Jurisdictional Challenges in Investor-State Arbitration: Analysis of Typical Provisions in Bilateral Investment Treaties, With Specific Reference to the Treaty Between the US and the Kyrgyz Republic

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A. Introduction

Investment is undoubtedly an important factor in the economic growth of a country.[1] Many countries, therefore, have taken various steps to attract foreign direct investment, which has proven to be more important to a nation's growth than domestic investment.[2] One of the main causes of a lack of direct foreign investment in developing and transitioning countries such as the Kyrgyz Republic is the insecurity and instability of its judicial system. This includes such problems as poor enforcement of judgments, an insufficient legal framework, and inefficiency of case management.[3] Therefore, "[i]nvestors in transitioning States in particular, 'invariably seek to have a dispute resolution mechanism which offers one or more of a neutral substantive law, forum, procedural rules and not the law and forum of the place of investment.'"[4]

Bilateral Investment Treaties (BITs) are agreements between two countries that attempt to solve these problems and that serve as a special tool and mechanism to promote and attract foreign direct investment.[5] BITs generally cover four substantial issues: "admission of foreign investors to the host State,

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1 R. Bhala, International Trade Law: Theory and Practice (2001).

2 *Id.*

3 According to a survey of 500 businesses in Bishkek, the capital of Kyrgyzstan, 85% believe that the courts are corrupted. (Law and Reality: 15 May 2004, Bi-monthly newsletter # 01, sponsored by OSCE in Bishkek and published by International Business Council.)

4 S. Spelliscy, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12 Am. Rev. Int'l Arb. 95, 101 (2001) (quoting R. H. Kreindler & T. J. Kautz, *Issues in the Drafting and Performance of Arbitration Agreements in the Context of Bilateral Investment Treaties and Energy Projects: The Example of Turkey*, 12(5) Int'l Arb. Rep. 25, 25 (1997)).

5 G. M. von Mehren, C. T. Salomon & A. A. Paroutsas, *Navigating through Investor-State Arbitrations—An Overview of Bilateral Investment Treaty Claims*, 59-Apr. Disp. Resol. J. 69, at 70 (2004).

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equal treatment of investors, the problem of 'expropriation' of an investment by the host State, and methods of settling disputes."[6]

The Kyrgyz Republic and many other developing countries[7] have signed and ratified number of such agreements.[8] One of the dispute settlement options provided by such agreements is investor-state arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). ICSID was established by and is governed by the "Convention on the Settlement of Investment Disputes between States and Nationals of other States" (the "Convention"). Investor-state arbitration provides a mechanism whereby foreign investors can avoid filing a claim against the host state in its courts, where the state is likely to enjoy a "home court advantage."[9] However, this alternative method of dispute resolution is slightly different from the regular commercial arbitration because of the involvement of vital state interests.[10]

Despite arbitration's effectiveness as an alternative means of dispute resolution, there are some challenges because of its special nature when a state is a party to the arbitration. One of the often-debated issues in investor-state arbitration is the jurisdiction of the ICSID tribunals to hear the case, which the Convention limits by imposing a number of objective requirements.[11] Article 25(1) of the Convention lays down jurisdictional requirements that are necessary for the ICSID Center to have jurisdiction. First, there must be "a legal dispute arising directly out of an investment […]."[12] Second, this dispute must arise "between a Contracting State […] and a national of another Contracting State […]."[13] Finally, parties to a dispute must have consented in writing to submit the dispute to the ICSID Centre.[14] Thus an ICSID tribunal has jurisdiction when a claim is made that satisfies the objective requirements of the Convention and contains the necessary elements stipulated in the BIT or any other relevant legal instrument. This article will concentrate on analyses of jurisdictional challenges of investor-state arbitration. Because of the broad discretion provided to Contracting States in defining the jurisdictional limits of the Tribunal, jurisdictional challenges vary from state to state and from one BIT to another. Therefore, the present analyses

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6 *Id.*

7 At the end of 2001, more than 1,100 Bilateral Investment Treaties were in effect. Most of these were between developed and developing countries but a substantial number were between developing countries *inter se*. (A. F. Lowenfeld, International Economic Law 473 (2003))

8 *See e.g.,* Kyrgyz-Indonesia BIT of 1993; Kyrgyz-Latvia BIT; Kyrgyz-Turkey BIT; Kyrgyz-Malaysia BIT; Kyrgyz-Pakistan BIT; UK-Kyrgyz BIT; Denmark-Kyrgyz BIT; Finland-Kyrgyz BIT; Sweden-Kyrgyz BIT.

9 Von Mehren, Salomon & Paroutsas, *supra* note 5, at 70.

10 R. W. Hulbert, *Comment on a Proposed New Statute for International Arbitration,* 13 Am. Rev. Int'l Arb. 153, 165 (2002).

11 Article 25 of the ICSID Convention.

12 Article 25(1) of the ICSID Convention.

13 Article 25(1) of the ICSID Convention. A "constituent subdivision or agency of a Contracting State designated to the Centre by that State" may be a party to the dispute in place of the Contracting State itself. *Id.*

14 Article 25(1) of the ICSID Convention.

will rely on the BIT between the United States and the Kyrgyz Republic as an example when discussing and illustrating such challenges.

The primary focus of this article is Article 25 of the Convention, which specifically defines the jurisdictional requirements of investor-state arbitration conducted under the auspices of the ICSID Centre. Although submitting to the jurisdiction of the ICSID Centre is not the only option available for the investors to resolve their disputes with the host country under the BIT, the jurisprudence of the tribunals of the ICSID Centre provides valuable guidelines and instructions in addressing such jurisdictional challenges.

Specifically this article will provide a critical assessment of the way that American investors can rely on the relevant provisions of the BIT or national legislation to protect their rights through means of investor-state arbitration. The first section provides a theoretical background for the formal requirements of such arbitration before submitting to ICSID Tribunals. The second section examines and compares the definitions of 'investment' contained in the BIT and the national legislation of the Kyrgyz Republic. The third section discusses the scope and existence of an investment dispute. In particular, the third section focuses on the analyses of what constitutes 'an investment dispute,' and whether an 'umbrella clause' contained in the BIT should be interpreted strictly or broadly, extending to obligations or commitments that arise not only under the BIT, but also under the national law.[15] It also discusses whether the investor-state arbitration clause, the national Kyrgyz law or a valid arbitration clause in a BIT should take precedence regarding some issues such as real estate. The final section of this paper discusses the definition of a Contracting State and the nationality requirement of the Convention.

Answering these questions will involve the analyses of the case law in this area. This work uses the comparative analyses of international and national law together with the critical assessment of existing legislation on foreign direct investments and descriptive methods.

The main sources for this work are the Bilateral Investment Treaty between the United States and the Kyrgyz Republic, applicable provisions of the Kyrgyz legislation, ICSID jurisprudence and different publications, articles and works of scholars in the field of investor-state arbitration.

B. Establishing the Jurisdiction of the Tribunal

I. Consent in Writing Requirement

One of the basic requirements of any arbitration is the consent of the parties to submit the dispute to arbitration and to be bound by its decision.[16] The consent

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[15] *See generally* SGS Societe Generale de Surveillance S.A. *v.* Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

[16] A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observation on Jurisdiction*, 5 Colum. J. Transnat'l L. 263, 265 (1966); M. Hirsch, The Arbitration Mechanism of

requirement is especially important in investor-state arbitration because it defines the scope of jurisdiction of the arbitral tribunal.[17] The consent of the parties will define not only the type of disputes (*ratione materie*) that the tribunal may hear but also the type of parties to the dispute (*ratione persone*) that may bring the claim to the tribunal.[18] In addition to determination of jurisdictional limits of the tribunal, consent indicates complete waiver of sovereignty in favor of jurisdiction of the Center.[19]

According to Article 25(1) of ICSID convention, jurisdiction of the Tribunal requires written consent between the Parties, which has to be "explicit and not merely construed."[20] "No proceedings can take place under the Centre's auspices unless the parties to the dispute have given their consent in writing." [21] The Tribunals have characterized the consent system contained in the Convention to be

> premised on two levels of consent. At the first level, one finds the consent expressed by the Contracting States which agreed to be bound by the Convention [i.e., ratification]. At the second level, one finds the consent given by the host State and the investor by means of an agreement to ICSID arbitration.[22]

The ratification itself of the Convention by the host State and the investor's State of nationality is not enough to satisfy the written consent requirement imposed by the Convention.[23] Obligation to submit a dispute to ICSID jurisdiction will exist only after the State concerned has specifically agreed to submit a particular dispute or classes of disputes[24] to ICSID arbitration through a bilateral investment treaty, through national legislation or through a special agreement with an investor.[25] It is evident from this Article that the consent to ICSID jurisdiction has to be obtained from all parties,[26] including the host State and the investor. The tribunal in the *Autopista Concesioanada v. Venezuela* case recognized written consent as the most important jurisdictional requirement.[27] It explained that:

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the International Center for the Settlement of Investment Disputes 47 (1993); K. Kaoma Mwenda & N. G. Gobir, *International Commercial Arbitration and the International Centre for Settlement of Investment Disputes*, 30 Zambia L.J. 91 (1998).

17 Hirsch, *supra* note 16, at 41.

18 Hirsch, *supra* note 16, at 41.

19 T. W. Michael, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 Int'l and Comp. L.Q. 813, at 815 (1986).

20 Ch. H. Schreuer, The ICSID Convention: A Commentary, para. 248 (2001).

21 Autopista Concesioanada de Venezuela, C.A. *v.* Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision of Jurisdiction; 27 September 2001, at para. 94.

22 *Id.*

23 P. Szasz, *The Investment Disputes Convention–Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J.L. & Econ. Dev. 23, at 28 (1970-1971).

24 Schreuer, *supra* note 20, at 104-105 (quoting Delaume, ICSID Arbitration), *see also* L. Reed, J. Paulson & N. Blackaby, Guide to ICSID Arbitration 7 (2004).

25 Reed, Paulson & Blackaby, *supra* note 24, at 35; C. F. Amerasinghe, Jurisdiction of International Tribunals 633 (2003); A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 Recueil Des Cours 331, at 353 (1972).

26 Schreuer, *supra* note 20, at 192, para. 245.

27 Szasz, *supra* note 23, at 27.

> It's paramount importance is underlined by the fact that at least to a certain extent the other two jurisdictional requirements can be conditioned (though not waived) by agreement of the parties that would normally be expressed in the instrument expressing the consent: the characterization of a particular transaction as an "investment," and the stipulation that a domestic corporation is to be considered as a national of another State because of foreign control.[28]

The Convention requires only that the consent be in writing,[29] therefore parties are free to determine the form and the method of expressing their consent.[30] An agreement between the parties recorded in a single instrument is the most common form of consent.[31] However, the court in *Tokios Tokeles* held that "it is not necessary that the consent of both parties be included in a single instrument."[32] Consent can be expressed "in instruments of completely diverse character, and *not necessarily addressed to the other party*"[33] as long as it is "clear, mutual and in writing."[34] Indeed, it is well established that the combination of written consent contained in the Request for Arbitration made by the investor and the consent given by the State in the BIT or national legislation suffices to satisfy the "consent in writing" requirement of the Convention, provided that the dispute falls within the scope of the BIT.[35]

1. Consent Given Through Bilateral Investment Treaties

In practice, the most usual way for a State to provide consent is for it to conclude BITs, according to which Contracting States agree to submit to ICSID arbitration when disputes arise.[36] Such consent is referred to as "non-contractual" or indirect consent to ICSID arbitration. It is argued that the consent provided in BITs is valid even after the treaties cease to be in force due to the principle of severability of arbitration clause contained in BITs.[37]

According to Article VI(3) of the BIT between the United States and the Kyrgyz Republic, a concerned company or national may choose to submit the

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[28] Autopista Concesioanada *v.* Venezuela, *supra* note 21, at para 95 (quoting P. Szasz, *A Practical Guide to the CSID*, I Cornell Int'l Law Journal (1968) Cl. Auth. 14).

[29] Tokios Tokeles *v.* Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at para. 97; Ceskoslovenska Obchodni Banka, A.S. *v.* The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, at para. 33.

[30] Schreuer, *supra* note 20, at 194, para. 249.

[31] Schreuer, *supra* note 20, at 194, para. 249; Szasz, *supra* note 23, at 27.

[32] Tokios Tokeles case, *supra* note 29, at para. 97 (quoting C. F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 Indian J. Int'l L. 166, at 224 (1979).

[33] *Id.*

[34] Reed, Paulson & Blackaby, *supra* note 24, at 35.

[35] SGS *v.* Philippines, *supra* note 15, at para. 31; CSOB *v.* Slovakia, *supra* note 29, at para. 38; Salini Costruttori S.p.A. and Italstrade S.p.A. *v.* The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, at para. 65; Tokios Tokeles case, *supra* note 29, at para. 98 (quoting Schreuer, *supra* note 20, at 218).

[36] Schreuer, *supra* note 20, at 211, para 286; Szasz, *supra* note 23, at 27; *see also* Hirsch, *supra* note 16, at 50; Reed, Paulson & Blackaby, *supra* note 24, at 35.

[37] Hirsch, *supra* note 16, at 57; Amerasinghe, *supra* note 25, at 635.

dispute to binding arbitration if the dispute has not been submitted to the courts[38] or to another agreed dispute settlement procedure and six months have elapsed from the date when the dispute arose.

Article VI(4) further obliges the Parties to consent to submit "any investment dispute for settlement by binding arbitration in accordance with the choice made by the national or the company." It further states that such consent shall satisfy the consent requirement for the purposes of Chapter II of the Convention and for all purposes of the Additional Facility Rules. It is clear from this provision that the contracting States, the Kyrgyz Republic and the United States, are bound to submit a dispute to arbitration upon the written request by an investor to arbitrate. The tribunal in *Tokios Tokeles* stated that "it is well established that, 'formulations [in a BIT] to the effect that a dispute "shall be submitted to the Centre"' […] leave no doubt as to the binding character of these clauses."[39]

The tribunal in *Tokios Tokeles* case further noted that "the Convention contemplates 'no requirement that the consent […] either precede or follow the incidence of a particular dispute,' neither does it require consent to precede or follow negotiations concerning a dispute."[40] However, the provisions in the BIT between the United States and the Kyrgyz Republic place two procedural conditions for submission of "consent in writing." First, that the national or company concerned has not submitted the dispute for resolution to the courts or administrative tribunals or to any other previously agreed dispute-settlement procedure.[41] Second, that six month have elapsed from the date on which the dispute arose.[42] The Convention allows such procedural conditions if they are not contrary to the Convention's mandatory provisions and if they comply with the Centre's Rules and Regulations.[43]

2. Consent Given Through National Legislation

Another way to consent to ICSID jurisdiction is to provide such consent explicitly in the national legislation of Contracting State.[44] However, these provisions in national laws must be carefully analyzed because not all references amount to consent to jurisdiction.[45] The Kyrgyz Republic is one of the countries that has unequivocally provided its consent for dispute settlement by ICSID in its national legislation.

According to the law of the Kyrgyz Republic, investment disputes shall be resolved by the courts of the Kyrgyz Republic unless one of the parties to a dispute

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38 In addition to the courts, Article VI also prohibits a party from submitting a dispute for resolution if it has previously been submitted to the "administrative tribunals of the Party that in [sic] a Party to the dispute."

39 Tokios Tokeles case, *supra* note 29, at para. 94 (quoting Schreuer, *supra* note 20, at 213) (alternations in original).

40 Tokios Tokeles case, *supra* note 29, at para. 98 (quoting Amerasinghe, *supra* note 32, at 224).

41 Article VI (3) of the BIT between the US and the Kyrgyz Republic.

42 Article VI (3) of the BIT between the US and the Kyrgyz Republic.

43 Schreuer, *supra* note 20, at 239, para. 357.

44 Schreuer, *supra* note, at 239, para. 258; CSOB *v.* Slovakia, *supra* note 29 at para. 44.

45 Hirsch, *supra* note 16, at 52; Schreuer, *supra* note 20, at 240, para. 259.

requests that it be considered by ICSID pursuant to the Convention on settlement of investment disputes between states and citizens of other states.[46] The Tribunal found a similar formulation of consent in national law unambiguous in *Tradex v. Albania*.[47]

Similar to provisions of the BIT between the United States and the Kyrgyz Republic, the Kyrgyz national legislation first requires consultation between the parties before resorting to arbitration. However, the term for consultation is only three months – shorter than the one provided in the BIT.[48] Therefore, in accordance with the national legislation, an investor may submit the dispute to arbitration after three months have elapsed since the written request for consultation had been submitted.[49]

3. Irrevocable Nature of Consent

Once the parties have established consent, a party cannot unilaterally withdraw its consent.[50] This requirement is evidenced by the preamble of the ICSID Convention in which the Contracting States recognize "that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement […]."[51] This obligation applies equally whether the consent has been given through BIT, national legislation or in a single document.[52] However, the parties may terminate consent to jurisdiction by mutual agreement either before or after the institution of proceedings.[53] It is also important to note that the prohibition on unilateral revocation of the consent applies only when both of the parties consented to arbitration.[54] Therefore, a party can unilaterally withdraw its consent so long as the other party has not consented to submit the dispute to arbitration.[55]

In conclusion, the 'consent in writing' requirement in disputes between United States' nationals and the Kyrgyz Republic can be established by reference to Article VI of the BIT between the two countries or to the foreign investment law of the Kyrgyz Republic, which clearly expresses the Kyrgyz Government's consent to ICSID jurisdiction. However, there are certain procedural preconditions that need to be fulfilled in order to have consent for the jurisdiction of the ICSID. First, that the parties have attempted to settle the dispute through negotiations during the period of six or three months, and second, that the investor has not resorted to other means or methods of dispute resolution. Although the Convention casts

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46 Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic, #66, Article 18, 27 March 2003.

47 Tradex Hellas S.A.T *v.* Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996.

48 Article 18 (2) of the Law "On Foreign Investments" of the Kyrgyz Republic.

49 *Id.*

50 Hirsch, *supra* note 16, at 50; Schreuer, *supra* note 20, at 253, para. 387.

51 Preamble of the ISCID Convention.

52 Schreuer, *supra* note 20, at 253, para. 388.

53 Schreuer, *supra* note 20, at 254, para. 393.

54 Hirsch, *supra* note 16, at 50; *see also* Broches, *supra* note 25, at 353.

55 Broches, *supra* note 25, at 353.

consent of the parties as a "cornerstone of the jurisdiction of the Centre,"[56] consent alone "will not suffice to bring a dispute within its jurisdiction."[57] Other jurisdictional requirements have to be met.

II. Existence of a Dispute of a Legal Nature: Competence Ratione Materiae

According to the Convention, if the dispute is "manifestly outside the jurisdiction of the Centre," the Secretary-General can refuse to register an arbitration request.[58] Such a provision exists to prevent the misuse of the Centre and to avoid groundless claims.[59] In general, a dispute is 'manifestly outside the jurisdiction of the Centre' when it is absolutely clear that it does not fall within the jurisdiction of the Centre.[60] However, it should be noted that such decision will be taken only on the information contained in the request,[61] and in case of doubt, the Secretary-General has an obligation to register the dispute.[62]

According to Article 25(1) of the Convention, the Tribunal's jurisdiction shall extend to any legal dispute. Therefore, it is the task of every Tribunal "to ascertain whether […] the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain,"[63] that is, whether the dispute exists, if so, whether it is a legal dispute within the meaning of article 25(1) of the Convention. The Convention, however, does not define nor does it provide any guidelines to what constitutes a legal dispute. This omission is explained by the fact that the drafters of the Convention could not agree on the meaning of 'legal disputes'[64] and because of their fear that the disputes which were legal could also involve economic, commercial or political matters, which were meant to be avoided.[65] The requirement to have a dispute of a legal nature is one of the requirements that limits the Tribunal's jurisdiction, but does not depend on the consent of the parties.[66] Thus, it is up to each Tribunal to decide in every case whether there is a dispute of legal nature, and consequently, whether it has competence to hear the case.[67]

In the *Mavrommatis* case, the International Court of Justice defined a dispute "as a disagreement on a point of law or fact, a conflict of legal views or interests

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56 Hirsch, *supra* note 16, at 47.

57 A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l L. 263, at 266 (1966).

58 Article 36 (3) of the ICSID Convention.

59 Hirsch, *supra* note 16, at 43.

60 Broches, *supra* note 57, at 263.

61 Broches, *supra* note 57, at 274.

62 Hirsch, *supra* note 16, at 43.

63 SGS *v.* Philippines, *supra* note 15, para. 26.

64 Amerasinghe, *supra* note 25, at 640.

65 *Id.*.

66 Amerasinghe, *supra* note 25, at 169; *see also* Emilio Agustin Maffezini *v.* The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, at para. 94.

67 Hirsch, *supra* note 16, at 45; Broches, *supra* note 57, at 274.

between two persons."[68] It is clear, therefore, that "the dispute must be presented as a claim with clearly identified issues."[69] The existence of a dispute presupposes a minimum of communication between the parties,[70] that is, the complaining party at least has to send some sort of request to the other Party about the complaints. According to article VI(2) of the US-Kyrgyz BIT, before submitting the dispute to the Arbitral Tribunal the parties are expected to seek a resolution through consultation and negotiation. This provision implies that before turning to Arbitration, the parties should have taken some efforts to communicate about the matter.

In addition to a minimum communication requirement, the disagreement must have practical relevance to parties' relationship, and must go beyond a purely theoretical disagreement on point of law or fact.[71] Commentary to the Convention explains that "conflicts of rights are within the jurisdiction of the Centre, but conflicts of interest are not."[72]

Most of the Tribunals have defined the legal nature of the dispute by requiring that the dispute be based "on the breach of legal rights and that there should at least be a claim that legal rights had been violated."[73] "The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[74] It has also been suggested that a legal dispute can concern a fact that is "relevant to the determination of a legal right or obligation."[75] The commentary to the Convention a dispute has a legal nature if "legal remedies such as restitution or damages are sought and legal rights are claimed."[76] However, there are disagreements about the standards of presenting the claims to be based on violation of legal rights and obligations[77] provided by a BIT or national legislation.

Some Tribunals have stated, "[T]he Claimants are free to present facts they rely upon and claims they advance in the way they think appropriate. It is up to the Claimants to characterize these claims as they see fit, and, in particular, to identify the contractual and/or Treaty provisions, which, according to them, have been violated."[78]

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[68] Tokios Tokeles case, *supra* note 29, at para. 106 quoting The Mavrommatis Palestine Concessions Case (Greece *v.* UK), 1924 PCIJ (Ser. A) No. 2 at 11-12; *see also* Emilio Agustin Maffezini *v.* Spain*, supra* note 66, at para. 94.

[69] Amerasinghe, *supra* note 25, at 643; *see also* Emilio Agustin Maffezini *v.* Spain, *supra* note 66, at para. 96.

[70] Schreuer, *supra* note 20, at 102, para. 35.

[71] Schreuer, *supra* note 20, at 102, para. 36; *see also* Amerasinghe, *supra* note 32, at 169; *see also* Emilio Agustin Maffezini *v.* Spain, *supra* note 66, at para. 94.

[72] Schreuer, *supra* note 20, at 104, para. 41, quoting the Report of the Executive Directors; Szasz, *supra* note 23, at 36.

[73] Amerasinghe, *supra* note 25, at 640.

[74] Schreuer, *supra* note 20, at 104, para. 41, quoting the Report of the Executive Directors.

[75] Amerasinghe, *supra* note 32, at 172; Szasz, *supra* note 23, at 37.

[76] Schreuer, *supra* note 20, at 105, para. 42.

[77] Amerasinghe, *supra* note 25, at 640.

[78] Salini Costruttori *v.* Jordan, *supra* note 35 at para. 136.

Other Tribunals and the International Court of Justice have disagreed with that statement and stated, "[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it."[79] The court in *Ambatieolos* case stated, "The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the *Ambatieolos* claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty."[80] The court further stated, "It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty…."[81] Thus, it seems from case law that the claimant has the burden of proof to provide some evidence of the other party's possible culpability.[82] However, these facts must be such that a legal right or obligation depends on their establishment.[83]

The Tribunal in the *Salini Costruttori v. Jordan* case summarized all these different tests and jurisdictional requirements and concluded that there is a

> balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate.[84]

The Tribunal found that issues related to responsibility for the performance under contract obligations and treaty obligations are substantive, therefore the Tribunal refused to address them when ascertaining its jurisdiction.[85] Similarly, the Tribunal in the *Emilio Agustin Maffezini v. Spain* case stated that claimant had not in fact made out a valid claim for damages at the time it was deciding whether it had jurisdiction. However, the Tribunal noted, "[I]t is enough for him to demonstrate that, if true, his allegations would give him standing to bring [the] case…."[86]

In conclusion, it is up to the Tribunal in each case to decide whether there is a dispute of legal nature. The case law has established that a dispute is a conflict of rights or views on the point of law, not a simply conflict of interests. In general, the requirement that a claim be of a legal nature is satisfied if the claim is based on the breach of legal rights guaranteed either by legislation or by the treaty. It can be seen from the case law that the claimant has a burden of presenting some evidence or facts to show that he has made a *prima facie* case to have standing in the case.[87] In establishing their jurisdiction, the Tribunals must maintain a

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79 Salini Costruttori *v.* Jordan, *supra* note 35, at para. 139 quoting Oil Platforms (Islamic Republic of Iran *v.* United States of America, Preliminary Objection, Judgment of 12 December 1996, 1996 ICJ Rep. 803, at 810, para. 16).

80 Ambatielos Case (Greece *v.* UK), Merits, Judgment of 19 May 1953, 1953 ICJ Rep. 10, at 18.

81 *Id.*

82 Salini Costruttori *v.* Jordan, *supra* note 35, at para. 148 (quoting Wena Hotels Ltd *v.* Arab Republic of Egypt, ICSID Case No. ARB/98/4, 25 May 1999).

83 Amerasinghe, *supra* note 25, at 642.

84 Salini Costruttori *v.* Jordan, *supra* note 35, at para. 151.

85 Salini Costruttori *v.* Jordan, *supra* note 35, at para. 157; Szasz, *supra* note 23, at 35.

86 Emilio Agustin Maffezini *v.* Spain, *supra* note 66, at para. 69.

87 *Id.*, at para. 70.

balance: they must be careful to avoid the merits of the case, but also avoid claims of abusive nature that have absolutely no merit.

C. Definition of Investment

According to Article 25(1) of the Convention, the Jurisdiction of the Centre shall extend to any legal dispute that arises directly out of investment. The concept of investment is central to the Convention, although it does not provide any definition or guidelines as to what constitutes an investment. The drafters of the Convention had a considerable debate on whether or not to include the definition of this basic term. Different definitions were proposed; however, none of them were satisfactory and were consequently rejected.[88] As a result, the present Convention offers no definition or explanation of this basic term, thus leaving to the parties to define its scope and meaning.[89]

The case law has established that the parties have a "large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention,"[90] as parties' specific objectives and circumstances may lead them to do so.[91] However, despite this broad discretion, there is still an objective meaning given to the term 'investments'[92] that has to be observed by the parties and by the Tribunal deciding the case.[93] The Tribunal in the *Autopista Concesionada v. Venezuela* case stated, "this discretion is 'not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention."[94] Similarly, the Tribunal in the *SGS v. Pakistan* case stated, "That freedom does not, however, appear to be unlimited, considering that 'investment' may well be regarded as embodying certain core meaning which distinguishes it from 'an ordinary commercial transaction…'."[95] It is also clear "that ordinary commercial [sales or] transactions[96] would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be."[97] Moreover, it is even important that ordinary transactions and investments are "kept separate and distinct for the sake of a stable legal order."[98]

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88 CSOB *v.* Slovakia, *supra* note 29, at para. 63.

89 Szasz, *supra* note 23, at 35; Broches, *supra* note 57, at 268.

90 Tokios Tokeles case, *supra* note 29, at para. 73 quoting Fedax N.V. *v.* Republic of Venezuela; Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 98 quoting Broches, *supra* note 25; Joy Mining Machinery Limited *v.* The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, at para. 42.

91 SGS Societe Generale de Surveillance S.A. *v.* Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, at para. 133.

92 Schreuer, *supra* note 20, at 125; CSOB *v.* Slovakia, *supra* note 29, at para. 68.

93 Szasz, *supra* note 23 at p. 36.

94 Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 98 quoting Broches, *supra* note 25; *see also* Joy Mining and Machinery *v.* Egypt, *supra* note 90, at paras 49-50.

95 SGS *v.* Pakistan, *supra* note 91, at para. 133, n. 153.

96 Joy Minding and Machinery *v.* Egypt, *supra* note 90, at para. 44.

97 Schreuer, *supra* note 20, at 125.

98 Joy Mining Machinery *v.* Egypt, *supra* note 90, at para. 58.

Most of the Tribunals recognize that central characteristics of investments involve a "certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development."[99] Duration presupposes a longer term of relationship, even though there may be some break down at an early stage.[100] A requirement of a certain regularity of profit and return excludes "a one-time lump sum agreement."[101] The requirement of assumption of risk usually requires risk from both sides and "is part of function of duration and expectation of profit."[102] The Commentary does not explain what *substantial commitment* means, however, it is assumed that the commitment on the part of investors in terms of both capital and human resources ought to be substantial. Finally, the last feature is the operation's significance for the host State's development. This feature reflects the general purpose and objective of the Convention as stated in its preamble: "[T]he need for international cooperation for economic development, and the role of private international investment therein." However, as the Commentary states, these are only typical features of "investment,"[103] and not necessary requirements, although the Court in *Fedax* called these features "central characteristics of investment."[104] The Tribunal in *Joy Mining Machinery v. Egypt* further commented, "[A] given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole […]."[105]

The 'territoriality' requirement seems to be another definitive feature of investment as claimed in many ICSID Tribunals. The Tribunals in *SGS v. Pakistan* and *SGS v. Philippines* held that the services in question were substantially "provided 'in the territory of the host State' because there had been an 'injection of funds into the territory of [the host State] […]'."[106] In coming to such finding, the Tribunal in *SGS v. Philippines* case looked at the "scale and duration of [the claimant's] activity and the significance of the activities of the [claimant's office in Manila]."[107] In the *CSOB* case, the Tribunal held that "the agreement in that case qualified as an investment under the BIT because its 'the basic and ultimate goal […] was to ensure a continuing and expanding activity of CSOB' in the Slovak Republic. The Tribunal emphasized 'the entire process' of economic activity, even though particular aspects of it were not locally performed."[108]

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[99] SGS *v.* Pakistan, *supra* note 91, at 133, n. 153 (quoting Fedax N.V. (Netherlands Antilles) *v.* Republic of Venezuela ("Fedax")); Joy Mining Machinery *v.* Egypt, *supra* note 90, at para. 53; *see also* Salini Costruttori S.p.A. and Halstrade S.p.A. *v.* Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision 0f 23 July 2001.

[100] Schreuer, *supra* note 20, at 140.

[101] *Id*.

[102] *Id*.

[103] *Id.*

[104] SGS *v.* Pakistan, *supra* note 91, at para. 133.

[105] Joy Mining Machinery *v.* Egypt, *supra* note 90, at para. 54.

[106] SGS *v.* Philippines, *supra* note 15, at para. 111.

[107] *Id.*

[108] SGS *v.* Philippines, *supra* note 15, at para. 110 (quoting *CSOB v. Slovakia*, *supra* note 29, at para. 88).

The US-Kyrgyz BIT also reflects the territoriality requirement. According to Article I(1) of the US-Kyrgyz BIT, investments are to be made in the territory of one contracting party. However, it does not specify what portion of investments has to be performed or made to satisfy the territoriality requirement. Following the case law on this issue, the Tribunal would have to consider the "scale and duration, and the entire economic process" of the claimant's activities to see whether it has made investments in the territory of one contracting party.

I. Consent of the Parties Given Through Bilateral Investment Treaties

Parties can define 'investment' in three ways: 1) through a direct agreement between the host State and the investor; 2) through a provision in the host State's investment legislation; or, 3) through a clause in a BIT.[109] According to Article I of the US-Kyrgyz BIT:

> "[I]nvestment" means every kind of investment in the territory of one of Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, dept, and service and investment contracts; and includes:
> (i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
> (iv) intellectual property…; and
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law …

As can be seen from this provision, the definition of "investment" in the US-Kyrgyz BIT is very broad,[110] and includes large variety of activities and assets. Such a broad definition of 'investment' is typical of the definition used in most contemporary BITs.[111] However, it is not clear enough whether real estate is included in the definition of 'investments,' because foreign nationals and foreign entities are not allowed to own land in the Kyrgyz Republic[112] and arbitration of real estate issues in the Kyrgyz Republic is prohibited.[113]

Similar to the BIT between Lithuania and Ukraine, the US-Kyrgyz BIT does not contain any requirement that the capital used by the investor to make investments originate in the United States, or, indeed, that such capital not have originated in the Kyrgyz Republic. That was one of the issues in the *Tokios Tokeles* case, where the defendant, the government, argued that the invested capital did not originate in Lithuania, and therefore did not constitute an investment within the meaning of

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[109] Schreuer, *supra* note 20, at 126; *J*oy Mining Machinery *v.* Egypt, *supra* note 90, at para. 42.
[110] Reed, Paulsson & Blackaby, *supra* note 24, at 44.
[111] Tokios Tokeles case, *supra* note 29, at para. 79; Reed, Paulsson & Blackaby, *supra* note 24, at 44.
[112] Article 5 of the Land Code of the Kyrgyz Republic.
[113] The issue of arbitrability of real estate issues will be discussed later in Part D II.

the BIT. The court followed the standard rule of interpretation and stated, "[W]e apply to the terms of the Treaty their ordinary meaning, in their context, in light of the object and purpose of the Treaty. The ordinary meaning of 'invest' is to 'expend (money, effort) in something from which a return or profit is expected […]'."[114] The Court found that "neither the text of the definition of 'investment,' nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied."[115] The Court stated, "The origin of capital is not relevant to the existence of an investment."[116] The same conclusion was reached in *Tradex v. Albania* case, where the Tribunal held that the sources from which the investor financed the foreign investment in Albania were not relevant.[117] Because the US-Kyrgyz BIT does not contain such a requirement either, it is fair to conclude that the origin of capital is irrelevant to the existence of investments. Moreover, it is explicitly stated in Article I of the US-Kyrgyz BIT that investment means every kind of investment made in the territory of one Party made "directly or indirectly by national or companies of the other Party." The Court in *Tokios Tokeles* case interpreted an 'indirect' requirement as meaning that the origin of capital does not have to come from Contracting Party, whose national is litigating the case.[118]

II. Consent of the Parties Given through National Legislation

The relevant law in the Kyrgyz Republic that governs the state's main principles on investment policy is Law # 66 of March 27, 2003, "On Investments in the Kyrgyz Republic." The definition given by this law is slightly different from the definition provided by the US-Kyrgyz BIT. Specifically, the definition provided by the national legislation excludes the words of Article I(1)(a) of the US-Kyrgyz BIT, which states, "'[I]nvestment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and services and investment contracts." The definition provided in the national legislation is narrower than the one contained in the BIT. A translation of the Russian version of the definition of investment reads as follows:

> Investment means capital or non capital contributions made into the economy of the Kyrgyz Republic through means of
> - money;
> - movable and immovable property;
> - property rights (mortgages, liens, pledges and others);
> - stock or other interest in the company;
> - bonds and other debenture liabilities;
> - intellectual property rights …

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[114] Tokios Tokeles case, *supra* note 29, at para. 75.
[115] *Id*., at para. 77.
[116] *Id.,* at para. 80.
[117] Tradex *v.*Albania, *supra* note 47, at 226.
[118] Tokios Tokeles, *supra* note 29, at para. 81, quoting Fedax case.

- any right conferred by law or contract, and any licenses and permits pursuant to law;
- concessions conferred by law including concessions for search, development, mining or exploitation of natural resources.

The language used in the BIT is very broad and contains a non-exclusive list of assets, claims, and rights and states, "[I]nvestment is any kind of investment;" whereas the language contained in the national legislation is limited to "capital or non-capital contributions." It is not clear whether the list in the national legislation is exclusive or not because, while the language contained in the BIT uses the word "includes," the language in the national legislation provides for "capital or non-capital contributions made […] through" and then provides the lists. The list is a bit broader than the one provided by the BIT because it explicitly lists concessions conferred by law. It is not clear whether the language contained in the national legislation follows the pattern of modern BITs such as the US-Kyrgyz BIT.

The major difference in the definition of 'investment' contained in the US-Kyrgyz BIT and the national legislation is the exclusion of indirect investments from the definition of 'investment' in the national legislation. The language used in the BIT explicitly states that investment is "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party." Whereas the Kyrgyz law on investments is silent on the issue of indirect investments, it mentions nowhere the word 'indirect investment.' It explicitly provides for the definition of direct investments and defines an investor as "a subject of investment activity making his own, borrowed or attracted contributions as direct investments."[119] Article 3, which defines the scope of application of this law states, "Direct investment relationships in the Kyrgyz Republic shall be regulated by this Law […]." Finally, Article 13 states, "The purpose of state support and protection of investors and investments is to create a favorable investment climate and attract direct investments into the country's economy." It is clear from the wording of these provisions that 'indirect investments' are excluded from the definition of investment. Thus, if a company is involved in carrying out indirect investments in the Kyrgyz Republic from which a dispute arises, then based on this national law, the government can object to the jurisdiction of the Tribunal because there is no dispute arising out of investments. Within the meaning of this law, indirect investments are not included in the definition of investments, despite the fact that the main objective of the law is to provide a favorable investment climate to attract and stimulate domestic and foreign investments in the country.[120]

If a dispute is submitted to an International Tribunal, such as the ICSID Centre, then the Tribunal will most likely be governed by the definition contained in the BIT. According to Article 2 of the Kyrgyz law on investments, if provisions of the present law and the provisions of an international treaty to which the Kyrgyz Republic is a party are contradictory, then the provisions of the treaty will prevail. Therefore, in accordance with this provision, the Tribunal will have to determine

[119] Article 1 (3) of the Law on Investments in the Kyrgyz Republic, 27 March 2003.
[120] *See* the preamble of the Law on Investments in the Kyrgyz Republic, 27 March 2003.

jurisdiction using the definition provided in the US-Kyrgyz BIT, which is broader and includes indirect investments. However, if the dispute will be submitted to the courts of the Kyrgyz Republic, then it is most likely that the courts would be governed by the definition contained in the national law despite the fact that the provisions of international treaty should prevail. The issue of the local courts not precisely following the provisions of international treaties unless they are directly incorporated in national legislation is beyond the scope of the present thesis.

D. Scope and Existence of an Investment Dispute

According to Article 25(1) of the Convention, the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment." The Convention does not provide with clear definition of what constitutes a dispute arising directly out of an investment. The only criteria indicated in the Convention is that "there must be a 'direct' connection between the dispute and the investment,"[121] that is "the dispute and investment must be 'reasonably closely connected.'"[122] The Tribunal in *Tokios Tokeles* stated, "[T]he requirement of directness is met if the dispute arises from the investment itself or the operations of its investment […]."[123] Accordingly, "'[d]isputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment […]'."[124] Moreover, the Tribunal in *Ceskoslovenska Obchodni Banka v. Slovakia* stated, "[T]he term 'directly,' as used in Article 25(1) of the Convention, should not be interpreted restrictively to compel the conclusion that CSOB's claim is outside the Centre's jurisdiction and the Tribunal's competence merely because it is based on an obligation of the Slovak Republic which, standing alone, does not qualify as an investment."[125]

The Tribunal in *SGS v. Philippines* interpreted Article 25(1) of the ISCID Convention as extending the jurisdiction of the Centre to "disputes which are purely contractual in character."[126] The Tribunal stated, "There is no distinction drawn in Article 25 […] between purely contractual and other disputes (e.g. claims for breach of treaty)."[127] Based on this interpretation of the Convention, a claimant can bring, *inter alia*, claims based on an alleged violation of national legislation, or a violation of an agreement between the investor and the State or on alleged violations of a BIT.

However, the dispute regarding the existence of an investment will mostly depend on the discretion of the parties' agreement to what constitutes 'investments' and accordingly to what constitutes 'an investment dispute.' Therefore, one has to

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121 Amerasinghe, *supra* note 25, at 636.
122 Tokios Tokeles case, *supra* note 29, at para. 88 quoting Schreuer, *supra* note 20, at 414.
123 *Id*., at para. 91.
124 *Id*., at para. 88.
125 CSOB *v.* Slovakia, *supra* note 29, at para. 74.
126 SGS *v.* Philippines, *supra* note 15, at para 29.
127 *Id.*

look first at the agreement of the parties' on these issues as reflected in either BITs or relevant national legislations.

According to Article VI of the US-Kyrgyz BIT,

> an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

The Tribunal in *SGS v. Philippines* case interpreted such language to be very broad: the language 'disputes with respect to investments' and 'legal disputes arising directly out of an investment' are very general phrases which include a wide range of disputes, including purely contractual disputes.[128]

According to Article 1(6) of the Kyrgyz law on investments, "[a]n Investment dispute means any dispute between an investor and governmental bodies, officials of the Kyrgyz Republic and other participants of an investment activity, arising in process of investment realization." The definition provided in the national law is narrower than the one provided in the US-Kyrgyz BIT because it focuses on the process of carrying out investments. This might be raised as an issue because it is not clear what the process of carrying out investments is and when such process starts and ends. Contrary to the national legislation, this is not an issue under the US-Kyrgyz BIT because that treaty defines an investment dispute as all encompassing.

I. Discussion of the Umbrella Clause

One of the most controversial issues that Tribunals have been facing in the recent times is the issue of a so-called 'umbrella clause' that can be found in most of the BITs. An 'umbrella clause' is a general statement that requires the parties to observe other obligations or commitments either assumed or entered into with regard to investments. The controversy of an umbrella clause arises because of its possibility of extending ICSID Tribunals' jurisdiction to adjudication of breaches of obligations that are not undertaken in the BIT by the States. This issue is controversial because the ISCID Tribunals have been very inconsistent in their approach to these clauses. There are two cases in ISCID jurisprudence, *SGS v. Pakistan* and *SGS v. Philippines*, which vividly illustrate the complexity and controversy of this issue. These two recent and conflicting decisions arose from substantially similar transactions. In each case a Swiss Company, SGS, entered into an agreement with Pakistan and with the Philippines, respectively. Under each agreement, SGS agreed to provide pre-shipment inspection services for imported goods prior to their shipment. Disputes arose under both agreements, and SGS

[128] *Id*., at 50.

chose to refer them to ISCID jurisdiction under the relevant BIT clauses. Both cases involved contractual jurisdiction clauses and BIT 'umbrella clauses.'[129]

The Tribunal in *SGS v Pakistan* was the first one to examine the legal effect of the umbrella clause. It first examined the words actually used in the umbrella clause of the Swiss-Pakistan BIT, "ascribing to them their ordinary meaning in their context and in the light of the object and purpose of [the umbrella clause] of the Swiss-Pakistan Treaty and of that Treaty as whole."[130] The Tribunal in *SGS v Pakistan* found that "the scope of [the umbrella clause], while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion."[131] The Tribunal further stated, "The text itself of [the umbrella clause] does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State […] are automatically 'elevated' to the level of breaches of international treaty law."[132] The Tribunal listed a number of reasons why the legal consequences of the umbrella clause could be "so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party […]."[133]

First, the Tribunal stated, "[The umbrella clause] would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party."[134] Second, the Tribunal reasoned that substantive obligations undertaken by the contracting parties in other articles of the Swiss-Pakistan BIT would be essentially superfluous because of the umbrella clause.[135] The Tribunal stated, "There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party."[136] The Tribunal found, "[T]here is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting [the umbrella clause] of the BIT."[137]

Another reason for its conclusion was the actual location of umbrella clause in the BIT. The Tribunal noted that the umbrella clause was "not placed together with the substantive obligations undertaken by the Contracting Parties" in other articles of the BIT.[138] Therefore, the Tribunal found that Switzerland and Pakistan did not intend the umbrella clause "to embody a substantive 'first order' standard obligation," otherwise "they would logically have placed [the umbrella

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[129] Global Legal Group (Ed.), The International Comparative Legal Guide to: International Arbitration 2005, A practical insight to cross-border International Arbitration work 4 (2005).
[130] SGS *v.* Pakistan, *supra* note 91, at para. 164.
[131] *Id.,* at para. 166.
[132] *Id*.
[133] *Id*., at para. 167.
[134] *Id*., at para. 168.
[135] *Id.*
[136] *Id*., at para. 168.
[137] *Id.*, at para. 172.
[138] *Id.*, at para. 169.

clause] among the substantive 'first order' obligations […]."[139] However, the Tribunal stated that it does not "preclude the possibility that under exceptional circumstances, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision […] enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party."[140]

Contrary to that finding, the Tribunal in *SGS v Philippines* found that an umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."[141] In coming to its finding, the Tribunal looked at the object and purpose of the BIT, which is "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other" and held that "[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[142] In the Tribunal's view, it is "entirely consistent with the object and purpose of the BIT to hold that [obligations or commitments under the applicable law] are incorporated and brought within the framework of the BIT by [the umbrella clause]."[143]

Similar to the Tribunal in *SGS v. Pakistan*, the Tribunal in *SGS v. Philippines* looked at the actual text of the umbrella clause to determine its meaning. The *Philippines* Tribunal noted that the language of umbrella clause "uses the mandatory term 'shall', in the same way as substantive Articles [of the BIT]."[144] The Tribunal interpreted the term "any obligations" as being "capable of applying to obligations arising under national law, e.g. those arising from a contract[,]"[145] further explaining that "indeed, it would normally be under its own law that a host State would assume obligations 'with regard to specific investments in its territory by investors of the other Contracting Party'."[146] The Tribunal also stated that the umbrella clause was "adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework."[147]

One of the reasons why the two Tribunals came to such different conclusions even when using standard means of interpreting the text is the slight difference in the language of umbrella clauses in two cases. The umbrella clause in *SGS v. Pakistan* case read, "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[148] The language used in the umbrella clause in Swiss-Philippines case states, "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its

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139 *Id.*, at para. 170.
140 *Id.*, at para. 172.
141 SGS *v.* Philippines, *supra* note 15, at para. 128.
142 *Id.*, at para. 116.
143 *Id*., at para. 117.
144 *Id*., at para. 115.
145 *Id.*
146 *Id.*
147 *Id.*
148 SGS *v.* Pakistan, *supra* note 91, at para. 53.

territory by investors of the other Contracting Party."[149] The difference in language in these two umbrella clauses is very slight. Actually, the only difference is "commitments entered" as opposed to "any obligations assumed with respect to specific investments," which the reasonable reader would understand as meaning the same thing. However, the Tribunal in *SGS v. Philippines* found the language in the Swiss-Pakistan BIT to be "formulated in different and rather vaguer terms," which were "less clear and categorical"[150] than the language in the Swiss-Philippines BIT. Nevertheless, the Tribunal in *SGS v. Philippines* addressed some of the arguments and reasons of the Tribunal in *SGS v. Pakistan* for limiting the effectiveness of the umbrella clause.

In response to the argument that the umbrella clause was "susceptible of almost indefinite expansion," the *Philippines* Tribunal noted that the language was limited only to "obligations […] assumed with regard to specific investments," and stated, "This is very far from elevating to the international level all 'the municipal legislative or administrative or other unilateral measures of a Contracting Party.'"[151] The *Philippines* Tribunal also stated that mere location of the umbrella clause does not make it legally inoperative.[152] The *Philippines* Tribunal further stressed the point that the umbrella clause does not address "the *scope* of the commitments entered with regard to specific investments, but the *performance* of these obligations, once they are ascertained."[153] In the Tribunal's view it is "a conceivable function of [an umbrella clause] to provide assurances to foreign investors with regard to the performance of obligations assumed by the host Stated under its own law with regard to specific investments-in effect, to help to secure the rule of law in relation to investment protection."[154]

These two decisions show that the view of and approach to umbrella clauses has been very controversial and reflects completely different points of view with regard to State's obligations towards investments. Therefore, it is up to the Tribunals in further cases to decide which view to adopt. Another case that has dealt with the issue of umbrella clause is *Salini Costruttori v. Jordan.* However, in that case, the language of the umbrella clause in the Italy-Jordan BIT was even more vague and general: "[E]ach contracting Party committed itself to create and maintain in its territory a 'legal framework' favourable to investments."[155] The Tribunal found this language to be "appreciably different"[156] from the ones in the *Philippines* or *Pakistan* cases. In this Tribunal's view, a contracting party did not undertake to be bound by contractual obligations under these provisions, and it therefore concluded that contractual undertakings could not be lifted to the level of international law obligations.[157] Because of the difference of the Italy-

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149 SGS *v.* Philippines, *supra* note 15, at para 115.
150 *Id.*, at para 119.
151 *Id*., at para 121.
152 *Id*., at para. 124.
153 *Id.*, at para. 126.
154 *Id.*
155 Salini Costruttori. *v.* Jordan*, supra* note 35, at para. 126.
156 *Id*.
157 *Id.,* at paras. 120-124.

Jordan BIT's umbrella clause language it is not clear which approach the Tribunal adopted in this case.

According to Article II(2)(c) of the US-Kyrgyz BIT: "Each Party shall observe any obligation it may have entered into with regard to investments." The wording of this provision is a perfect mixture of the umbrella clauses in the *Philippines* and *Pakistan* cases. The phrase "any obligation" appears in the umbrella clause in the *SGS v. Philippines* case and the phrase "entered with" appears in the umbrella clause in the *SGS v. Pakistan* case. It is not clear why the Tribunal in *SGS v. Philippines* stated that the language in Switzerland-Philippines BIT is more clear and categorical and less vague than in the Switzerland-Pakistan BIT. It is not clear from the court's reasoning where it put more emphasis, on the words "any obligations" vs. "commitments" or on the words "entered" vs. "assumed."

However, what is definitely clear and leans toward a broad interpretation of the umbrella clause is the fact that the umbrella clause in the US-Kyrgyz BIT appears among the substantive provisions of the BIT. Therefore, it is fair to assume that the language in the umbrella clause is intended to cover a wide range of investment disputes, which arise not only directly under the BIT, but also from purely contractual obligations between the parties.

II. Arbitrability of Real Estate Issues With the Kyrgyz Republic

Investor-state arbitration is viewed differently from ordinary commercial arbitration because vital interests of the state are often involved. One of the major concerns that states had when drafting the Convention is the arbitrability of certain issues that are of high significance to the country. The commentary to the Convention indicates "[e]ven if a dispute that gives rise to legal questions is sometimes said to be inappropriate for arbitration if it affects sovereign powers or questions of political significance."[158] This concept is not new in international commercial arbitration law, is specifically reflected in international conventions (such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959 (the "NY Convention")), and has been further supported by case law.

According to Article V(2)(b) of the NY Convention, "recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award be contrary to the public policy of that country." Another ground for refusal to recognize and enforce the arbitral award is if the arbitration agreement was invalid under the laws to which the parties have subjected it.[159] These provisions illustrated that states have the right to uphold their sovereignty and choose not to enforce certain arbitral awards if they find them to be contrary to public policy or find them invalid under the laws of the state where the arbitral award was rendered. Thus under commercial arbitration

[158] Schreuer, *supra* note 20, at 110 at para. 56.

[159] Article V (1) (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959.

law, states can exclude from arbitration certain issues which they see to fall within their sovereign prerogative.

One of such issues in the Kyrgyz Republic is the arbitrability of real estate issues. According to the law on arbitratal tribunals in the Kyrgyz Republic, the law regulates the formation of extrajudicial bodies, i.e., the arbitral tribunals. Thus the arbitral tribunals created in accordance with this legislation are not considered judicial bodies of the Kyrgyz Republic and do not constitute part of the judicial system of the Kyrgyz Republic. Article 45 of this law lists issues that cannot be arbitrated or decided by arbitral tribunals in the Kyrgyz Republic. The list is not exhaustive but Article 45(2) specifically excludes the arbitration of disputes which cannot be submited to the arbitration by the laws of the Kyrgyz Republic. According to the Article 119 of the Land Code of the Kyrgyz Republic disputes that deal with the giving away of land, its taking, and termination of rights with regard to the land can be decided only by the courts. It is evident from the legislation that the issues dealing with the land cannot to be arbitrated and can be decided only by judicial bodies of the Kyrgyz Republic.

This might be a basis for challenging the jurisdiction of the Tribunal over investor-state arbitration in disputes involving real estate. There are three main factors a Tribunal should consider when determining whether to accept or reject such a jurisdictional challenge and hear a dispute arising out of or relating to real estate. First, the term "investments" in the US-Kyrgyz BIT, which has been interpreted broadly, covers immovable property, i.e., real estate. Second, the BIT provides broad protection to investors and does not include a specific provision that excludes the arbitration of real estate issues. Nevertheless, one cannot disregard the policy of the Kyrgyz Republic that certain issues concerning real estate cannot be arbitrated. Therefore, it would be prudent to allow the Tribunal to decide disputes involving real estate issues depending where the 'center of gravity of dispute' lies in order to maintain balance between the interests of the Kyrgyz Republic and an investor.

If the 'center of the gravity of dispute' is real estate, i.e., if the dispute arises out of a gift of land, its taking or termination of rights with regard to the land, then the Tribunal should refer the parties to litigate the matter in the courts of the Kyrgyz Republic. However, if the 'center of gravity of dispute' is not gift or taking of the land or terminating the rights with regard to the land, then the Tribunal should hear the case.

E. Definition of Contracting State and the National of Another Contracting State

According to Article 25(1) of the Convention, only Contracting States and the nationals of another Contracting State can arbitrate an investment dispute under ICSID jurisdiction. This provision imposes two limitations on the entities that can initiate ICSID proceedings. First, it is self-evident that non-contracting states

cannot be parties to regular proceedings before ICSID.[160] Therefore, it is important that, by the time the proceedings have commenced in the ICSID Centre, the State has become a party to the Convention. The Commentary explains that the "crucial date for determining the status of a state is […] the date on which the Secretary-General considers the request for conciliation or arbitration."[161] The consent to ICSID jurisdiction, however, may be given prior to the State's ratification of the Convention.

Similarly, the nationals of non-contracting states cannot be parties to regular ICSID proceedings. The Convention, however, does not define 'nationality'[162] nor does it provide for a method of determining the nationality of another Contracting Party,[163] thus leaving it to the Contracting States to decide this issue. Determination of nationality is not always a straightforward procedure and can cause confusion and complications especially in the case of legal entities or companies. This section will focus on the discussion of what constitutes a constituent subdivision or agency of the State that can also be parties in ICSID proceedings. The second part of this chapter will talk about the nationality requirement for natural persons and legal entities. It will specifically analyze different means and methods for determining corporate nationality and will briefly talk about the practice of ICSID Tribunals in upholding the doctrine of 'piercing the corporate veil' in determining the nationality of legal entities.

I. Definition of a Contracting State

1. Constituent Subdivision

Article 25(1) of the Convention provides for jurisdiction of the Centre between a Contracting State or "any constitutive subdivision or agency of a Contracting State designated to the Centre by that State." This clause was designed to cover as wide range of entities as possible,[164] and "to create maximum flexibility in order to take account of national peculiarities."[165]

In particular, the term 'constituent subdivision' covers any territorial entity below the level of the State itself such as "municipalities and local government bodies in unitary states, […] semiautonomous dependencies, provinces, or federal states in non-unitary states and the local bodies in such subdivision."[166] The Tribunal in the *Vivendi* case found that under international law, "it is well established that actions of a political subdivision of federal state, […] are

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160 Amerasinghe, *supra* note 25, at 643.
161 *Id.*
162 Autopista Concesionada *v.* Venezuela*, supra* note 21, at para. 106.
163 Tokios Tokeles case, *supra* note 29, at 10; Autopista Concesionada *v.* Venezuela*, supra* note 21, at para. 106 quoting Ch. H. Schreuer, *Commentary on the ICSID Convention*, 12 ICSID Review – FILJ 59 (1997).
164 Amerasinghe, *supra* note 25, at 644, Schreuer, *supra* note 20, at 151, at para 148.
165 Schreuer, *supra* note 20, at 151, at para. 148.
166 Amerasinghe, *supra* note 25, at 644.

attributable to the central government."[167] Similarly, the Tribunal in *Tokios Tokeles* case stated, "[T]he *actions* of municipal authorities are attributable to the central government […]."[168] The Tribunal in *Vivendi* further stated that "the internal constitutional structure of a country can not alter [the obligations of the State under the BIT]."[169]

2. Agency of a Contracting State

The commentary to the Convention explains that "the concept of 'agency' should be read not in structural terms but functionally."[170] What is important in the concept of an agency is what tasks or functions it performs despite its legal structure. If it "performs public functions on behalf of the Contracting State or one of its constituent subdivisions"[171] then it is considered to be an agency of a Contracting State within the meaning of article 25(1) of the Convention. Therefore, such interpretation "would lend support to extending the concept to agencies of constituent subdivisions."[172]

The controlling case in this issue is *Emilio Agustin Maffezini v. Spain.* The Tribunal looked at the applicable rules of international law on state responsibility in deciding whether a particular legal entity is a state body.[173] The Tribunal considered various factors such as "ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken."[174] It noted, "[A] State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil."[175] Furthermore, the Tribunal stated that domestic determination as to the legal structure of an entity "is not necessarily binding on an international arbitral tribunal."[176] After considering all of these factors, the Tribunal concluded that SODIGA's actions were attributable to the State because it satisfied both "the structural test of State creation and capital ownership and the functional test of performing activities of a public nature […]."[177]

3. Designation by the State

According to case law, Article 25(1) allows a contracting state to be represented in the ICSID proceedings either as a contracting state itself, where the actions of constitutive subdivisions and agencies would be attributed to its central

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[167] Compañía de Aguas del Aconquija, S.A. & Vivendi Universal *v.* Argentine Republic, ICSID Case No. ARB/97/3, at para. 49.
[168] Tokios Tokeles case, *supra* note 29, at 45.
[169] Compañía de Aguas del Aconquija, S.A. & Vivendi Universal *v.* Argentine Republic, *supra* note 167, at para. 49.
[170] Schreuer, *supra* note 20, at 151, at para. 148
[171] Schreuer, *supra* note 20, at 151, at para. 148
[172] Schreuer, *supra* note 20, at 151, at para. 148
[173] Emilio Agustin Maffezini *v.* Spain, *supra* note 66, at para. 76.
[174] *Id*., at para. 76.
[175] *Id*., at para. 78.
[176] *Id.*, at para. 82.
[177] *Id.*, at para. 89.

government, or those constitutive subdivisions or agencies can be represented on their own behalf if they have been designated by the State. In other words, the case law interpreted Article 25(1) of the Convention as an extension of the Tribunal's jurisdiction. The Tribunal in *Vivendi* stated that provisions of Article 25(1) regarding the consent of the State are optional and "do not apply to disputes between the Contracting State itself […] and a national of another Contracting State […]."[178] "In other words, Article 25(3) does not restrict the subject matter jurisdiction of the Tribunal; rather, it creates potential efficiencies in operations of ICSID by establishing, with approval of the central government, the right of such agencies or subdivisions to be parties in their own right to an ICSID proceeding."[179] If such designation has been made, it creates "a very strong presumption that the entity in question is indeed a 'constitutive subdivision or agency.'"[180]

II. Definition of a National of Another Contracting State

1. Nationality of Natural Persons

According to Article 25(1) of the Convention, for the Centre to have jurisdiction, a dispute must be between a "Contracting State and a national of another Contracting State." Article 25(2)(a) defines a "national of another Contracting State," as "any natural person who had the nationality of a Contracting State other than the State party to the dispute." As discussed earlier, the Convention does not provide a definition or methods for determining the nationality requirement. "As reflected in the *Travaux préparatoires*, the drafters intentionally gave up inserting into the ICSID Convention a definition of nationality."[181]

In determining the nationality of natural persons, there is btoh a positive and a negative requirement[182] prescribed by the Convention. First, the natural person has to have the nationality of a contracting state and second, this natural person must not have the nationality of a contracting state that is party to the dispute.[183] Thus, persons who are nationals of non-contracting states or nationals of host states or those who have dual nationalities[184] are excluded by the Convention.[185] The Tribunal in *Trading Champion v. Egypt,* however, noted that "situations might arise where the exclusion of dual nationals could lead to [manifestly absurd or unreasonable results]." Although, it is up to the contracting states to define the nationality of natural persons, the Convention still contains an objective criterion: "the existence of a consent agreement between a host State and an investor cannot be taken as an automatic recognition that the investor has met the Convention's

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178 Compañía de Aguas del Aconquija, S.A. & Vivendi Universal *v.* Argentine Republic, *supra* note 167, at para. 51.
179 *Id.*
180 Schreuer, *supra* note 20, at 151, at para 149.
181 Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 106.
182 Amerasinghe, *supra* note 25, at 646.
183 *Id.*.
184 Champion Trading Company Ameritrade International, Inc. *v.* Arab Republic of Egypt, ICSID Case No. ARB02/9, Decision on Jurisdiction, October 21, 2003, at 17.
185 Schreuer, *supra* note 20, at 265, at para. 424.

nationality requirement."[186] Under international customary law[187] and during the Convention's preparatory work, it was generally accepted that "nationality would be determined by reference to the law of the State whose nationality is claimed subject, where appropriate, to the applicable rules of international law."[188]

The International Court of Justice defined the concept of nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[189] Since these rules were developed in the context of diplomatic protection, some commentators have suggested that they need not be followed for the purposes of ICSID's jurisdiction, explaining that "the function of nationality for diplomatic protection is said to be different from its function for bringing the private party within the jurisdictional pale of the Centre."[190] However, as the commentary to the Convention states, "until international practice develops new criteria for purposes of access to institutions like the Centre, the rules as developed in the context of diplomatic protection would appear to offer the only reliable guidance."[191]

2. Nationality of Legal Entities

Article 25(2)(b) further defines a national of another contracting state as

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute […] and any juridical person which had the nationality of the Contracting State party to the dispute […] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

The Tribunal in *Tokios Tokeles* case indicated that "the purpose of Article 25(2)(b) is not to define corporate nationality but to […] 'indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto.'"[192] The Tribunal further stated that "the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion."[193] Therefore, "the Contracting Parties enjoy broad discretion to define corporate nationality."[194] Such a definition can be made either in national legislation or in the treaties, which will be "controlling for the determination of whether the

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[186] *Id.,* at para. 426.
[187] Amerasinghe, *supra* note 25, at 646.
[188] Schreuer, *supra* note 20, at 267, at para. 430.
[189] Nottebohm (Liechtenstein *v.* Guatemala), 2nd Phase, Judgment of 6 April 1955, 1955 ICJ Reports 4, at 23.
[190] Schreuer, *supra* note 20, at 267, at para. 431.
[191] *Id.*, at 268, at para. 431.
[192] Tokios Tokeles case, *supra* note 29, at para. 25 quoting Ch. F. Amerasinghe, *Interpretation of Article 25 (2)(b) of the ICSID Convention*, *in* R. B. Lillich and C. N. Brower (Eds.), International Arbitration in the 21st Century: Towards "Judicalization" and Uniformity 223, at 232 (1993).
[193] Tokios Tokeles case, *supra* note 29, at 10 quoting Broches, *supra* note 25.
[194] *Id.*, at para. 26.

nationality requirements of Article 25(2)(b) have been met."[195] "[I]t is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention […]."[196]

Despite the broad discretion given to the Contracting States in defining the nationality of legal entities, such determination must still be reasonable.[197] In particular, as it has been noted by the Tribunal in *Autopista Concesionada v. Venezuela* case, "the Tribunal has to review the concrete circumstances of the case without being limited by formalities."[198] The Tribunal in the *Tokios Tokeles* case found the method of defining of corporate nationality contained in the Ukraine-Lithuania BIT, which defines an investor "as any entity established in the territory of the Republic of Lithuania [or the Ukraine] in conformity with its laws and regulation"[199] to be "consistent with modern BIT practice [which] satisfies the objective requirement of Article 25(2)(b) of the Convention."[200]

Article 25(2)(b) of the Convention has two parts in determining the nationality of legal entities or, to use the language of the Convention, the nationality of "juridical persons."[201] The first part is similar to determination of nationality of natural persons, which defines the nationality of a legal entity as "any juridical person which had the nationality of a Contracting State other than the State party to the dispute […]." Even though this first part of Article 25(2)(b) of the Convention is silent on the determination of corporate nationality, the Tribunals found the concept of nationality contained in this Article to be "a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."[202] Such finding is supported by the fact that, under international law and practice, the most widely used test in defining the corporate nationality is the place of incorporation or registered office,[203] which has been also uniformly adopted by the ICSID Tribunals.[204] "Alternatively, the place of the central administration or effective seat may also be taken into consideration."[205] "By contrast, neither the nationality of the

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[195] Schreuer, *supra* note 20, at 286, at para. 481.

[196] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 116.

[197] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 116; Tokios Tokeles case, *supra* note 29, at 10; Schreuer, *supra* note 20, at 286, at para. 481.

[198] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 116.

[199] Article 1(2)(b) of the Ukraine-Lithuania BIT, *Tokios Tokeles*, *supra* note 29, at para. 18.

[200] Tokios Tokeles case, *supra* note 29, at para. 52.

[201] "This indicates that legal personality is a requirement for the application of Article 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify." Schreuer, *supra* note 20, at 276, at para. 458.

[202] Amco Asia Corp. and Others *v.* Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983; Tokios Tokeles case, *supra* note 29, at para. 40; Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 108.

[203] Schreuer, *supra* note 20, at 277, at para. 460; *see also* Société Ouest Africaine des Betous Industriels (SOABI) *v.* Senegal, ICSID Case No. ARB?82/1, Published in ICSID Reports, Vol. 8, Cambridge 2005, at 2.168-2.341.

[204] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 108; Tokios Tokeles case, *supra* note 29, at para. 42 (quoting Schreuer, *supra* note 20, at 279-80).

[205] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 107.

company's shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances."[206]

The second part of Article 25(2)(b) defines nationality of legal entity as "any juridical person which had the nationality of the Contracting State party to the dispute […] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention." This provision is similar to other objective requirements of Article 25 of the Convention in that it does not define foreign control. The Tribunal in *Autopista Concesionada v. Venezuela* case stated that the "Article 25(2)(b) does not specify the nature, direct, indirect, ultimate or effective, of the foreign control."[207] Therefore, the Tribunal in *Autopista Concesionada v. Venezuela* rejected the arguments that effective control is required in determining juridical entity of corporation[208] and stated that the "concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights etc."[209] The Tribunal further stated, "[A]s long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused …, the Arbitral Tribunal must enforce the parties' choice."[210]

The case law regards this second part of the Article 25(2)(b) of the Convention as "an exception" to classical concept of nationality of legal entities,[211] justified by the fact that "[i]f no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention."[212] Article 25(2)(b) also provides "an exception to the rule that a national cannot initiate ICSID proceedings against its own State."[213] "This exception is justified by the fact that host states may require foreign investors to operate by way of a locally incorporated company, without intending to prevent such investor from acceding to ICSID arbitration."[214]

The Tribunal in *Wena* indicated that Article 25(2)(b) of the ICSID Convention "is meant to expand ICSID Jurisdiction."[215] This view has been confirmed by the Tribunal in *Tokios Tokeles*, where the Tribunal noted that "the control-test should not be used to restrict the scope of 'investors,'"[216] indicating that such use

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[206] Société Ouest Africaine des Betous Industriels (SOABI) *v.* Senegal*, supra* note 203; *see also* Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 108.
[207] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 110.
[208] *Id.*, at para. 112.
[209] *Id.*, at para. 113.
[210] *Id.*, at para. 116.
[211] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 108 (quoting *A*mco Asia Corp. *v.* Indonesia*, supra* note 202, at 396); SOABI *v.* Senegal*, supra* note 203*;* Tokios Tokeles case, *supra* note 29, at para. 40.
[212] Tokios Tokeles case, *supra* note 29, at para. 46 quoting Broches, *supra* note 25, at 358-359.
[213] Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 102.
[214] *Id.*
[215] Wena Hotels Ltd. *v.* Arab Republic of Egypt, *supra* note 82.
[216] Tokios Tokeles case, *supra* note 29, at para. 31.

"would be inconsistent with the object and purpose of Article 25(2)(b)."[217] The Tribunal in *Tokios Tokeles* further stated, "[T]he second clause of Article 25(2)(b) should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties."[218] In other words, legal entities that are incorporated under the laws of the host State will be treated as foreign entities only in the presence of such agreement. Furthermore, the Tribunal in *CMS v. Argentina* stated that "the reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State *is precisely meant to facilitate agreement between the parties* […]."[219]

Similar to other requirements of article 25, "the Convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state as a national of another Contracting State because of foreign control."[220] Such an agreement will carry much weight, "but it cannot create a nationality that does not exist."[221] In general, the Tribunals will respect such an agreement if it is based on a reasonable criterion.[222]

According to Article I(1)(b) of the US-Kyrgyz BIT "'company'[223] of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled." As this provision illustrates, the definition of a legal entity is very broad, covering "virtually any type of legal entity."[224] The commentary to the US-Kyrgyz BIT states that the definition of a "'company' ensures that companies of a Party that establish investments in the territory of the other Party have their investment covered by the Treaty, even if the parent company is ultimately owned by non-Party nationals."[225] The definition also covers charitable and non-profitable entities.[226]

Article I(2) of the US-Kyrgyz BIT, however, gives *each* Party the right to deny the advantages and the protection to any company which is controlled by nationals of third countries, and, "in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations." The Article does not provide any guidance to what constitutes 'control by nationals of third countries,' nor does it explain what is considered to be 'a substantial business activity.' A similar

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217 *Id*., at para. 46.
218 Tokios Tokeles case, *supra* note 29, at para. 50.
219 Tokios Tokeles case, *supra* note 29, at para. 50 (quoting CMS Gas Transmission Company *v.* Republic of Argentina, Decision on Jurisdiction, Case No. ARB/01/8 (July 17, 2003), 42 I.L.M. 788 (2003), at para. 51).
220 Autopista Concesionada *v.* Venezuela, *supra* note 21, at para. 105.
221 Schreuer, *supra* note 20, at 283, at para. 476.
222 *Id*..
223 The term "company" is referred to legal entity.
224 Commentary to the US-Kyrgyz BIT.
225 Commentary to the Article I(1)(b) of the US-Kyrgyz BIT.
226 *Id*.

provision exists in Article 17(1) of the Energy Charter Treaty and other BITs, mostly concluded with the United States.[227] The Tribunal in *Plama Consortium v. Bulgaria* that interpreted this provision of the Energy Charter Treaty stated, "[C]ontrol includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body."[228] The Tribunal, however, did not explain what 'substantial business activities' means since the claimant in that case asserted that it did not have "any substantial business activities in the Area of the Contracting Party in which it is organised […]."[229]

Although this provision exists to prevent the misuse of the BIT by legal entities and to safeguard the political interests of contracting parties, little availability of guidance in interpreting these terms might produce the opposite effects. The sole discretion provided to each contracting party to deny advantages granted by the BIT might lead to abuses by the state. Situations might arise where some legal entities might be outside the scope of protection granted by the BIT without valid justification, including the right to file a dispute with ICSID Centre[230] or any other dispute settlement procedure prescribed by the BIT. Therefore, in order to avoid such situations, it is essential to ensure that the burden of proof of control by the nationals of third countries or the absence of substantial business activities in the country lies on the state before the ICSID Tribunal. The ICSID Tribunal, as an impartial and professional body, should be the one to decide whether the legal entity is really controlled by the nationals of third countries or does not have substantial business activities in the country.

3. Definition of a Foreign Legal Entity in National Legislation

The definition of a foreign legal entity contained in the national legislation of the Kyrgyz Republic is even broader than the one contained in the US-Kyrgyz BIT or the Convention.[231] It includes any type of legal entity founded and registered under the laws of a foreign state, or founded under the laws of the Kyrgyz Republic with foreign participation.[232] The definition of foreign legal entity also includes legal entities established by international treaty.[233]

The Tribunal in the *Tokios Tokeles* case stated, "Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT."[234] However, "once that consent

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227 *See e.g.*, Ukraine-US BIT; US-Argentina BIT.

228 Plama Consortium Limited *v.* Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, at para. 170.

229 *Id*., at para. 168.

230 Tokios Tokeles case, *supra* note 29, at para. 39.

231 *See* article 1(2)(2) of the Law on Investments in the Kyrgyz Republic, 27 March 2003.

232 *Id.*

233 *Id*.

234 Tokios Tokeles case, *supra* note 29, at para. 39.

is defined, […] tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended."[235]

4. Doctrine of 'Piercing the Corporate Veil'

One of the exceptions to the rule of defining the corporate nationality is the doctrine of 'piercing the corporate veil', which defines the corporate nationality according to its controlling interest, "notably that of the shareholders."[236] The Tribunal in *Tokios Tokeles* stated, "ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationship among the companies involved."[237]

One of the cases that discussed the doctrine of 'piercing the corporate veil' in international law is the *Barcelona Traction* case.[238] The Tribunal in *Tokios Tokeles* quoted the International Court of Justice as saying, "[T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law."[239] The Tribunal also quoted the ICJ as noting, "[T]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to *prevent the misuse of the privileges of legal personality*, as in certain cases of *fraud* or *malfeasance*, to *protect third persons* such as a creditor or purchaser, or to *prevent the evasion of legal requirements or of obligations*."[240] The doctrine of 'piercing the corporate veil' is invoked in exceptional circumstances to prevent the fraud and misuse of the advantages granted to a legal entity under the a BIT or the national legislation. The ICSID Tribunals tend to accept this doctrine and are willing "to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them."[241] This tendency is supported by the view that "Article 25 of the Convention allows tribunals to be 'extremely flexible' in using various methods to determine the nationality of juridical entities, including the control-test."[242]

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[235] *Id.*

[236] Schreuer, *supra* note 20, at 277, at para. 460.

[237] Tokios Tokeles case, *supra* note 29, at para. 58 (quoting Banro American Resources, Inc. and Societe Aurifere du Kivu et du Maniema SA.R.L. *v.* Democratic Republic of Congo, ICSID Case No. ARB/98/7, Award, September 1, 2000 (excerpts))

[238] Barcelona Traction, Light and Power Co., Ltd (Belgium *v.* Spain), Judgment of 5 February 1970, 1970 ICJ 3, at para. 58.

[239] Tokios Tokeles*, supra* note 29, at para. 54 (quoting Barcelona Traction, Light and Power Co., Ltd (Belgium *v.* Spain), *supra* note 238).

[240] *Id*.

[241] Tokios Tokeles*, supra* note 29, at para. 58 (quoting *Banro Resources*, *supra* note 237, at para. 11).

[242] *Id.,* at para. 68 quoting Amerasinghe, *supra* note 32, at 214.

F. Conclusion

Investor-state arbitration is a new and interesting phenomenon in international law because it grants the opportunity for investors, i.e., non-state actors, to directly enforce treaty law obligations of the state. The states are thus accountable not only before the other Contracting States of a particular BIT or any other legal instrument containing an investor-state arbitration clause, but also before the private entities. One of the major reasons why states have entered into such agreements and granted such rights to private entities is as an attempt to lower the perceived political risks and provide legal security for foreign investors.

With the constantly growing number of BITs, investor-state arbitration is gaining greater importance. Investor-state arbitrations conducted under the auspices of ICSID are becoming one of the leading means for settlement of investment disputes. Therefore, the knowledge about such arbitrations is essential not only for investors, especially in many developing countries, but also for the states. One of the distinguishing features of investor-state arbitration conducted under the auspices of ICSID is the fact that the award of the Tribunal is final and is not subject to any further appeals or judicial reviews unlike regular arbitral awards. However, establishing jurisdiction remains one of the challenging factors in such arbitrations because it depends heavily on the consent of the contracting parties.

Article 25 of the Convention lists the objective requirements for the establishment of jurisdiction of such Tribunals. Having analyzed the BIT between the United States and the Kyrgyz Republic, it can be concluded that the 'consent in writing' requirement can be established through reference to Article IV of that BIT or through reference to the Kyrgyz Republic law on foreign investments." According to both the BIT and the national legislation, certain procedural requirements have to be fulfilled before initiating proceedings in such arbitrations, namely, an attempt to settle the dispute through negotiations and the requirement that the investor has not resorted to other means of settling the dispute.

Once the consent in writing of both parties has been established, it is up to each Tribunal to decide whether there is a dispute of a legal nature arising directly out of investment. Therefore, it is the responsibility of a claimant in every case to present claims of the breach of legal rights guaranteed either by the Treaty or by national legislation. One has to also ensure that the dispute and investment are "reasonably connected" to satisfy the requirement of Article 25 of the Convention.

Since the Convention does not provide for the definition of investment, contracting states are free to determine the meaning of this basic term. However, this freedom is limited and the concept of investment has to satisfy certain central characteristics such as certain duration, certain regularity of profit and return, assumption of risk, a substantial commitment, and significance for the host state's development. These characteristics are not necessarily defining, but rather typical and guiding; therefore, one has to decide on case-by-case basis in determining whether there is an investment made within the meaning of the Convention.

According to the US-Kyrgyz BIT, the term 'investment' is very broad and covers a wide range of activities and assets, including direct and indirect investments. The definition of investment in the national legislation, on the other hand, however, is narrower and covers only direct foreign investment. Therefore, it is advised for United States' investors in the Kyrgyz Republic to invoke the provisions of the BIT when seeking protection through investor-state arbitration.

One of the basic requirements of the Convention is that the dispute must arise between a contracting state and a national of other contracting states. A contracting state is understood to include both the central and the local government, including municipalities, federal states, provinces etc. The Convention also provides for the jurisdiction of the Centre when one of the parties to a dispute is an agency of a contracting state if it is designed by the state. Difficulties might arise in deciding whether a particular publicly owned company is an agency of the state within the meaning of the Convention. Therefore, one should look at the functions that that public company performs in determining the nature of that company.

One of the challenges to the jurisdiction of investor-state arbitrations seems to be the determination of the nationality of legal entities. Under the US-Kyrgyz BIT, the definition of a company is very broad and covers all types of legal entities. However, Article I(2) gives each party the right to deny the advantages and the protection to any company which is controlled by nationals of third countries, or "in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party." The definition of foreign investor is even broader under the national legislation that covers all legal entities founded and registered under the laws of a foreign state and those founded under the laws of the Kyrgyz Republic with foreign participation. In addition, the national law does not contain a provision regarding the denial of advantages granted by the law to foreign investors. Therefore, the provisions of the national law seem to contain better protection for foreign investors.

One of the highly contested issues in investor-state arbitration is the legal effect of a so-called 'umbrella clause.' There is no uniform approach to the interpretation of an 'umbrella clause.' It seems that personal views and feelings of arbitrators in a particular case will influence significantly the legal effect of an umbrella clause if it is stipulated in a more or less clear manner. One of the factors that would contribute to a broad interpretation of the umbrella clause in the US-Kyrgyz BIT is the fact that the umbrella clause is located among the substantive obligations of the contracting states. However, the mere location of umbrella clause in the BIT does not suffice to determine its legal effect. Other factors together with textual analyses will have to be considered.

The exclusive jurisdiction of the Kyrgyz Republic over real estate issues might arise as one of the grounds for challenging the jurisdiction of investor-state arbitration in cases involving such issues. Arguments for both sides can be brought when deciding whether the Tribunal should hear a case arising out of real estate issues. Therefore, to maintain the balance between the interests of the Kyrgyz Republic and an investor, it is suggested that the Tribunals hear the cases involving real estate issues depending on where the 'center of gravity of dispute' lies. If the 'center of the gravity of dispute' is real estate then the Tribunal

should refer the parties to litigate the matter in the courts of the Kyrgyz Republic. However, if the 'center of gravity of dispute' is not real estate, then the Tribunal should accept the case.

The final conclusion of this article is that foreign investors should utilize their opportunities in protecting their rights provided in the BIT and the national legislation. The responsibility to enforce the obligations undertaken in these documents lies not only with the state but with the investors as well. On the other hand, the Kyrgyz Republic should take seriously its responsibilities under these documents in order to not diminish the meaning and value of the rights granted by the documents. Creation of favorable conditions for foreign investors depends not only on creating and agreeing to these documents but also on their effective implementation.