EL) was issued for 50 sq.km area for an initial period of 6 years. CHEJVA provides its terms for the area of exploration, its duration and prospecting licensing. The agreement provide jurisdiction under Article 25(1) of the ICSID convention in case of failure of parties for amicable settlement of dispute. On refusal of ICSID to exercise its jurisdiction, it shall be settled under the ICC rules of arbitration by International Chamber of Commerce.[1014]

In April 2000, BHP entered into an agreement with an Australian (Perth) incorporated company MINCOR for establishing an alliance for the exploration in Reko Diq area. MINCOR created a specialized company i.e. Tethyan Copper Company (TCCA) to finance and operate the alliance agreement. TCCA incorporated its subsidiary in Pakistan namely Tethyan Copper Company Pakistan (TCCP) in 2002. In September 2002, TCCP applied for Exploration License (EL) for 973.75 sq.km which was granted (EL-5) under Balochistan Mineral Concession Rule (BMR) 2002.[1015] TCCP purchased all 75% shares of BHP under CHEJVA. The novation

[1013] BHP Mineral stated to be incorporated at state of Delaware (USA). CHEJVA provides for the creation of relationship between the parties with 75% and 25% shares of BHP and BDA respectively.
[1014] Tethyan v. Pakistan, Award on Jurisdiction and Liability, ICSID Case No. ARB/12/1.
[1015] Ibid.

agreement of CHEJVA was entered in April 2006 between Government of Balochistan, BDA, BHP and TCCA (Australia) to substitute 75% shares of BHP in CHEJVA. The amalgamation scheme of TCCA (Australia) and TCCP (Pakistan) was approved by Islamabad High Court under the company laws of Pakistan. The licenses and properties of TCCA got transfer to TCCP (PAK) after approval of the amalgamation scheme in 2008.[1016]

In 2006, a constitutional petition was filed under Art.199 of the Constitution of Islamic Republic of Pakistan before Balochistan High Court. The petition challenged legality of CHEJVA and validity of relaxation under Balochistan Mineral Concession Rule (BMR) 2002 by Government of Balochistan. The petitioner prayed for the relief to declare all transactions illegal, ultra vires, unconstitutional and mala fide based on CHEJVA including concessions, licenses and transfer of interests. The High Court dismissed the petition in its judgment June 2006 and found CHEJVA, relaxation under BMR 1970 and acts thereunder legal and valid. The petitioner preferred an appeal before the Supreme Court of Pakistan against the judgment of the Balochistan High Court.[1017] During the years 2009-2011, some other petitioners filed constitutional petition[1018] directly to the Supreme Court to challenge the validity of granting of licenses to BHP/TCC. The petitions alleged the absence of fairness, transparency and violation of local laws/rules for the investment transactions. The violations of fundamental rights were alleged on the possible risks of vital interests of the province. The Supreme Court of Pakistan consolidated the petitions and issued its interim order on 7th January 2012. Final hearing of the petitions held in November

[1016] Tethyan v. Pakistan, Award on Jurisdiction and Liability, ICSID Case No. ARB/12/1; Maulana Abdul Haq Baloch and others vs Government of Pakistan and others, 2012 SCMR 402. (February 7, 2012).
[1017] Maulana Abdul Haq Baloch vs. Balochistan 2012 SCMR 402.
[1018] under 184(3) of the constitution of Islamic republic of Pakistan,1973.

and December 2012. The Supreme Court of Pakistan pronounced its final judgment on 7th January 2013.[1019]

In 2009, Government of Balochistan invited Metallurgical Corporation China (MCC) to submit a financial proposal for Reko-Diq mines of Chagai Hills. At the same time, Federal Government also expressed its interest on the proposal of Dr. Samar Mubarakmand for the construction of a smelter in the Reko-Diq area. The Government of Balochistan got an approval for the copper/gold project funding from National Economic Council (ECC) of Pakistan. In 2011, TCCP notified his interests for the purchase of shares of Government of Balochistan to pursue the project as sole participant to the CHEJVA. In September 2011, The Licensing Authority rejected the application for License by declaring it "not satisfactory". In October 2011, the Claimant serve a notice to the Government of Balochistan of depriving of its investment which constitutes expropriation under Art.7 Pakistan-Australia BIT 1998 and an amicable settlement of foreign investment dispute. TCCP filed an administrative appeal against the rejection order which was denied by the order of 3rd March 2012 in consequent of a direction of the Supreme Court of Pakistan regarding the disposal of the administrative appeal till 3rd March 2012. Prior to the final judgment of the Supreme Court, Tethyan Copper Company of Pakistan (TCCP) filed is request with the Secretary General ICSID to constitute arbitration tribunal in November 2011. The investment dispute was registered on 12th January 2012.[1020]

Tethyan Copper Company Pvt. Limited (TCCA) registered in Australia filed its request with the Secretary General ICSID to constitute ICSID tribunal on 28 November 2011. The complainant alleged that the host state failed to protect the

[1019] Maulana Abdul Haq Baloch vs. Balochistan 2012 SCMR 402.
[1020] Tethyan v. Pakistan, Award on Jurisdiction and Liability, ICSID Case No. ARB/12/1.

On the other hand, ICSID tribunal after hearing of parties, decided the question of jurisdiction and issue an award on provisional measures on December 13, 2012. The tribunal declared that the respondent shall not expand mining activities to any deposits of the area till the final disposal of the dispute.[1025] Despite the order of Supreme Court of Pakistan dated 7th February, 2012 Secretary General ICSID appointed arbitrators to constitute the tribunal between May and September 2012. In December, 2012 ICSID tribunal announced its decision on the provisional measures. The ICSID tribunal declared that it has the authority to decide the question of jurisdiction and merits of the investment disputes under the authority provided by Article 25, 37 and 41 of the ICSID convention. The authority of ICSID tribunal remain unaffected by the parallel proceedings in any other forum including before Supreme Court of Pakistan. Supreme Court proceedings has no effect on the jurisdiction of the ICSID tribunal for the reasons. Firstly, the Supreme Court proceedings are distinct as that is pending between different parties. Secondly, the Supreme Court Proceedings are pending to interpret CHEJVA under Pakistani law. On the other hand, the ICSID proceedings are before the ICSID tribunal for the breach of obligations under the Australia-Pakistan BIT 1998.[1026]

The final hearings of the petitions before Supreme Court of Pakistan were held in November and December 2012. Therefore, Supreme Court of Pakistan pronounced its judgment about the legality and validity of CHEJVA on 7th January 2013.[1027] The petitioners argued against the legality and validity of before Supreme Court that the execution of CHEJVA defeated the various provisions of the laws in Pakistan. The

[1025] Tethyan v. Limited v Pakistan, Award on Provisional Measures, ICSID Case No ARB/12/1.
[1026] Tethyan Copper Company Pty. Limited v Islamic Republic of Pakistan, Decision on Provisional Measures December 13, 2012., ICSID Case No ARB/12/1.
[1027] Maulana Abdul Haq Baloch and others vs Government of Balochistan through Secretary Industries and Mineral Development, PLD 2013 SC 641. (Dated 7th January 2013).

execution of the joint venture agreement has defeated the various domestic laws.[1028] The agreement had not been placed before any Government department nor consulted for the opinion of law department. Therefore, the agreement was approved in gross violation of the procedural requirements of the law. The Australia-Pak BIT also provides that where any investment is made in violation of the domestic laws of the state it will be illegal and cannot be protected under the BIT. The laws of Pakistan are applicable to the agreement and the courts of Pakistan are the appropriate forum to decide the legality and validity of CHEJVA.[1029]

The relaxation was granted without applying an independent mind by the authorities. The BMR provides that such relaxation can be granted in case of "Hardships" but the authorities ignored it. The authorities did not even mention reasons for the relaxation of BMR without any just cause. The relaxation involved number of irregularities: the prospecting licenses covering 1000 sq.km were granted in violation of the limit provided under BMR 1970 which provides a maximum limit for 10 sq. Miles i.e. 25.4 sq.km for an exploration license. According to Rule 12(1) of BMR, 1970, any lease granted cannot be alienated without prior consent of the licensing authority. BHP did not followed the provision at the time of transferring its interest to TCC.[1030]

Pakistan is run by a written constitution and a sovereign state. The sovereignty of the state implies that no other entity can interfere into the internal economic affairs of the country and its ultimate authority. The agreement is an attempt to curtail the statutory and constitutional duties of licensing authority. The government of

[1028] S.25 of The Contract Act, Article 17, of The Registration Act, and not processed under The Foreign Private Investment Act, 1976.
[1029] Maulana vs Government of Balochistan, PLD 2013 SC 641.
[1030] Ibid.

Balochistan is a party to the agreement and exercising all powers relating to prospecting licenses. On the other hand, BDA as an agency of the provincial government and minority shareholder (25% shares) in CHEJVA is receiving and following directions of the majority shareholder, BHP (75% shares). The arrangement is tantamount to subordinating sovereign rights of Balochistan province to a foreign company for the potential monetary benefits. Supreme Court of Pakistan did not accept the argument in defense of legality and validity of CHEJVA by BHP mining contractors that: the agreement was duly negotiated and approved by the government of Balochistan. And the CHEJVA as investment contract is protected under 270AA of the Pakistan constitution therefor, not within the jurisdiction of the domestic court as Pakistan has consented for ICSID jurisdiction under Australia- Pakistan BIT 1998.[1031]

The Supreme Court of Pakistan declared the agreements invalid and illegal, void and non-existent for the reasons that: The record discloses illegalities and irregularities were committed in the execution of CHEJVA and other related instruments. The caretaker government was in place and respondent took a lot of advantages of non-transparent procedures adopted during the time. The CHEJVA 1993 and the novation of agreements held to have been executed contrary to provisions of the domestic laws of Pakistan.[1032] The Exploration License and the rights conferred under CHEJVA were granted on BHP, MINCOR, TCC, TCCP, AUTOFAGASTA and Barriek Gold has been contrary to laws of the state therefor, declared non-existent and void. The Supreme Court relied upon the UNIDROIT principles of International Commercial Contracts. The rules provide that any contract conceived by the party seeking to take unfair advantages of the other party's

[1031] Ibid.
[1032] Relating to Mineral Development Act 1948, Balochistan Mineral Concession Rules 1970, The Contract Act 1872 and Transfer of Property Act 1882.

dependence, economic distrust, improvidence, ignorance inexperience and lack of bargain skill cannot be enforced. The violation of general principles of law including the violation of the host state laws relating to commission of crimes i.e. fraud or bribery is a ground for preventing a foreign investor from taking benefit under the relevant BIT. [1033]

Supreme Court further held that the Court has wide powers under 184(3) of the Constitution to oversee the acts of the other organs of the state, namely executive and legislature. The Court has jurisdiction to adjudge the validity of CHEJVA on the grounds of curtailment of fundamental rights of general public, violation of laws and non-transparency. [1034]

Pakistan raised objects to ICSID jurisdiction that: firstly, the previous mining license was granted under CHEJVA i.e. a joint venture agreement was not the property of the company. Thus, Tethyan Copper Company has no Locus Standi under the Ultra Vires contract i.e. CHEJVA. Secondly, the assumption of ICSID jurisdiction under an Ultra Vires contract does not create the Right of Mining under the Legitimate Expectation Right of customary international law. Thirdly, the legality and validity of CHEJVA is pending before the Supreme Court of Pakistan for the alleged illegalities, violating transparency of the licensing and for involved corruption. The Chairman Balochistan Development Authority has already convicted for the alleged corruption in the mining lease case by accountability court in Pakistan. The Respondent requested the tribunal to dismiss the application of interim measures as

[1033] Maulana vs Government of Balochistan, PLD 2013 SC 641.
[1034] Ibid.

there is no any risk of harm to the right of legitimate expectations under the circumstances of the case.[1035]

The tribunal rejected the assertions made by the respondent and declared that it has jurisdiction over the merits of the disputes by virtue of Article 25 of the ICSID convention[1036] and Article 13 of Australia-Pakistan bilateral investment treaty (BIT).[1037] The tribunal considers that the complainant is the foreign investor and the parties failed to resolve the dispute through their negotiation.[1038] The dispute is related to and arise directly out of the investment and parties have consented for the jurisdiction within the meaning of Art.25 of the ICSID Convention.[1039]

The tribunal is satisfied that prima facie jurisdiction not affected by any parallel proceedings before ICC. ICSID tribunal did not accept the assertions of the respondent that the claim is the classic example of the contractual dispute between two joint venture partners. The contractual dispute is subject to the jurisdiction of ICC under the choice of forum class of CHEJVA. At the same time, the claimant is barred

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[1035] Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, Award on Jurisdiction and Liability, ICSID Case No. ARB/12/1.

[1036] Art 25 of the ICSID convention reads as follow:
(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.

[1037] Article 13 of the BIT provides: Settlement of disputes between a Party and an investor of the other Party. 1) - In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations. 2) - If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may: (a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies; (b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"),[1] refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention; 3) - Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article: (a) where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor.

[1038] Article 13(1) of the BIT.

[1039] Tethyan Copper Company v. Pakistan, ICSID Case No. ARB/12/1.

to re-litigate the contractual claim under the non-existent and void agreement after the decision of the Supreme Court of Pakistan. The tribunal noted that it has authority to decide the investment disputes based on the violation of investment agreement when amounts to breach of investment treaty obligations. The respondent has not established any right under the treaty which preclude any party to approach ICSID tribunal or fork in the road clause. The proceeding before ICC are different because different parties are perusing their rights under CHEJVA agreement.[1040] The proceeding pending before the Supreme Court of Pakistan does not affect by the assumption of jurisdiction of the tribunal. The ICSID tribunal asserted two reasons for the irrelevancy of Supreme Court proceeding for the ICSID jurisdiction. Firstly, the Supreme Court of Pakistan is not dealing with the allegation of breach of treaty obligations under Australia-Pakistan BIT and general international law. Secondly, parties in the present arbitration are different from those in Supreme Court of Pakistan. The ICSID tribunal announced its award on jurisdiction on 13th December 2012 ten days before the date of final hearing in proceedings before the Supreme Court of Pakistan. [1041]

The ICSID tribunal pronounced its decision on jurisdiction and liability on 10th November 2017. The tribunal declared that the respondent has breached the Fair and Equitable standards of the Pakistan-Australia BIT 1998. The act of denying the application of the claimant after the assurances by the officials of federal and provincial government have violated the FET clause of the investment treaty. The action of taking over the mining site even without paying any prompt, full and effective compensation amounts to expropriation of the foreign investment in violation of the Article 7(1) of the investment treaty. ICSID tribunal declared that the

[1040] Ibid., 148-152.
[1041] Ibid.

act of novation of agreement and relaxation by provincial government under Balochistan Mineral Rules has created the specific assurances for the Mining. The tribunal accepted the assertion of the claimant that 'assurances' and the 'conduct' of the federal and provincial government under CHEJVA has created the 'Right of Legitimate Expectations' for the entitlement of the mining lease.

6.3.4.2 The Rental Power Ship Investment Dispute[1042]

Another conflicting investment dispute appeared which led to conflict of jurisdiction. The investment dispute emerged as a result of the decision of the Supreme Court of Pakistan for a *Suo Motu* action taken under Article 184(3) of the Constitution of Pakistan, 1973.[1043] The Supreme Court of Pakistan took action in response to a press conference and a letter sent to the Court by a parliamentarian. The apex Court proceeded its action for an alleged corruption of billions of dollars for granting power generation contract to a Turkish Rental power producers (RPPs) company i.e. Karkey Karadeniz Elektrik Uretim.

The Economic Coordination Committee (ECC) of the government of Pakistan adopted Rental Power Policy adopted in 2006. Several contracts were executed for the production of Electricity, including a Turkish Rental Power Producer (RPP) to Karkey Karadeniz. Karkey was granted with the Letter of Award for the period of 5 years in pursuant to Rental power policy of the government. Private Power Infrastructure Board (PPIB)[1044]executed implementation agreement and issued a sovereign guarantee on behalf of the government of Pakistan. These limited-term contracts were

[1042] Human Rights cases regarding 'Alleged corruption in rental power plants' The Rental Power Case, 2012 SCMR 773.
[1043] Ibid.
[1044] The regulatory Body was specifically established to facilitate private investors for power generation project for the implementation of power policy of the government 2006.

granted on short term investment basis to overcome the acute shortage of energy in Pakistan.

The newspaper daily 'Nation' reported a conference by a Pakistani parliamentarian regarding the alleged corruption of $ 5 billion. The press conference statement alleged that the public functionaries including the minister of water and power have received kick-backs for awarding an illegal contracts to the RPPs including Karkey Karadeniz. The statement alleged that the contracts have been awarded in contravention of Pakistani law relating to public procurements i.e. PPRA. The Supreme Court of Pakistan took *Suo Motu* action under the Constitution by exercising its original and appellate jurisdiction.[1045] The Supreme Court asked the parliamentarian to produce evidence for the alleged corruption and illegalities of the process of awarding 'Energy Contracts'.[1046]

The Supreme Court of Pakistan undertook a detailed hearing of the case and ordered to rescind the power generation investment contract of Karkey Karadeniz by declaring it as void *ab-initio*. The Supreme Court of Pakistan rejected the assertion made by the corporation that the contract was awarded according to the Rental Power Policy approved by the ECC of the cabinet. Supreme Court declared that the contract was awarded without adhering to PPRA[1047] and its Rules responsible for ensuring transparency of transactions for the power generation contract. The tariff was fixed at exorbitant rate for an unsolicited proposal. The advance-payments of millions of dollars were made without prior approval of the cabinet.[1048]

[1045] Article 185(3) & 184 (3) of The Constitution of Islamic Republic of Pakistan 1973.
[1046] Human Rights, 2012 SCMR 773.
[1047] Public Procurement Regulatory Authority ordinance, 2002 and Rules 2004.
[1048] Human Rights, 2012 SCMR 773.

The Supreme Court held that it has authority to review the policies of government and actions which affect the socio-economic impacts of the citizens of Pakistan under Article 29 and 2A of Constitution of Pakistan, 1973. The Court has the authority to review the government policy on the touchstone of fairness, legality and open competition. The government (i.e. executives) is the custodian of national resources. The executives are bound to preserve and protect the same by strictly adherence to the laws. The executive authorities are bound to exercise their powers in public interest and the Court can invalidate their action on the touchstone of fairness, legality and transparency.[1049] The Court further directed the Chairman of National Accountability Bureau (NAB)[1050] to investigate all public functionaries and all the participants of the transaction including Investor Company for their involvement in corrupt practices and illegal gain. The court bound the chairman to submit its report of progress fortnightly with the Registrar Supreme Court.

The Supreme Court of Pakistan decided the case on 30th March 2012. The Supreme Court of Pakistan rendered its judgment after two years of hearing of the case. The Supreme Court of Pakistan concluded that RPP contracts had been procured in breach of PPRA Rules and declared those contracts void ab initio. Consequently, the NAB authorities detained four power generation vessels of Karkey Corporation to continue with criminal investigation for the corruption of government authorities. The action was taken on binding directions of the Supreme Court of Pakistan. The Supreme Court referred the matter for further probe of the allegation of corruption to the NAB and place the name of Mr. Karkey on the Exist Control List (ECL)[1051] The Supreme Court froze bank accounts of the company and ordered to detain the power

[1049] Human Rights, 2012 SCMR 773.
[1050] NAB is empowered to investigate and trial of financial corruption matters in Pakistan.
[1051] A list maintained under the authority of Federal government of the persons prohibited to depart from Pakistan.

ships in pursuant to the inquiry of the NAB till its completion. The NAB demanded the return of US$ 183.5 Million which finally settled at US$17.2 million between NAB and Karkey. At this stage, another letter of the Parliamentarian, Faisal Saleh Hayat which stated that the actual claim of 227 million had been settled for 17.2 million. The Supreme Court of Pakistan took the notice of the settlement and directed to the NAB to clarify its position and to recover a further amount of US$ 128 million. The NAB again placed restrictions on the karkey vessels to leave Pakistan on the directions of the Court. In May 2013, Lakhra filed admiralty suit against karkey in Sindh High Court for the US$128 million and in case of default to sell the vessel for recovery of the amount due. In October 2013, the Pakistani shipping agent, Bulk shipping Pvt Ltd of karkey, filed a suit of US$1.1 million against karkey for the recovery of docking charges along with the damages of US$ 949,000 to pay to the company. The Sindh High Court issued detention order of all four power vessels till the payment of US$ 1.1 million by exercising its admiralty jurisdiction. The Sindh High Court revoked this order of detention of the vessels on the furnishing of receipt of payment made to Bulk Shipping Pvt Ltd.

The Turkish company, Karkey karadeniz Electrcity Production Corporation (Karkey Corp.), filed its request on February 8, 2013 to constitute arbitration tribunal for the investment claim of $ 2.1 billion as damages.[1052] Karkey filed its claim for breach of obligation under Turkey-Pakistan BIT for the ongoing detention of power generation vessels. The claimant alleged that treatment of Pakistani authorities has caused financial damages and loss of earning of profits out of the investment made by the corporation. The respondent has violated international laws on foreign

[1052] Karkey v. Pakistan, ICSID Case No. ARB/13/1.

investment[1053]. The claim was filed for the alleged violation of Turkey-Pakistan BIT 1995 by the foreign investor corporation against Pakistan (Respondent) as host state before ICSID. The Arbitration tribunal constituted by the Chairman of the Administrative Council in pursuant to default procedure of Art.38 of ICSID Convention and Rule 4 of the ICSID arbitration Rules due to non-compliance about the appointment of respondent's arbitrator. The claimant investor sought compensation for the redress for the damage from the ICSID tribunal for the breach of bilateral investment treaty (BIT) between Turkey-Pakistan 1995 and the terms of investment agreement between Karkay karadeniz and Pakistan.

On March11, 2013, the claimant filed a request for the 'provisional measures' for the release of power producing vessel i.e. Karkey Ships. The Rental Power Ships were taken into custody by NAB an agency of the government of Pakistan. The tribunal held its first session in Washington regarding the provisional measures immediately after its establishment. The tribunal issued a decision on Oct 16, 2013 regarding the provisional measures and directed the host state (Respondent) for release of the power producing vessel as the investment property (assets) of the foreign investor.[1054] The ICSID tribunal directed to the government of Pakistan to take all necessary step to depart the detained vessel to international water after making required clearances from customs, port authorities and NAB. [1055] ICSID tribunal directed the claimant to make necessary arrangements for the return of the vessels after necessary repairs from Dubai.

The parties exchanged correspondence for non-compliance of the respondent to the decision with reference to provisional measures directed by ICSID tribunal. In

[1053] Published in The Nation newspaper on 11th February 2014.
[1054] Business Recorder, Mustaq Ghuman, August 12, 2014.,Express Tribune , March 1st, 2016.
[1055] Karkey v. Pakistan, ICSID Case No. ARB/13/1, Para 187.

November 2013, the tribunal noted if the respondent had not complied with the decision "*unless it is immediately complied with, the Tribunal [would] draw all the consequences of that breach under International law.*" The tribunal sent a letter to the parties for the compliance of the decision of the ICSID tribunal on Provisional Measures. On 14th May 2014, the respondent informed that the power ships have been released by order of the Sindh High Court and has arrived in Dubai for dry-dock inspection: The respondent consented for permanent release of the ship on application of the claimant regarding modification of provisional measures to affect its permanent release. In August 2014, the tribunal modified the decision on the provisional measures and held that the return of power ship is not mandatory to Pakistan.[1056]

The Respondent challenged jurisdiction of the ICSID tribunal On Jan 31, 2014 with the request to deal the issues as preliminary question. The request to decide the question of jurisdiction as preliminary question of law was turned down by the ICSID tribunal and decided to proceed with the merits of the case.

ICSID tribunal rejected the objections of the respondent: firstly, Rental Service contract was undertook by the way of fraud and corruption. Secondly, illegal procurements were made for the implementation of the contract in breach of Article 1(2) of Turkey-Pakistan BIT. The tribunal held that judgment of the Supreme Court of Pakistan has not followed the high standards of proof as approved by international law, in order to deal with corruption allegation. The international standards require a clear and convincing evidence to prove the corruption allegations. But the Supreme Court of Pakistan relied upon the evidence from Pakistani officials and decided the case on balance of probability standards whereas, majority of the allegations raised by

[1056] Ibid., Para 187.

the respondent are based on acts or omissions of Pakistani officials. These evidences cannot be considered as an evidence of positive proof of corruption.[1057]

The tribunal held that the ICSID tribunal is judge of its own competence as envisaged by Article 25 of the ICSID convention. The Supreme Court of Pakistan has exercised its jurisdiction irrationally and arbitrarily. The jurisdiction of the tribunal has been created under the international law. The tribunal is not bound to follow judgment of the Supreme Court of Pakistan to the effect to deprive the tribunal of its jurisdiction under an international law.[1058] The ICSID tribunal is a forum to apply international law and is not bound by the decision of the Supreme Court of Pakistan, which found Rental Service Contract null and void.[1059] The ICSID tribunal relied upon judgment of the International Court in Diallo vs Egypt which pointed out that:

"Where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation."[1060]

The ICSID tribunal accepted assertions made by the claimant that termination of Rental Service Contract (RSC) amounts to expropriation of the investment made by the foreign investor. The respondent has breached the treatment and expropriation clause of the Turkey Pakistan BIT 1995.

The tribunal held its final hearing on jurisdiction and merits of the case between Feb 29, 2016 and March 12, 2016 in London. Consequently, rendered an

[1057] Ibid., para 521.
[1058] Karkey v. Pakistan, ICSID Case No. ARB/13/1, para 550-61.
[1059] Ibid., 154, 544.
[1060] ICJ, Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo, Judgment of 30 November 2010, ICJ Reports (2010): 639.

award of damages against Pakistan.[1061] To the question whether Pakistan has expropriated Karkey's investment in breach of Article III of the Turkey-Pakistan BIT? The tribunal held that Pakistan has expropriated Karkey's investment through judgment of the Supreme Court whose acts are attributable to Pakistan. The tribunal declared that Supreme Court judgment has deprived karkey from its investment by expropriation, terminated the investment contract and interfere with free transfer of funds of foreign investor i.e. Karkey Karadenis Elektrik Uretim.[1062]

The contention of respondent about the non-existence of the investment and terming the activities of the claimant as sale of goods transaction not covered under the Art.25 (1) of the ICSID convention. The tribunal rejected the claimant objection's and held that karkey has made an investment by applying the standard enumerated in Salini vs Morroco[1063] to identify an investment protected under the ICSID convention. The tribunal accepted existence of foreign investment even without having the permanent structure in the Host state as approved by SGS vs Philippine[1064] (i.e. pre-shipment inspection service case).

The tribunal unanimously declared that it has jurisdiction to decide the claim. The tribunal decided an award of damages (US$ 1.4 billion) in favour of the claimant for the breach of obligation under Article III (expropriation) and Article IV (1) of the treaty by the respondent.[1065]

[1061] Karkey v. Pakistan, ICSID Case No. ARB/13/1.
[1062] Ibid., 629-650.
[1063] Salini Costruttori S.P.A y Italstrade S.P.A. v. Kingdom of Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4. 16 July 2001, "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
[1064] SGS v. Philippines, ICSID Case No. ARB/02/6.
[1065] Turkey Pakistan Bilateral Investment Treaty, 1995.

Pakistan has filed petition for annulment proceedings which was registered on 7th November 2017 for which the Secretary General of ICSID has constituted an ad hoc committee on 5th December 2017 in accordance with the Article 52 (3) of the ICSID Convention. (ICSID has suspended the execution of the judgment in annulment proceedings on request of Pakistan in February 2019.

6.3.4.3 Evaluation of Mining and Energy ISDS of Pakistan

In mining and energy disputes the Supreme Court of Pakistan took action to decide contractual disputes after invoking its original jurisdiction. Illegalities and corruptions were alleged for Mining and Energy production contracts with the foreign investors. The Supreme Court of Pakistan exercised its jurisdiction and passed the directions to investigate the matter against the federal and provincial officials who participated negotiation and executed investment contracts.

The foreign investors in both the cases defended their positions by pleading that such foreign investment are outside the jurisdiction of the domestic courts. The Supreme Court of Pakistan rejected the arguments that the disputes are to be dealt with under the international framework on foreign investment dispute settlement. The Court, in both the cases, declared that it has jurisdiction to decide the contractual obligations on the touchstone of fundament rights of the citizens of Pakistan. The Supreme Court of Pakistan declared the investment contracts of Mining and Energy declared as null and void because of illegalities and corruption involved at the time of execution of contracts. The Supreme Court clarified that all the relaxations and concessions granted in violation of the provisions of national and international laws thus, illegal and have no effect in the eye of law. Supreme Court of Pakistan referred the matter to anti-corruption agency of the state to investigate of financial transactions

of the investment contracts. The anti-corruption agency i.e. NAB proceeded for the indictment of the officials involved and detained assets of the foreign investors for the purpose of investigations. At the same time, the Apex Court passed an order forbearing parties to participate for the international settlement of investment disputes before icsid.

Nonetheless, the foreign investor approached the ICC for the breach of contractual obligations under investment contracts. The Foreign investor invoked ICSID jurisdiction and alleged for the breach of bilateral investment of treaties. These foreign investors pleaded violation of fair and equitable and expropriation clause of the BITs regarding the acts of declaring the investment contracts null and void. The decision of the Supreme Court Pakistan declaring the investment contracts non-existent and actions of the government officials thereunder amounts to destroy the foreign investment thus, expropriations without adequate compensations by the host state.

ICSID proceeded to constitute ICSID tribunals in both the cases, which was contrary to the directions of the Supreme Court. At the same time, these ICSID tribunals issued their decisions of provisional measures to restrain the respondent to take any steps violative of the international investment obligations. The directions issued by the ICSID tribunal were in denial of the binding order issued by the Supreme Court of Pakistan. The Supreme Court of Pakistan issued exercised its original jurisdiction for the review of the executive actions of the government and its agencies regarding the execution of the contracts of foreign investment. Supreme Court exercised its original jurisdiction to take radical action while declaring the investment contract non-existent and restrained the parties to participate for ICSID proceedings. The judgment of the Supreme Court has binding effect for on the

government of Pakistan under the Constitutional law of country. Otherwise, the government has to face contempt of court with penal consequences. Contrarily, the opposite rather conflicting decisions of ICSID tribunal announced provisional measures and final award of damages against Pakistan for the breach of treaty.

The binding judgments of the Supreme Court appeared in conflict with the decisions of the ICSID tribunals, which relied upon the international framework for ISDS. The judgment of the Supreme Court has binding impact on all agencies of the government whereas the awards of the ICSID tribunals are mandatory to be followed by the state under international law of treaties. The opposite position of jurisdictional conflicts between the Supreme Court of Pakistan and ICSID tribunals in Mining and Energy disputes have contributed for the indeterminacy of ISDS regime thus, legitimacy of ICSID mechanism.

6.4 Legitimacy Analysis of Pakistan's Approach for ICSID Jurisdiction

This was the part of struggle to participate liberal politico-economic strategies of international economic regime. The ICSID tribunals assumed jurisdiction in case of breach of contract by invoking the provisions of investment treaty executed even some time later in time than investment contract. The investment contract provided for the local settlement of investment dispute according to the laws of the host states i.e. Pakistan. But the foreign investors resorted upon the BITs which in fact entered upon later in time than the enforcement of investment contract.

The parties in those case disputes about the interpretation of the clauses of investment contract. The host state asserted to rely upon the dispute settlement clause

of the investment contract and gave preference to the local arbitration procedures. On the other hand, the foreign investors resorted their preference for the dispute settlement clause of the bilateral investment treaty which in terms suggest ICSID jurisdiction for resolution of investment dispute. The host state challenged the jurisdiction of the ICSID tribunal in all ICSID disputes relating to Pakistan including the non-conflicting disputes. The claimants pleaded violation of fair and equitable treatment and expropriation clauses of the bilateral investment contract. These disputes ended up in compromise between the parties without a final merit base award.

The cases where jurisdictional conflicts arose when local courts assumed the jurisdiction of the international investment cases. The investment disputes already initiated in local courts for the same subject matter. The foreign investors later when filed their claims before ICSID forum by relying upon dispute settlement clauses of bilateral investment treaties. The jurisdiction was challenged by relying upon the ground that the investor has already participated to seek their reliefs and the courts had already decided the matter for their relief. These disputes of jurisdictional conflict were started before other forums than the initiation of ICSID proceedings. Those other forums decided the matter through their decisions before the final award of the ICSID tribunals for these matters. The cases where the state challenged the jurisdiction of the ICSID tribunal proceeded up till final pronouncement of the decision.

The respondent host states challenged in all these ICSID cases challenged the jurisdiction of the cases. The ICSID tribunal decided for all these case in favour of foreign investor. The tribunal decided that it has jurisdiction to decide it final and these are not even bound be the decisions of any other court.

In the case of Mondev Int. Ltd vs United States the investment claim was denied and ICSID tribunal refused to usurp the authority of the domestic courts by acting as international appellate court wherein Mondev challenged the exercise of discretion by local courts.[1066]

The compensation for the regulatory changes does not abolish the powers of the host states but invoke due considerations to protect foreign investment by balancing rights of foreign investors and the public rights of the states.[1067]

In Loewen Group Inc. vs United States, the complainant argued that the local courts have violated the national treatment clause under NAFTA (Ch.11). The ICSID tribunal dismissed the claim because claimant has already exhausted its remedies under US laws.[1068]

The decisions of superior courts in Pakistan which cause the conflicting position to follow the uniform approach for taking cognizance for the disputes of foreign investors. These cases were pleaded for different grounds but follow the same argument of illegalities of contracts by the parties. The decisions of the court identified the contracts as unlawful and void.

It is the established principle of law that specific exclude the generality. Where a contract is provided with the specific procedure that would prevail of the general provision for the dispute resolution. The procedures agreed by the parties with specific intentions receive precedence in the jurisprudence of international law. That may be the specificity of procedure or application of law. The jurisprudence of international law recognized the doctrine of party autonomy. The justification for

[1066] Mondev Int'l Ltd. v. United States, Final Award, ICSID Case No. ARB (AF)/99/2.
[1067] Brower and Schill, "Is arbitration a threat," 484.
[1068] The Loewen Group, Inc. v. United States, Final Award, ICSID Case No. ARB (AF)/98/3: 87.

taking the cognizance of the disputes involving international law was the legality and the validity of the international contracts. The decisions of the investment tribunals affected to determine the regulatory regime of the capital importing nations. The stakeholders seek guidance from the rules elucidated by the ICSID arbitration tribunals for their future relationship.[1069]

The language of BITs is barely guiding to solve the uncertainty for the application of principles of international investment law and its sources. The respected publicist and arbitrators are even concerned about the lack of hierarchical application principles of international law and its consensus sources of international law as established in Article 38 of statue of international court of justice. This unpredictable pattern of international investment law has complicated the narratives for investor state resolution of disputes.[1070]

6.5 Conclusion

The successive governments in Pakistan owed its international obligations for the protection of foreign investments. Policies were made and initiatives were taken to build a free market and liberal economic outlook of Pakistan. Pakistan signed international instruments for promotion and protection of foreign investments in the host states. Pakistan remains aligned with the international peace and economic stability. The legislative measures for the purpose has introduced incentivized measures to attract inward flow of foreign investment in the country. The domestic policy framework, legislative measures and executive actions has had reflected the conformity approach to the contemporary regime of ISDS i.e. ICSID mechanism. The legislative and executive actions has provided a credible assurance of foreign

[1069] Garcia, "Dirty little secrets," 347.
[1070] Ibid., 347.

investment protection. Legislative and executive measures in Pakistan remain consistent to owe international obligations for the effective settlement of investment disputes. Pakistan signed ICSID Convention on July 06, 1966 and ratified the same on September 15, 1966[1071] to build a credible assurance of ISDS.

Pakistan participated to international instruments for the promotion and protection of foreign investment in the country. The executives of the state executed number of multilateral and bilateral agreement to owe international obligations. Pakistan signed multilateral agreements such as OIC and ECO agreements which provide for the resolution of foreign investment disputes. OIC has provided ISDS mechanism as alternative to ICSID for the member states. FTAs of Pakistan with Malaysia and China have referred ICSID mechanism along with other alternative options for the resolution of foreign investment disputes. Pakistan was the first country in 1959 which signed first ever BIT with Germany which provide for the supranational resolution of foreign investment disputes. The executives signed fifty three (53) bilateral investment treaties (BIT) till December 2017. All eight BITs signed before 1990s were ratified. The executives of Pakistan executed thirty two (32) BITs in the last decade of 1990 and twelve (12) in first decade of new millennium. A major shift can be inferred when only one BIT was signed after 2010. A large majority of these BITs have referred ICSID as forum of ISDS.

Pakistan has been the respondent in eight ICSID claims. One was withdrawn in its initial stage.[1072] Later three cases[1073] were settled by executing compromises between parties. The other four litigations were contested between the parties. SGS

[1071] https://icsid.worldbank.org/about/member-states/database-of-member-states accessed on 12-10-2020.
[1072] Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan, ICSID Case No. ARB/87/4.
[1073] Impreglio S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 and Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan ICSID Case No. ARB/03/29.

case discontinued as result of settlement between parties before final award while three others[1074] ended up with the heavy weight awards against Pakistan. Unless claims reached on compromise with Pakistan, the contested ICSID cases resulted in jurisdictional conflicts. The superior courts of Pakistan in cases of jurisdictional conflict asserted its review jurisdiction on the investment contracts of Pakistan. The superior courts issued mandatory directions to abandon ICSID litigations. The supreme court of Pakistan declared the investment contracts illegal, invalid and void. The authorities of Pakistan were not allowed under the law of the land to take measures for the purpose of participating ICSID litigations. Therefore, Reko diq mining and karkey power ship cases resulted in awards of billions of dollars due to such jurisdictional conflict.

Unpredictability grew out of accumulative signaling effect of maneuverability of investment transactions and experiences of ICSID litigations in disputes relating to Pakistan. The frequency of ICSID litigations impacted to decrease the trend of adoption and ratification of BITs in Pakistan. Thus, the experience of ICSID litigations for Pakistan affected to engender unpredictability of the rights of foreign investors in Pakistan. Unpredictable impression of ICSID mechanism to engender a radical approach in Pakistan include following contributor factors.

Firstly, the perceived inequality has been embedded for the compromised legitimacy of ICSID mechanism. Lack of professional contribution and unskilled handling of treatification process of investment treaties has enhanced the risk of economic setback for the country. The stock of investment treaties of Pakistan reflect

[1074] Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8, Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1.

an evidence of deficient due diligence at the time of negotiating and formalization of international instruments of obligations. The majority of investment treaties are replica of each other with minor modifications. Irrevocability of consent for decades for the sake of credible assurance to protect foreign investments has place the country in disadvantage position. Foreign investors who owes no obligation under the treaty provision with the advantage of invoking ICSID mechanism even without any role of the home state i.e. actual party of the investment treaties. The host states are the permanent respondent in ICSID mechanism. The local investors have the options to maneuver to take the advantage of ICSID arbitration by registering itself as foreign company in the country of most suitable BIT. This vary fact has been a discouraging factor for local investors. The investment treaties in Pakistan has affected to restrict even the vital public interests of the subject of the state. Public interest suffers when illegalities and corruptions are required to honor for the sake of international obligations.

Secondly, Unpredictable experience of ICSID jurisdiction created vulnerability challenges to govern the vital public interest of the state. Pakistan challenged the ICSID litigations arose out of contractual obligations of construction and service contracts on the grounds that such contractual disputes are not legal issue relating investment. The disputes referred to contractual obligations relating to performance. ICSID tribunals turned down Pakistan's objections of ICSID jurisdiction on the issues by adopting a liberal interpretation of 'foreign investment' by including contractual obligations as legal issues relating to foreign investment. The judgments of ICSID tribunals have diluted the distinction between contract claim and treaty claims. These cases of construction contracts were decided while ignoring the party's autonomy for choice of law and forum clause for dispute resolution.

Therefore, unpredictability arise for other parallel proceeding to resolve contractual disputes before other international forums. The expansion of contract claim to treaty claim has engender unpredictability for an established principle of '*Pacta Sunt Servanda*' of international law. In SGS case ICSID tribunal assumed its jurisdiction for an already decided case from Swiss courts by the retrospective application of bilateral investment treaty. In SGS and Agility Corporation case ICSID tribunal consider the professional service agreement as foreign investment. The experience of judgment in construction and service contracts have engendered indeterminacy and incoherence for the resolution of investment disputes. The confidential close door arbitration proceedings and unavailability or partially available ICSID record of cases has raised question of transparency of awards of billions of dollars by the tax the tax payers in Pakistan.

Thirdly, unaccountable maneuverability of foreign investors has been another reason for declining confidence of Pakistan for ICSID mechanism. In SGS, Rekodiq mining and Karkey ship cases, Pakistan asserted corruption and kickbacks for the procurement of investment contracts. ICSID tribunals did not consider the alleged corruption of and gross violation of domestic laws of the host state. Notwithstanding the treaty provision of Australia Pakistan BIT 1998 which has barred the protection of foreign investment found illegal. ICSID tribunals discredited the judgment of the supreme court of Pakistan in Rekodiq case by declaring that Supreme Court of Pakistan has not followed the standards of 'positive proof' of corruption in accordance to international law.

Therefore, the prevailing unpredictability about the rights of foreign investment has motivated nuances of response by executive and judicial organ of the state. The executives have shown reluctance to adopt further treaty obligations for

ISDS. Pakistan has signed only one more BIT in last ten years with Bahrain in 2014 in contrast to 32 BITs in the last decade of 1990s. The deviating and backlash of jurisdictional conflicting trends for contemporary framework of investor-state dispute settlement has weaken the legitimacy rhetoric of ICSID system.

The conformity approach of Pakistan transform to a deviated approach after experiencing indeterminate and incoherent adjudicative standards of the ICSID tribunals. In the backdrop of unpredictable and declined legitimacy standards of investor-state dispute settlement, the executives and judicial organs of the states have adopted a deviated approach for ICSID system of ISDS. The executive authorities of the state have chosen for a 'reluctant approach' to owe further obligations under ICSID system of adjudication. Superior Judiciary of Pakistan exercised an unprecedented action to declare investment contract illegal and void to throw the respondent into a dead end. Therefore, ICSID forum out rightly rejected the position taken by Pakistan and pronounced ICSID awards of billions of dollars.

CHAPTER NO-7

CONCLUSIONS AND SUGGESTIONS

7.1 Conclusions

To conclude the research project on "*Critical Evaluation of Institutional Arbitration for the Settlement of Investor-State International Investment Disputes: A Case Study of Pakistan*" it can be inferred that the stakeholders of investor state dispute settlements (ISDS) remained concerned with foreign investment protections. The dispute resolution mechanism appeared to be the pivotal feature of investment protection. After WWII, the international community took certain initiatives to devise a transnational mechanism so as to address foreign investment disputes by specialized impartial forums. An attempt under the auspices of World Bank Group proved to be successful while establishing ICSID jurisdiction for the settlement of investment disputes.

The ISDS system has contributed for international economic and political stability. The system has contributed for the economic welfare of host state with their enhanced responsible attitude toward foreign investment. Secondly, the specialized system of disputes resolution has built protection for the vulnerable players i.e. multinational corporations of international economy on foreign land. Thirdly, the ISDS mechanism has established equilibrium between economic interests of the foreign investors and the host states. The ICSID Convention gained its legitimacy due to fairness and impartiality discourse to resolve foreign investment disputes without any political interference.

The research has unveiled that Thomas Franck has extended the theory of legitimacy to discuss foundational attributes for the normative legitimacy of international rule. The theory of legitimacy suggests that the attributes of legitimacy persuade sovereign states to comply with the rule and rule making institutions where a right process has been followed. Sovereign states submit their compliance by conformity response to follow the rule. Thus, the legitimacy discourse of an international rule or rule making institution has the capability to exert compliance pull for the conformity response of the sovereign state.

The research has analyzed that the ICSID Convention has been established to provide an impartial and fair procedure of investor-state dispute settlement (ISDS). The ICSID Convention has incorporated substantive and procedural rules to attract compliance pull of the system by the stakeholder of foreign investment disputes. The rules of procedure for exercise of ICSID jurisdiction has provided a specialized and neutral transnational forum for the settlement of foreign investment disputes. The majority of sovereign states approved this specialized forum by their conformity response. Overwhelming adoption of the ICSID jurisdiction by their bilateral investment treaties (BITs) increased the number of ICSID litigations between foreign investor and the host states.

This research has discovered some latent faults in ICSID mechanism. The growth of ISDS litigations by availing ICSID jurisdiction contributed to produce unpredictable results in the backdrop of these inherent faults. The exercise of ICSID jurisdiction has shown its weaknesses to meet with essential attributes of normative legitimacy by Thomas Franck. The research has evaluated the incidence of exercise of ICSID jurisdiction on the touchstone of normative legitimacy by Thomas Franck. The research revealed that the inherent fault lines of the ICSID mechanism contributed to

produce unpredictable results, which affected normative legitimacy of the ICSID mechanism. Denial Bodansky has argued that normative legitimacy provides reasons for sociological legitimacy in form of affirmative response by the sovereign states.[1075] Normative legitimacy focused on procedural requirements of fairness and transparency. The accountability of the results of the application of rule has been the matter of concern for the normative legitimacy. On the other hand, sociological legitimacy emphasized on applicable rules being accepted by sovereign subjects of international law.[1076] The compliance behavior of the sovereign states emerged under the pull exerted by a legitimate international rule as it ascends to the attributive standards of normative legitimacy.

The growing demands for investor-state dispute settlement legitimatized the ICSID institutional settlement of foreign investment disputes. The ICSID jurisdiction was accepted by majority of sovereign states in their investment treaties. This sociological legitimization has been evidenced from the World Investment Reports, which shows that 3317 investment treaties were executed among 150 economies of the world till June 2019.[1077] Since its establishment in 1965, the ICSID jurisdiction is taking its loin share of 89% from investor state settlement of investment disputes.[1078] The ICSID tribunals exercised its jurisdiction in majority of the disputes emerged since last decade of 20th century.

The ICSID jurisdiction was established under the ICSID Convention. The Convention can be considered as hasty efforts to formalize a long standing controversy between capital exporting rich nations and capital importing least

[1075] Bodansky, "Concept of legitimacy," 7.
[1076] Ibid., 4-6.
[1077] *UNCTAD*, "World Investment Report 2019."
[1078] *ICSID*, "Caseload 2019."

developing countries (LDCs). World Bank took the initiative in 1963 to start negotiations at regional consultative level. The Regional Consultative meetings were held in December 1963 to May 1964 i.e. Six months among 61 economies of the world to discuss suggestions for a transnational forum for ISDS. The consultative stage was followed by 22 meetings of Legal Expert Committee in 20 days i.e. 23rd November to11th December 1964, in order to formalize the draft convention. Thereafter, Executive Directors approval in 17 days 16th February to 4th March 1964, to establish a supranational forum for the resolution of foreign investment disputes. Consequently, 21 negotiating states denied to accept the convention in its Tokyo meeting in 1964. However, Executive Directors approved the draft of ICSID Convention without addressing concerns of LDCs. The draft of ICSID Convention was enter into force in 1965 after execution by 30 states, including most poor economies and few richest nations.[1079]

After the end of Cold War, the capital thirsty nations left no choice except to give consent for the flow of foreign investment from IMF, IBRD and capital exporting nations. LDCs accepted obligations under ICSID conventions despite vulnerability of their public and sovereign interests for comparative advantage and flow of foreign investments, which was essential to maintain their economic growth.

The research has also highlighted the undermining factors of fairness for the assumption of jurisdiction by ICSID tribunals. The procedural practices under ICSID arbitration rule provided arbitrary authority of Secretary General of ICSID for the selection and constitution of ICSID tribunals. These elite arbitrators are selected from some elite law firms for such highly expensive litigations mostly belong to advance countries. These arbitrators are judges of their own cause if any objection is raised

[1079] *ICSID*, "History of ICSID Convention."

regarding the constitution of the ICSID tribunal on the compliant of foreign investors. The dual face of the arbitrators as member of ad hoc committee in one side of the spectrum and council of litigant parties give rise the perception of bias at least on the ground of disclosed mind set.[1080]There are valid reasons for their latent bias to protect their high financial interests in the litigations. The repeated appointments of such unaccountable arbitrators from few elite law firms is undermining factor to the fairness of the ISDS mechanism. The favorable appointments have no checks and balance, which results favorable outcome of the ICSID litigation.[1081] A relatively less fair procedure for the assumption of ICSID jurisdiction is followed by unpredictable exercise of ICSID jurisdiction by the tribunals.

Jurisdiction of ICSID tribunals has been invoked in majority of foreign investment disputes for last thirty years in post-Cold-War era. The unpredictability prevailed in the exercise of ICSID jurisdiction. The research has highlighted uncertainty regarding applications of international law for the resolution of investment disputes. The choice of applicable law is the sole discretion of arbitrators. The ICSID tribunals have applied private international law for the issues of public interests. The ICSID jurisdiction deals with the issues of state as question of public law by applying the standards of review developed through the application of private law. These tribunals frequently analyzed measures of public interests where rights of foreign investors are affected. To scrutinize such issues, application of private commercial law of contract raised the questions of legitimacy of the mechanism.[1082] This legitimacy gap is also due to improper application of standards of review for the questions of public law in ISDS.

[1080] Gharavi, "ICSID annulment committees," 4.
[1081] Ibid., 3.
[1082] Burke-White, and Staden, "Private litigation," 285.

In the absence of precedent for adjudication, such indeterminate and incoherent applications of sources of law are validly responsible for expensive interpretations of liability clauses in favour of foreign investors. Consequently, inconsistent and unpredictable awards appeared. In majority of the claims, LDCs received heavy awards payable to foreign investors, which are unmatchable with their economic worth.

The non-availability of appeal or review procedure to look into the vires of the ICSID judgments has ascended the award a divine decree. Although, limited scope of annulment procedure is available on the grounds, barely provable against the arbitrators of the tribunals. In case, the respondent state remain successful to prove any ground for annulment of award this does not mean set-aside the case of the foreign investor. Such annulment shall be the end of new beginning, which means a new ICSID tribunal shall be required to try the claim against the same respondent host state.[1083]

The unpredictability of normative legitimacy of ICSID jurisdiction generated legitimacy crisis for ISDS thus, unconformity response of the member states. This research work has analyzed the contributory factors to generate the legitimacy crisis. This research has discovered general and specific contributory factors which have impacted ICSID mechanism to reduce its normative legitimacy. General contributory factors include inherent imbalances of investor-states' rights and liabilities, lopsided constitution of ICSID tribunals, unpredictable ICSID awards and lack of effective supervisory review. General factors have impacted the ICSID system by generating a debate to reform mechanism for its enhanced legitimacy. On the other hand, specific contributory factors are affecting legal and economic interest of the states. Specific

[1083] Article 52 of the ICSID Convention, 1965.

contributory factors include increased frequency of hefty claims, high cost of litigations, and heavy awards for fragile economies when there is no effective forum of review. The judge Charles N Brower has already termed transnational arbitration mechanism as worst form of disputes settlement even for investment disputes. He seems to be doubted about the superiority rhetoric of international investment arbitration. The states are tightening their grip on the arbitration mechanism by realizing the legitimacy crisis for ISDS.[1084]

Apart from the general economic, political and legal debates for the reform of the ICSID mechanism has shown its practical implications which reflect unconformable behavior of states. The non-conformity of behavior from states appeared in the form of reluctance, deviations and backlash toward the ICSID jurisdiction. The unconformity responses for ICSID mechanism of ISDS have been emerged due to indeterminate and incoherent exercise of ICSID jurisdiction for ISDS. In the backdrop of legitimacy crisis of ICSID jurisdiction, deviated approaches emerged: firstly, to manage a 'breathing space' while living within the premises by overcoming suffocation causing factors. Secondly, to abandon the whole system, 'leave it forever', which few host states decided to get out of this mechanism.

Some states have chosen to live with the system by creating breathing space by incorporating clauses in response to reduced legitimacy of ICSID jurisdiction. There are states which resorted upon a reluctant response by creating exceptions for the sake of public health and environment. There are instances where states deviated from the prevalent practices of ICSID jurisprudence. This research has discovered the

[1084]Schill, "Conceptions." 2,3. See also Brower, C. N. (2002). A crisis of legitimacy. *National Law Journal*, *7*, 1-3.

nuances of responses which have appeared in consequent to legitimacy crisis of the ICSID jurisdiction.

The reluctant response of states appeared since formalization stage of the ICSID Convention when some of the negotiating nations voted against the draft convention and did not accept ICSID jurisdiction. Thereafter, China signed the ICSID Convention, but filed reservation on ICSID jurisdiction under Article 25 of the Convention. The effect of the reservation is that China has not accepted ICSID jurisdiction for the violative action of fair and equitable clause of the ICSID Convention. Thus, for China, the ICSID tribunals can exercise its jurisdiction only in case of expropriation and nationalization of the foreign investments. There are states which have adopted a policy to say no to ICSID jurisdiction since its establishment. Brazil can be cited as an example which signed BITs but has not ratified any such BIT to accept obligations for ISDS under the ICSID Convention.

Secondly, the response of deviation appeared on behalf of certain states. These states, in their initial response, adopted and participated in the system of adjudication for investment disputes but later on deviated from the practices under the ICSID mechanism. Some member states have renegotiated their existing stock of investment treaties in order to create exceptions for their public interests, human rights, environment, public health, and labour rights. India and Singapore renegotiated to remove fair and equitable clause of the BIT. Number of states of European Union have consented for an investment court as an alternative to contemporary mechanism of investor-state disputes settlements. Another alternative mechanism has been established by the Union of South American Nations, i.e. UNASUR. The Union organization has devised a parallel ISDS mechanism for the settlement of disputes relating to foreign investment. In CETA 2016, Canada-EU free trade agreement has

established standing investment tribunals with a comprehensive procedural mechanism for the settlement of foreign investment disputes.

The unconformable deviating responses of the states sometime transform into backlash in its aggressive state of affairs. These backlashes appeared when states decided to exonerate their obligations form ISDS by terminating their investment treaties. After Philip Morris case, Australian government announced its trade policy to exclude ISDS provisions from future investment treaties. There are states such as South Africa, Indonesia, Some Latin American nations which decided to abandon their existing stock of investment treaties to say goodbye to ICSID obligations. These states have opted various options to reduce the impact of ICSID mechanism. States adopted different policies for the purpose including let these treaties to expire without renegotiating for renewal, let these die or crushed them by termination. Some states have terminated their investment treaties to exonerate themselves from the obligations of ISDS under ICSID. Another extreme deviating response appeared when some of the Latin American countries notified their withdrawal from ICSID Convention. Bolivia, Ecuador and Venezuela have quitted the ICSID Convention to exonerate their liabilities under ICSID jurisdiction.

One of the radical backlash appeared in Pakistan, notwithstanding the reluctant behavior of the executive with reference to investment treaties, the Superior Courts have decided to the extent of denying ICSID jurisdiction. the ICSID tribunals assumed its jurisdiction for claims against Pakistan. The Supreme Court of Pakistan directed the executive authorities of the state not to participate in the ICSID proceedings. The binding directives of the Supreme Court of Pakistan under domestic law and assumption of jurisdiction by the ICSID tribunal under international law have caused a conflict of jurisdiction between the state and transnational forum for ISDS.

7.2 Suggestions

The dispute resolution is an important factor for providing a trustworthy environment to foreign investors by protecting their investment stability. After World War II, the institutional arbitrations have played an important role to achieve this aim to the satisfaction of the stakeholders of the foreign investment. The institutional ISDS of ICSID has played a significant role to achieve the objective of stable foreign investment regime which is still a tight robe walk. The introduction of reforms would enhance legitimacy standards of the system and shall create a balanced approach for the rights of foreign investors and host state. A balanced approach can be achieved by overcoming the crisis of legitimacy. The research has analyzed the imbalances of ISDS which have the potential to generate a response of deviation, non-compliance and jurisdictional denounce in its aggravated forms. On the other hand, the reforms to address the legitimacy crisis shall provide for exert compliance pull thus, consequent durability. The quest for enhanced standards of legitimacy of ISDS will serve for continued survival of international institutional arbitration.

The transformation of normative foundations of domestic and international community has changed the need of legal to a legitimate system. The ISDS is facing challenges where reforms in the system, on the touchstone of legitimacy standards prevalent in international law, are inevitable. This has been involved the settlement of investment disputes as well as the stabilization of the relationship of different socio-political set-ups.[1085] The ICSID Convention was adopted in 1965 more than a half a century ago which need its reform process to make it pragmatic and transparent in the

[1085] Schill, "Conceptions." 6.

light of ideologies of fairness and transparency, thus its legitimacy. The stability and predictability is linked with the permanency of the regime for ISDS.

To achieve the enhanced standards of normative legitimacy so as to ensure conformable response of the sovereign states, following suggestions and recommendations have the capability to go a long way for continued survival of international institutional ISDS.

7.2.1 For ICSID Jurisdiction

For the constitution of arbitration penal, some guidelines should be issued for the appointment of the arbitrators. This will ensure equal ownership and participation of the member states to build a trust based compliance rather than coerced. The quota and training program should be introduced for the LDCs to constitute a vibrant penal participation for the sake of its enhanced validation of the system.

The ICSID Secretariat should promulgate a code of ethics to avoid conflict of interests of the arbitrators. The long affiliations of the panel arbitrators with the staff raise otherwise impression than fairness. The concerns should be addressed by increasing the number and diversity of the arbitration panel. The diversity has the potential to bring more wisdom to strengthen and sustainability of the ICSID system. The personal linkage of ICSID penal members undermines the integrity and fairness. The detail provision to avoid conflict of interest should be issued. The code of conduct should incorporate provision that if any arbitrator has already been engaged by a party is not qualified to be appointed as the member of the tribunal or ad hoc committee. The serving arbitrators are should be disqualified for their act to serve as the council of parties or party in already filed cases. An arbitrator ought not to be the prosecutor at the same time on the touchstone of principles of natural justice. These

provisions have the potential to inculcate fairness of the process of assumption of jurisdiction and enhanced legitimacy.

The code of conduct should be issued so as to prevent the staff members of ICSID to join law firms in order to get some unfair advantage of their contacts or links with the panel arbitrators and other colleague staff member who act as the secretary of the tribunals. The staff has been the custodian of sensitive or classified information about a state as party respondent in a case. In number of cases, the information relating to the power generation capacity, mining potential, details of mega project and sensitive information regarding economic affairs are involved which has potential vulnerability for its disclosure.

The institution should establish working groups consist of practitioners, academicians, arbitrators, and government delegates to establish a code of best practices for the investment arbitrations to take account of the public implications of investment treaties. The code of best practices should incorporate a mechanism for the revision of awards. Cost shifting of unmeritorious awards and revision of rules for the purpose can enhance the legitimacy of the system. Forum shopping right of investor should be clarified by providing guidelines to the investors. These interpretive notes can achieve coherence in rights and liabilities of the stakeholders and parties to the litigation in particular. The tenured appointment has the capacity to ensure independence and impartiality with its mechanism to delist the arbitrators on the ground of conflict of interests. The provision for the disclosure of their interests should be institutionalized.

7.2.2 For The Assumption of Jurisdiction

It is suggested to establish an ICSID commission to clarify the substantive and procedural standards of ICSID mechanism. To reduce the inconsistency of interpretations at the time of exercise of jurisdiction, the textual determinacy should be ensured by the ICSID institution. The contracting states can also seek guidance to clarify their instruments of investments.

The ICSID institution should introduce global objective statements, which should be fulfilled by the member states. These objectives should be made justiciable before ICSID tribunals. The restatement of these objectives to include the treaty rights of Human rights, global environment, and public health internationally recognized corrupt practices and economic emergencies. These global objectives have evidently pleaded by host states in majority of the cases before ICSID tribunal. The restatement of ICSID should make these defenses justiciable on the bases of reasonable evidence before ICSID tribunals. The ICSID tribunals should assess these defenses by treating as legal issues on the touchstone of qualified international conventions at the time of assumption of jurisdiction.

The ICSID institution should develop a mechanism to clarify some vague rather controversial expression such as Indirect Expropriation, Fair and Equitable Treatment (FET), legitimate expectation etc. A standard clarification of these expressions should be applicable. A standardized clarification shall have the capacity to enhance compliance pull for the rules to implement and a consequent legitimacy. The contracting parties should have option to introduce these enhanced standards at the time of negotiating new investment treaties. The contracting parties should renegotiate expiring investment treaties and should clarify rights and obligations of

foreign investors and the host states. The contracting state should be encouraged with the specific and localized versions of the global objectives of human rights, global environment, public health and corrupt practices which are not inconsistent with the institutional version of ICSID.

To build a credible normative standard as source for ISDS, a detailed guideline to achieve these global objectives, due process and corrupt practices is a must. These global objectives can be made justiciable by the ICSID institution. Various measures should be adopted after seeking permission of the institution on the reference of the host state. It has the potential of serving the stakeholders of the ICSID jurisdiction. This will equally serve the host state to approach the ICSID forum by removing the impression that it only serves foreign investors' interests. The foreign investors will have the opportunity to negotiate with the host states before adoption of measures which would have the potential to hurt the financial interests of the foreign investors. The institution should have the confidence to earn more credibility and trust from the member states.

In the context of Pakistan, at the time of negotiating new investment treaties, the guidelines regarding public health, environmental hazards and corrupt practices hurting public interests of the host state should be introduced.

7.2.3 For the Assumption of Jurisdiction

The following aspects of jurisdiction would bring reforms to enhance its transparency, fairness and predictability: there is a need of permanent supervisory commission of credible professional on tenured basis. The commission should decide the question of jurisdiction before handing over the case to three members' tribunal. Any objection, if raised, about the constitution of the tribunal should also be heard by

the commission of tenured professionals. The tenured job would ensure independence, impartiality and objectivity, thus fairness and legitimacy of the system. The tenured position will not allow them to assist or help any claimant party to proceed with the investment dispute settlement.

For annulment proceedings and tribunal appointments, there should be a different crew for the ad hoc committee. The appointments of panelist in both the tribunals are hurting the normative standards of natural justice. Natural justice has an established principle that nobody can be judge of his own cause. At the same time, the panelist or the tribunal members should not act as the council for the parties to plead their case before other fellow panelist, which, despite of all discourse of credibility, gave rise suspicions of conflict of interests. A reasonable standard of fairness requires settlement of rights to follow the objective standard of justice at the time of decisions of the cases. With global perspective, the enhanced standards of fairness should strengthen trust and confidence of the ICSID system of ISDS by its compliance pull and legitimacy.

7.2.4 For the Exercise of jurisdiction

A commission should be appointed for providing interpretations on the reference by the stakeholder parties to propagate uniformity of jurisprudence of international investment law. For determinacy, fairness, uniformity and predictability of interpretation of ICSID decisions, the commission should interpret application at the time of decisions for the enhanced determinacy of the ICSID jurisprudence. Coherent interpretations of rights promote legitimacy of investment arbitration. The determinacy of the rights and obligations will have the potential to establish

legitimacy of the ISDS system.[1086] The interpretation commission should interpret 'interpretable' text by applying the standards of public law which involve the questions of public interest. The clauses of BITs should be subjected to measures necessary interpretations of Vienna Convention on law of treaty. Article 31 of the VCLT requires that the text of the treaty is to be interpreted according to the ordinary meaning of the text. The treaty provisions of the BIT should be interpreted according to the plain meaning of the text for its determinacy and coherence thus, normative legitimacy.

The ISDS decisions should be made public via online sources so that the decisions made by the arbitrators are subjected to scrutiny by the professional, academicians and general public. A control mechanism for the appointment of arbitrators ensures impartiality and independence. The credibility of arbitration mechanism has nexus with impartiality and independence of decision making by the arbitrators.[1087]In order to ensure, expansion of Panel in its diversity and expertise, the process of selection of panelist should be more determined, fair and transparent. In the era of technology and democracy, a confidential settlement of disputes to impose liabilities on the tax payer money is weird and unreasonable.

The legitimacy crisis of ISDS system has become global as all nations are responding with consensus to reform the existing standards of mechanism.[1088] There are different views regarding standards of transparency. The ICSID is also justifying the rhetoric of fairness and determinacy and coherent of procedure of ISDS mechanism. The evolutionary adaptability of new standards provides a safeguard for

[1086] Franck," Legitimacy," 1589.
[1087] Brower and Schill, "Is arbitration a threat," 493.
[1088] The European Union's approach to investment dispute settlement. (The 3d Vienna Investment Arbitration Debate 22 June 2018, European Commission), Accessed August 18, 2019. https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf.

the continuity of the system. The reform process facilitates to improve the system with the emerging world of technology and democracy.

The discussion has been theorized that investment disputes shall be settled not only to follow determinacy and fairness of procedures, but also manifestly resolve according to the legitimate standards of international law to attract its compliance.

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