



ICSID, Jurisdictional Basis, and Its Arbitral Perspectives: The Arbitral Tales of Umbrella Clause and Its Future

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ABSTRACT

The development of international investment law in the last 50 years changed the paradigm of the standing before international law that individual investors have the right to directly institute investment claims even without having any contractual relationship with the host state. This non-privity nature of arbitration is more developed through a jurisprudence of arbitration tribunal adjudications. In this regard, the role played by ICSID is very pivotal. Among the jurisdictional basis of ICSID tribunals, the umbrella clause is one of the common bases of jurisdiction that frequently existed in the majority of Bilateral Investment Disputes. But, the heyday of this century seems not a time of both ICSID as well as umbrella clauses after 50 years' ups and downs of the development of international investment law. Two situations can be easily grasped. On the one hand, ICSID has now faced different critiques, such as lack of consistency of decisions and predictability, and on the other hand, the prominent umbrella clause also faced such inconsistency of application and interpretation before ICSID tribunals. The way outs employed by the stakeholders seems that reforming ICSID, and retreating from adopting the umbrella clause in BITS. Therefore, the paper argued that a centric approach should be adopted to heal out of the ill syndrome of the international investment legal regime and adjudication.

Keywords: ICSID; Investment Arbitration Jurisdiction; Arbitral inconsistencies; Arbitral Tale; Umbrella Clause; SGS; investment contract; investment treaty.

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INTRODUCTION

The fast development of international investment law in general and the articulation of Investor-State Arbitration in Investor-State Dispute Settlement (ISDS) in particular changes the traditional paradigm that "only states have a standing before international law, International Court of Justice and international arbitral tribunals to present a legal claim and receive justice"[1]. Before the development of treaty-based investment arbitrations, the effort of protecting foreign investment relied upon the traditional means of diplomatic protection. Diplomatic protection is all about the espousal of the investor's claim by the home state of the investor and pursuit of such claim against the host state [2]. Though diplomatic protection was an old method of investment dispute resolution and was used to settle investment disputes, because it needs exhaustion of local remedies in the host state and being diplomatic protection is a discretionary power of the state, it entails disadvantages to the protection of the investor[3]. Thus, a direct investment arbitration approach between the host state and the foreign investor is now a common and a preferred available forum in international investment arbitration. A treaty-based direct international investment arbitration is a late development. The first international investment arbitration that stemmed from a United Kingdom (UK) Bilateral Investment Treaty (BIT) was

¹ Concerning the development of international investment law and the articulation of investor-state arbitration, see M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 3rd ed., 2010; Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart Publishing, 2008. In relation to the issue here at hand, Surya P Subedi remarked:

"...during the 1970s and before the proliferations of Bilateral Investment Treaties (BITS), investment arbitrations had been mainly state to state rather than investor-state arbitrations", Id at 1.

In relation to whether corporations are subjects of international law with specific reference to international investment law issues, further see Jose E. Alvarez, "Are Corporations 'Subjects' of International Law?" 9 *SANTA CLARA JOURNAL OF INTERNATIONAL LAW* 1(2011), 1-36.

² Rudolf Dolzer and Christoph Schreuer, *Principles of Investment Law*, Oxford University Press, 2nd ed., 2012 at 232; Christoph Schreuer, *The Future of Investment Arbitration*, 1998, available at <https://www.univie.ac.at/intlaw/pdf/98-futureinvestmentarbitr.pdf>.

³ Sornarajah supra note 1 above at 276; Christoph Schreuer supra note 1 above at 2-3. The frequent exercise of diplomatic protection, sometimes followed by the use of force, was a manifestation of politicization of foreign investment disputes that Latin American states were exposed to such abuses of diplomatic protection in 1980s, in this regard see Ibrahim F.I Shihata, "To Wards a Greater de-politicization of Investment Disputes: The Role of ICSID and MIGA" 1 *ICSID Review* 1(1986), 1-25.

the *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* brought and decided in 1987 [4]. This is the first case decided before the International Center for Settlement of Investment Disputes (ICSID).

What the nature and jurisdictional basis of ICSID look like? How ICSID assumes jurisdiction in handling international investment arbitrations? What is the trend of the arbitral perspective of ICSID? Is there consistency in the arbitral decisions rendered by ICSID in the last five decades of arbitral practice? If not what are the possible justifications? Among the jurisdictional basis of ICSID, what is the unique nature of the umbrella clause? What are the arbitral tales of ICSID while rendering arbitral decisions according to an umbrella clause? Is still the umbrella clause a frequently agreed clause in BITs or multilateral agreements to present investment arbitration claims before ICSID? If the status is to the contrary, what are the possible reasons for investors and host states opting out of the confident on umbrella clause and what are the implications for international investment law on its development? This short essay tries to discuss these issues descriptively based on the historical memory of ICSID's more than five decades and its well-developed international investment law principles through arbitral decisions and judicial writings. The main motive behind writing this short essay is to discuss possible reasons for the tale of arbitral decisions of ICSID and to suggest some points of reform ideas with an emphasis on the umbrella clause.

This paper is organized into four main parts. Part one of the paper will narrate the institutional nature of ICSID and highlight the arbitral balance sheet of ICSID in the last five decades to have a clear arbitral database for further discussions. The second part of the paper will discuss the basis as well as the content of ICSID's jurisdiction. Umbrella clause as one source of ICSID's jurisdiction, its conception, and ICSID's arbitral tales on umbrella clause will be the main focus of the third part of this paper. The focus of the fourth part of this paper will be on related institutional challenges of ICSID, and the future of the umbrella clause together with certain policy implications. Concluding remarks with certain recommendations will close up this paper.

ICSID: A BIT HISTORICAL MEMORY, NATURE, and ITS FIVE DECADES ARBITRAL BALANCE SHEET

The International Center for Settlement of Investment Disputes (ICSID) is the only global institution dedicated to international investment dispute settlement. ICSID was created in 1966 by a multilateral convention on the settlement of investment disputes called the ICSID Convention as a forum for the settlement of investment disputes [5]. Aron Broches, the then General Counsel of the World Bank, was the giant personality who conceived the idea of the ICSID Convention in 1961 [6]. During this initial conception, there was a debate as to whether the production of multilateral substantive standards or providing an effective procedure for impartial settlement of disputes would be necessary for promoting Foreign Direct Investment (FDI) [7]. But until now, except for a high demand and push for having a multilateral substantive legal regime in international investment law [8], the success is the ratification of the ICSID Convention in 1966 as an effective procedure and its institutionalization for impartial settlement of investment disputes.

Despite the failure of the attempt of having a multilateral substantive obligation on international investment law since the Havana Charter of 1948, the ICSID Convention was opened for signature in 1965. The ICSID Convention entered into force on October 14, 1966, upon the first 20 states deposited their instrument of ratifications [9]. Among the first 20 states that deposited their first instrument ratification, 14 countries were African countries and Nigeria was the first country in the world that deposited its instrument of ratification on August 23, 1965 [10]. Among the first 20 states that deposited their instrument of ratification, the non-African states were only Iceland, Jamaica, Malaysia, Netherlands, Pakistan, and the United States of America [11]. China deposited its instrument of ICSID's Convention ratification on January 7, 1993, and the ICSID Convention entered into force for China on February 6, 1993. Therefore, China has an

⁴*Asian Agricultural Products Ltd (AAPL) v Sri Lanka*, ICSID Case No ARB/87/3, it was the first case brought before the International Center for Settlement of Investment Disputes (ICSID).

⁵Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar.18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (The ICSID Convention). The ICSID Convention is sometimes called the 'Washington Convention' or the 'World Bank Convention'.

⁶A Foreword Message by Professor Sir ElihuLauterpacht, CBE, QC at Christoph H. Schreuer, and Loretta Malintoppi et al, *The ICSID Convention: A Commentary*, Cambridge University Press, 2nded, 2009.

⁷Ibid.

⁸For the multilateralization effort of international investment law, see Stephan W. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009. In fact, in addition to ICSID, the Multilateral Investment Guarantee Agency (MIGA) came in to force and institutionalized as a multilateral investment insurance scheme in 1980s.

⁹Christoph H. Schreuer supra note 6 above, a foreword message by Professor Sir ElihuLauterpacht.

¹⁰The first twenty states that deposited their instrument of the ratification of ICSID Convention were, Benin, Burkina Faso, Chad, Cote d'Ivoire, Republic of Congo, Central African Republic, Ghana, Iceland, Jamaica, Madagascar, Malaysia, Malawi, Mauritania, Netherlands, Nigeria, Pakistan, Sierra Leone, Tunisia, Uganda, and United States of America that 14 of them were deposited their instrument of ratification on October 14, 1966 that the date took as the date of the entry into force of the ICSID Convention. In this regard, see ICSID, List of Contracting States and other Signatories of the Convention, available at www.WORLDBANK.ORG/ICSID.

¹¹Ibid.

experience of more than a quarter of a century in ICSID's membership [12]. Ethiopia is still only a signatory of the ICSID Convention that signed the Convention on September 21, 1965. The other unique fact about membership to ICSID Convention is that countries, such as Bolivia, Ecuador, and Venezuela denounced their instrument of ratification of the ICSID Convention according to Article 71 of the ICSID Convention in 2007, 2009, and 2012 respectively and in effect, they are not members to ICSID at the time of the writing of this short essay. Why these countries denounced their ICSID membership? Some justifications by the states as to their denunciation will come to the floor while discussing the nature of ICSID in the next sub-sections. As of April 12, 2019, 163 states signed the ICSID Convention and 154 states have deposited their instrument of ratifications [13].

The International Center for the Settlement of Investment Disputes (ICSID) is an international organization affiliate to the World Bank that created by a multilateral ICSID Convention as a procedural framework for the settlement of investment disputes between a foreign investor and a host state through a binding International Commercial Arbitration (ICA) [14]. Therefore ICSID is established according to Article 1(1) of the ICSID Convention [15]. The ICSID's arbitration legal infrastructure (the ICSID Rules and Regulations) consisted of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institutional Rules), Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rules of Procedure for Conciliation Proceedings (Conciliation Rules), Administrative and Financial Regulations, and Additional Facility Rules [16]. Therefore, ICSID is an international World Bank Group Institution that handles investment dispute legal matters under the major sets of rules and regulations available for investment arbitration and conciliation for the last more than five decades. What are the objectives and institutional features of ICSID that can be taken as a yardstick in assessing its arbitral journey and also understood as institutional peculiarities? Here below the discussion proceeds.

Objectives and Institutional features (Peculiarities) of ICSID

Objective Clause of ICSID Convention

The institutional birth of ICSID in 1966 was targeting some identified goals to be achieved. The objectives justified the creation of the International Center for Settlement of Investment Disputes (ICSID) is articulated under the preambles of the ICSID Convention. Thus the grand objectives of ICSID have to be seen in line with its authority of providing facilities and services to support the conciliation and arbitration of international investment disputes. Thus, what is the purpose of providing conciliation and arbitration facilities and services for international investment disputes? The intent of member states of the ICSID Convention is reflected in the preamble paragraphs that the core aim of providing conciliation and arbitration facilities is cognizant of "... a need for international co-operation for economic development and the role of private international investment [for economic development]" [17]. Therefore, creating a conducive investment environment is the ultimate purpose of ICSID's conciliation and arbitration facilities and services in international investment disputes. ICSID's Convention ancillary objectives can be summarized as, offering a procedural framework for possible investment disputes, opting in international methods of investment dispute settlement, availing a venue for individual investors to present their claims before ICSID, creating close administrative ties with the World Bank in promoting private foreign investment, offering a binding conciliation or arbitration facilities upon the consent of the parties [18]. Thus, almost more than half a century's of ups and downs of ICSID's journey can be analyzed in the eyes of these core and ancillary objectives besides other available and relevant basics.

Institutional Features (Peculiarities) of ICSID

Individuals and private companies as subjects of international law: "A Silent Revolution"

The ICSID investment arbitration enables individuals and private companies to have a direct legal standing before international investment arbitration without seeking a spousal by his/her home state to bring claims and enjoy the arbitral justice. This new approach of bringing individual claims before an international investment tribunal is exactly contrary to the traditional view that only sovereign states and maybe "international organizations" are subjects of international law. Surya P. Subedi coined this approach of international commercial arbitration as "[The] silent revolution in foreign

¹² Concerning China's experience of ICSID's membership and the development of international investment law, see Wenhua Shan, and Jinyuan Su (eds.), *China and International Investment Law: Twenty Years of ICSID Membership*, BRILL NJHOFF, 2015.

¹³ List of ICSID's members supra note 10 above.

¹⁴ Stephan W. Schill supra note 8 above at 45.

¹⁵ Concerning the Rules and Regulations of ICSID, see ICSID Convention, Regulations and Rules, ICSID/15, April 2006, available at <https://icsid.worldbank.org/en/documents/resources/2006-CRR-English-final-pdf>.

¹⁶ Pursuant to Article 6(1) (a) –(c) of the ICSID Convention, the ICSID Administrative Council issued Rules and Regulations, and amendments is made at different times on ICSID's Rules and Regulations in addition to the coming into effect of the Additional Facility Rules. Concerning ICSID's Rules and Regulations, further see Aurelia Antonieetti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules" 21 *ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL* 2(2006) available at <https://doi-org/10.1093/icsidreview/21.2.427>.

¹⁷ Christoph H. Schreuer, and Loretta Malintoppiet al, supra note 6 above at 4.

¹⁸ Id at 5-9.

investment law that took place in the 1960s by way of ICSID and other BITS”[19]. But it doesn’t mean that the home state of the foreign investor has nothing to do with such an individual’s claim for standing before international commercial arbitration. A prior arrangement for a citizen of a home state is made by signing the multilateral treaty called the Convention for Settlement of Investment Disputes between States and nationals of other states in which no other multilateral or non-investment Bilateral Treaty conferred such privilege for an investor. On the other hand, in exceptional circumstances according to the Additional Facility Rules of ICSID citizens of a non-member state to the ICSID Convention still might have standing before the ICSID tribunal.

Therefore, this new paradigm of the development of individuals or private company’s direct standing before international law of foreign investment is “a silent revolution”, and one institutional feature of ICSID. Jan Paulson, following the emergence and further development of Bilateral Investment Treaties (BITs), coined the concept of ‘arbitration without privity’ that qualifies the investor to submit an arbitration claim against a host state even in the absence of any contractual obligation of arbitration between the host state and the investor [20].

Institutional “de-politicization” of investment disputes

A quest for “de-politicization” of investment disputes was a push from a pre-ICSID hangover of a *Calvo doctrine*[21], a need for a new paradigm other than diplomatic protection through espousal, and host as well as home states unlimited interference in regulating foreign investment as well as in investment disputes. Ibrahim F.I. Shihata coined the role of ICSID’s being a neutral forum for settlement of investment disputes between states and nationals of other states as the “de-politicization” role of ICSID in international investment dispute settlement [22]. “De-politicization” of investment disputes, according to Ibrahim F.I. Shihata, means providing a forum for investment dispute resolution in the ICSID framework that balances the interests of all the parties involved [23]. Here the issue is can we say that ICSID is fully free from any bias and has no pressure from Bretton Woods Institutions being ICSID is a World Bank affiliate institution? What about the reasons behind the denunciation of ICSID by Bolivia [24], Ecuador[25], and Venezuela? [26]

Voluntary, Flexible, and Effective ICSID System

The voluntary nature of ICSID can be viewed from two different perspectives. The first one is how states accept their membership to ICSID. Why the membership of ICSID needs further clarification other than the sovereign decision of states is that to check whether or not the World Bank creates undue influence being ICSID is an affiliate institution of the World Bank. In this regard, Ibrahim F.I. Shihata presented his arguments that the invitation of the World Bank for member states to sign the ICSID Convention according to Article 67 of the ICSID Convention is fully on a voluntary basis and if member states are not interested to sign the convention, states can decline to join as a member [27]. The second test of ICSID’s voluntary nature connected with jurisdictional issues that ICSID’s member states liberty to notify the arbitrable and non-arbitrable transactions for ICSID’s jurisdiction according to Article 25(4) of the ICSID Convention during the time of ratification [28].

The flexibility of procedural proceedings is in general one common manifestation of arbitrations in comparison to judicial proceedings and in this regards ICSID’s international investment arbitration might not be an exception. But, there are real procedural flexibilities under the Rules and Regulations of ICSID that should be considered as institutional features. Thus, flexibility as to ICSID’s proceedings indicates the parties’ right to derogate from certain procedural rules, the right to a preliminary consultation in certain issues, deciding the location of the seat of arbitrations, and related procedural issues[29]. Besides, the flexible nature of ICSID Rules reaches to guarantee issues that frustrate the arbitral proceedings, such as refusal to co-operate in the appointment of arbitrators and parties’ failure to appear in the proceeding. The refusal to co-operate in the appointment filled by the Secretary-General of ICSID according to Article

¹⁹ Surya P Subedi supra note 1 above at 32.

²⁰ Jan Paulson, “Arbitration without Privity”, *10 ICSID Review – Foreign Investment Law Journal* (1995), 232-257.

²¹ The *Calvo doctrine* was a doctrine against the abuses of diplomatic protection on unlawful interference of the home state of the investor in the host state. Thus, the famous doctrine and policy prescription of 1868, named after the Argentine diplomat and legal scholar Carlos Calvo that dictates “the principle of equality of states” and propagated that “foreign nationals should not have a special rights and privileges and emphasized the claim of foreign nationals were to be settled exclusively under domestic law and domestic tribunals.” In this regard further see Ibrahim F.I. Shihata supra note 3 above.

²² Ibrahim F.I. Shihata supra note 3 above at 3.

²³ Id at 4.

²⁴ Bolivia submitted its notice of ICSID’s denunciation under Article 71 of the ICSID Convention on 16 May 2007. In this regard, see Charles N. Brower & Sadie Blanchard, “What is in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States” *52 Columbia Journal of Transnational Law* 689 (2014) at 691-692.

²⁵ Ecuador submitted its notification of ICSID’s denunciation under Article 71 of the ICSID Convention on 26 January 2012. See Charles N. Brower & Sadie Blanchard supra note 24 above.

²⁶ Venezuela submitted its notification of ICSID’s denunciation under Article 71 of the ICSID Convention on 26 January 2012. Similarly see Charles N. Brower & Sadie Blanchard supra note 24 above.

²⁷ Ibid.

²⁸ Id at 5-6.

²⁹ Id at 6-7.

38 of the ICSID Convention and Articles 4 & 11 of the ICSID Arbitration Rules. Parties' failure to appear in the proceeding could not ban ICSID's proceedings according to Article 45(2) of the ICSID Convention.

The effectiveness of the ICSID system on the other hand refers to the non-revocation of the proceeding once consented according to Article 25(1) of the ICSID Convention, the exclusivity of other remedies once consented to the ICSID system according to Article 26 of the ICSID Convention, and rendering a binding award that may obtain recognition and enforcement according to Article 53(1) & 54(2) of the ICSID Convention. The 1974 Jamaica's intent to revoke ICSID's jurisdiction relating to "investments of minerals and natural resources" with a plan to increase taxes payable to investors a month before deciding the new proposed tax system was rejected by ICSID tribunals in *Alcoa Minerals of Jamaica, Inc. v. Jamaica*[30], *Kaiser Bauxite Co. v. Jamaica*[31], *Reynolds Jamaica Mines, Ltd., Reynolds Metals Co., v. Jamaica*[32] ICSID cases shows the consent given to ICSID is unconditional and unqualified [33].

ICSID's Arbitral Balance Sheet

ICSID has almost 50 years of arbitral experience since the registration of the first request for arbitration submitted under the ICSID Convention on 22 December 1971. The first ICSID arbitral case recorded in the arbitral history of ICSID was *Holiday Inns v. Morocco*[34]. According to the ICSID caseload statistics, the number of cases registered by ICSID under the ICSID Convention and Additional Facility Rules varies from a single-digit registration from 1972-1996 to a double-digit number registration from 1997 onwards[35]. Before the first double-digit number of cases were registered in 1997, at the end of 1994, ICSID had registered only three cases. Eloise Obadia coined these long years of ICSID's insignificant number of arbitration cases as "*a sleeping beauty*" years[36]. On the other hand, Stanimir A. Alexandrov coined the time the mid-1990s for ICSID as the "*baby boom*" stage of investment arbitrations since the caseload of ICSID began to raise beginning from the 1990s[37]. Therefore, the caseload of ICSID in the last ten years was 40 cases on average per year. Thus, as of December 31, 2019, ICSID had registered 745 cases under the ICSID Convention and Additional Facility Rules[38].

Antonio R Parra, who contributed in writing the first book named '*History of ICSID*' tried to tell us the reasons and the situations on the caseload of ICSID during the first decades and while its caseload went improving[39]. The first two decades of ICSID were the phases of institutional development that most of the time occupied in getting institutional machinery into working order, the process of decolonization, the oil price shock in the wake of the Yom Kippur War, and the influence of the 'New International Economic Order' can be mentioned for the scant number of arbitral cases. On the other hand, after two decades, in addition to the increasing number of contracting parties, the efforts by Aron Broches (the main architect of the ICSID Convention) and his staff promoted and motivated the jurisdiction of ICSID that the number of cases registered before ICSID[40]. But still, can we say that the caseload of ICSID is enough by taking some arbitration institutions and tribunals into consideration? I believe that still, the caseload of ICSID is minimal while comparing to some other arbitration institutions for example if we look at the trend of the caseload by China International Economic and Trade Arbitration Commission (CIETAC), though it is difficult to parallel comparison with ICSID, according to the 2018 caseload statistics, CIETAC received 2962 new cases and among them, 522 were cases with foreign-related cases[41].

Concerning ICSID's Caseload balance sheet, among other elements, those worth mentioning here to the scope of this short essay is the type of cases submitted to ICSID's registration and the bases of consent invoked to establish ICSID jurisdiction. The ICSID Convention gives a mandate for ICSID to provide facilities of conciliation and arbitration of investment disputes between member states and nationals of other member countries. The conciliation and arbitration facilities of ICSID are administered by the ICSID Convention, and the ICSID Regulations and Rules. The ICSID Regulations and Rules mainly include the ICSID Arbitration Rules and the ICSID Conciliation Rules adopted by the

³⁰ICSID Case No.ARB/74/2.

³¹ICSID Case No.ARB/74/3.

³²ICSID Case No.ARB/74/4.

³³Ibrahim F.I. Shihata supra note 3 above at 7.

³⁴ICSID Case No.ARB/72/1. For historical account of the first ICSID arbitration and its legal problems, see Pierre Lalive, "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems", *51 British Yearbook of International Law* (1) 1980, pp. 123-162.

³⁵ICSID, The ICSID Caseload Statistics, Issue 2020-1, available at [WWW.ICSID.WORLDBANK.ORG](http://www.icsid.worldbank.org) , Accessed on 8 May 2020.(The ICSID Caseload Statistics).

³⁶Eloise Obadisa, "ICSID, Investment Treaties and Arbitration: Current and Emerging Issues, in: Gabrielle Kaufmann – Kohler and Blaise Stucki (eds.), *Investment Treaties and Arbitration* , ASA Special Series No.19 (2002) at 67-68 as cited by Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There need for a systemic reform?" *17 Chinese Journal of International Law* (2018) at 138.

³⁷Stanimir A. Alexandrov, "The 'Baby Boom' of Treaty – Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' under Investment Treaties" *4 The Law and Practice of International Courts and Tribunals* 19 (2005) at 387.

³⁸The ICSID Caseload Statistics supra note 32 above.

³⁹Frank Berman, "Book Report: *The History of ICSID by Antonio R Parra*", *28 ICSID Review* 1(2013), pp. 144-151.

⁴⁰Ibid.

⁴¹CIETAC Caseload Statistics 2019, available at <http://www.cietac.org.cn> , Accessed on 8 May 8, 2020.

Administrative Council of ICSID in 1967. Besides, the ICSID's Administrative Council adopted the Additional Facility Rules in 1978 and amended the ICSID Regulations and Rules in 1978, and amended the ICSID Regulations and Rules in 1984, 2002, and 2006. Therefore, the ICSID Conciliation and Arbitration facilities offered by ICSID according to the above ICSID's Regulations and Rules are ICSID Convention Arbitration Cases, ICSID Convention Conciliation Cases, ICSID Additional Facility Arbitration Cases, and ICSID Additional Facility Arbitration Cases.

Among 745 cases registered under the ICSID Convention and Additional Facility Rules, as of 31 December 2019, a significant majority of the cases is 667 cases (89.5%) were ICSID Convention Arbitration Cases followed by 66 cases (8.9%) were ICSID Additional Facility Arbitration Cases, and the rest insignificant cases were ICSID Convention Conciliation Cases and ICSID Additional Facility Conciliation Cases[42]. From the perspective of the basis of consent invoked to establish ICSID jurisdiction, among the cases registered as of 31 December 2019, 60% of the cases were instituted based on Bilateral Investment Treaty (BIT) followed by 16% based on investment contract between the investor and the host state, 9% based on Energy Charter Treaty, 8% based on the investment law of the host state, and rest insignificant portions were based on other factors invoked to establish ICSID's jurisdiction.

THE JURISDICTIONAL BASIS OF ICSID TRIBUNALS

The jurisdiction of arbitration tribunals is the core legal concept that is connected to the competence and admissibility of the arbitration tribunal to decide on a claim presented to the tribunal. The legal concept of jurisdiction, in general, is defined from the perspective of judicial jurisdiction that refers to "the power of a court or judge to entertain an action, petition or other proceedings"[43]. Thus, the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID Center) is the competence of ICSID's Tribunals to hear and decide on conciliation and arbitration facilities within the ICSID's Center authority conferred by the ICSID Convention and the ICSID Regulations and Rules including the Additional Facility Rules.

The ICSID jurisdiction is composed of the substantive question of jurisdiction (*jurisdiction ratione materiae*), procedural questions of jurisdiction (*jurisdiction ratione personae*), jurisdiction based on the consent of the parties (*jurisdiction voluntatis*), and standing as to time limit and cause of action (*jurisdiction temporis*)[44]. These four elements are independent and can be assessed in a detailed manner. But here, owing to time and space limitations in this short essay, I opt for a tri-test approach to the jurisdiction of ICSID in determining the competence and admissibility of ICSID's jurisdiction. The first test is the substantive question of ICSID's jurisdiction according to Article 25 of the ICSID Convention ("**substantive question of jurisdiction**"). The second test of ICSID's jurisdiction is the procedural question of jurisdiction that mainly dealt with on Articles 28(3), 32, 36(3) & 41 of the ICSID Convention ("**Procedural Question of Jurisdiction**"). The third test is the consent of the parties as a jurisdictional base (*jurisdiction voluntatis*). The jurisdictional exclusion provisions of the ICSID Convention that proclaimed under Articles 26 & 27 of the ICSID Convention should also be seen to strengthen the judicial competence test of ICSID. Let us see each of the jurisdiction questions precisely ad in turn.

The Substantive question of ICSID jurisdiction

The basic elements of the ICSID jurisdiction on the substantive questions of jurisdiction are proclaimed under Article 25 of the ICSID Convention. Article 25(1) of the ICSID Convention provides as follows:

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

The above substantive requirement of ICSID jurisdiction consisted of multiple layers of legal requirements that should be checked against the claim of the investor and laws that conferred the right to present claims as well as the applicable law to the dispute. For instance, the requirements relating to the nature of the dispute (*ratione materiae*), the parties (*ratione personae*), and the consent requirement given by the parties are the substantive tests of ICSID's jurisdiction[45]. The nature of the dispute (*ratione materiae*) refers to the phrase "**... any legal dispute arising directly out of an investment ...**" under the substantive test of Article 25 of the ICSID Convention. Thus, the issue of a legal dispute might not controversial as such as "investment." What is "investment" therefore? The term "investment" plays a significant role in international investment law and comprises the qualification test of an asset to be an "investment" for substantive protection in international investment agreements and a jurisdictional requirement for *ratione materie* for ICSID arbitration[46]. This approach of examining the requirements for "investment" for instance, if jurisdiction is based

⁴² The ICSID Caseload Statistics supra note 32 above.

⁴³ Brayn A. Garner, Black's Law Dictionary, LawProse, Inc., 9th ed., 2009 at 927; Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 85.

⁴⁴ M. Sornarajah supra note 1 above at 307.

⁴⁵ Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 82.

⁴⁶ Marc Bungenberg, and Jorn Griebel et al (eds.), International Investment Law, Hart Publishing, 2015 at 497.

on consent offered by a BIT, establishing the definition of investment under the BIT and the ICSID Convention referred to as “a dual test approach”[47].

In applying the dual test approach of ascertaining whether an investment dispute claim is a legal claim arising out of an investment, the content of agreement used as a base for jurisdiction before ICSID, such as in BIT most of the time is not difficult. The problem is that there is no clear definition of investment under the ICSID Convention. In this regard, the ICSID Tribunals attempt to identify the characteristics of investment in *SaliniCostruttori SPA v. Morocco*[48] in 2001 called the *Salini test*[49]. The *salini test* then identified the characteristics of investment involving: contributions in money, in-kind, or the industry; long duration; the presence of risk; and the promotion of economic development[50]. On the other hand, most BITs include a clear definition and “listed identified investments”.

The 2012 Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Article 1 defined investment as, for this agreement “investment” means:

- (a) *An enterprise;*
- (b) *Shares, stocks, and other forms of equity participation in an enterprise;*
- (c) *Bonds, debentures, and other debt instruments of an enterprise;*
- (d) *A loan to an enterprise*
 - (i) *Where the enterprise is an affiliate of the investor, or*
 - (ii) *Where the original maturity of the loan is at least three years;*
- (e) *Notwithstanding sub-paragraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only when the loan or debt security is treated as regulatory capital by the contracting party in whose territory the financial institution is located;*
- (f) *An interest in an enterprise that entitles the owner to share in the income or profits of the enterprise;*
- (g) *An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;*
- (h) *Interests arising from the commitment of capital or other resources in the territory of a contracting party to economic activity in such territory, such as under*
 - (i). *contracts involving the presence of an investor’s property in the territory of the contracting party, including turnkey, or construction contracts, or concessions to search for and extract oil and other natural resources, or*
 - (ii). *Contracts where remuneration depends substantially on the production, revenue, or profits of an enterprise;*
- (i) *Intellectual property rights; and*
- (j) *Any other tangible or intangible, movables or immovable property and related property rights acquired or used for business purposes.*

From the perspective of ICSID’s arbitral experiences, let I present one of the tales of ICSID’s arbitral decisions in deciding whether sovereign bonds (security entitlements) are investments or not. The tale of the arbitral decision on sovereign rests on *Possotovabanka, a.s and ISTROKAPITAL SE v. Hellenic Republic*[51] decided in 2015 that ICSID denied jurisdiction on sovereign bonds, on the other hand, ICSID assumed jurisdiction on sovereign bonds in *Abaclat and Others v. Argentine Republic*[52] (formerly *Giovanna a beccara and Others v. the Argentine Republic*) and *AmbienteUfficio SPA and Others v. Argentine Republic*[53] (formerly *Giordano Alpi and Others v. Argentine Republic*) decided respectively in 2012 and 2013 [54]. The ICSID Tribunal in the 2015 *Possotovabanka case* rejected its jurisdiction on the dispute of sovereign bonds by deciding that “sovereign bonds are not investments either in the applicable BIT or according to Article 25(1) of the ICSID Convention” on the reasoning that “sovereign bond is a sale and sale is a process of exchange of values and investment is a process of purported creation of value”, thus the sovereign bond is not an investment[55]. In the case of *Abaclate and Others Case*, the tribunal decided that “investors have contributed when purchasing bonds and the concept of investment in ICSID Convention related to ‘contribution’ thus, bonds are an investment. The above two cases are typical tales of the Arbitral perspective of the center.

⁴⁷ Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 117.

⁴⁸ ICSID Case No. ARB/00/4 (Jurisdiction Award, 23 July 2001).

⁴⁹ Sornarajah supra note 1 above at 309.

⁵⁰ Ibid.

⁵¹ ICSID Case No. ARB/13/8.

⁵² ICSID Case No. ARB/07/5.

⁵³ ICSID Case No. ARB/08/9.

⁵⁴ On ICSID’s jurisdiction on sovereign bonds and recent developments, further see Sara Pendjer, “Investment Status of Sovereign Bonds: recent developments in the case law of ICSID” LLM Short thesis, Central University Press, 2016, available at www.etd.ceu.edu .

⁵⁵ Id at 23.

Jurisdictional standing of the parties (*ratione personae*)

The jurisdictional standing of the parties here refers to the admissibility of both the claimant and the respondent of having legal standing before the jurisdiction of the ICSID Tribunal. From the jurisdictional provision of Article 25 of the ICSID Convention, it is a matter of identifying a host party to ICSID or any competent organ that substitute the host state and the investor. The relevant phrase of Article 25 of the ICSID Convention on the standing of the parties goes, "... between a contracting state (or any constituent subdivision or agency of a contracting state designated to the center by the state) and a national of another contracting state." Here the state is obvious that belongs to the host state to the investor which is a party to the ICSID Convention. But the phrase '*any constituent subdivision or agency of a contracting state designated to the center by the host state*' has to be more explained from two perspectives that are which institutions or delegations are constituent subdivision or agency? What about designation to the ICSID by the host state? According to the commentary by Christoph H. Schreuer and Loretta Malintoppi, constituent subdivisions or agencies refers to "statutory corporations or agencies and public companies that exercise the public function of the host state either in participating in an investment agreement or appear as a respondent"[56]. Thus, here subdivisions or agencies refer to any central government or sub constituent organ having the function of substituting the host state concerning the issue concerned with ICSID and the proceedings before its jurisdiction. Designation to the center on the other hand refers to the process of official accreditation that entities might become parties to the ICSID proceedings to the center is to assure an investor of dealing with an authorized entity[57]. It is possible to cite evidence on the usage and practice of ICSID in constituent subdivision or agency and designation to the center. In connection with constituent subdivision or agency, in *Noble Energy v. Ecuador*, the ICSID Tribunal confirmed that "[Ecuador] designated CONELEC to the center on 21 August 2002 for Article 25 of the ICSID Convention and CONELEC is thus to be considered as an agency of the Republic of Ecuador"[58]. Practically, therefore, constituent sub-division or agency included political subdivisions, state corporations having separate legal personalities, and agencies of the host state's government[59]. The practical importance of 'designation to the center' was alleged in *Cable TV v. St. Kitts and Nevis Case*[60]. *Cable TV v. St. Kitts and Nevis*, the case stems from the 1986 agreement containing an ICSID arbitration clause between the claimants and the Nevis Island Administration (NIA) in which St. Kitts and Nevis is an autonomous entity of the federation of NIA but had not been designated as a constituent subdivision or agency to ICSID, so the ICSID tribunal decided that it had no jurisdiction according to Article 25(1) of the ICSID jurisdiction[61].

The next issue is who is the investor that enjoys the privilege of getting direct access to an international forum of ICSID investment arbitration? Article 25(2) of the ICSID Convention defined "*national of another contracting state*" dealing with the nationality of a natural person and juridical persons for the identification of an "investor" for ICSID's jurisdiction. Article 25(2) of the ICSID Convention provides: "*National of another contracting state*" means:

- (a) *Any natural person who had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered according to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the contracting state party to the dispute; and*
- (b) *Any juridical person which had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the contracting state party to the dispute on that date on which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for this Convention.*

Thus, this provision has two-fold critical tests for identifying a natural or juridical person as an investor before the definition of ICSID jurisdiction. The first one is the nationality test that is identifying the nationality of the claimant and at the same time whether the home state of the claimant is a party to the ICSID Convention at the time of the submission of a claim by the "investor" for ICSID Proceeding. Thus, the critical date of the home state's party to the ICSID Convention is during the time of ICSID's claim submission date. In this regard, the first case of ICSID, that is *Holiday Inns v. Morocco* can be a good practical example. In *Holiday Inns v. Morocco*, the basic agreement of ICSID's arbitration clause between Switzerland and Morocco signed on 5 December 1966 and Switzerland (the claimant's state of nationality) became a party to ICSID Convention on 14 June 1968; therefore, the *Holiday Inn's* submission of a claim in

⁵⁶Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 149.

⁵⁷ Id at 154-155.

⁵⁸*Noble Energy v. Ecuador*, Decision on jurisdiction, 5 March 2008, Para. 63, as cited by Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 154.

⁵⁹Ibid.

⁶⁰ *Cable TV v. St Kitts and Nevis*, Award, 13 January 1997 as cited by Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 155.

⁶¹Ibid.

1971 before ICSID proceeding was acceptable because on this specific date Switzerland is a party to the ICSID Convention[62].

ICSID's Jurisdictional Exclusivity Provisions: Articles 26 & 27 of the ICSID Convention

Jurisdictional exclusivity is one of the unique features of ICSID international investment arbitration. The focus of jurisdictional exclusivity is on capitalizing the implications of giving consent for ICSID arbitration facilities. Therefore Articles 26 & 27 of the ICSID Convention in this regard are self-explanatory on the implications of giving consent to the ICSID Convention. Article 26 of the ICSID Convention provides:

*Consent of the parties to arbitration under [the ICSID] Convention shall unless otherwise stated, be deemed consent to such arbitration **to the exclusion of any other remedy. (Emphasis added).** A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under [the ICSID] Convention.*

Therefore, from the reading of Article 26 of the ICSID Convention, the only pre-negotiating condition is to reach an agreement for the exhaustion of local administrative or judicial remedies when consent is reached for arbitration within the jurisdiction of ICSID. Otherwise, once consent is given for ICSID arbitration, no way to looking at other remedies.

On the other hand, according to Article 27(1) of the ICSID Convention, espousing a citizen's claim or bring an international claim is impossible once consent for ICSID jurisdiction for arbitration is reached. Article 27(1) of the ICSID Convention provides:

No contracting state shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under [the ICSID] Convention unless such other contracting state shall have failed to abide by and comply with the award rendered in such dispute.

Therefore, one of the jurisdictional features of ICSID jurisdiction is, upon the establishment of ICSID jurisdiction, the exclusion of local administrative or judicial remedies, or no espousal and bringing international claims.

Additional Facility Jurisdiction of ICSID

Additional Facility Rule (AFR) of ICSID is one of the techniques for extending the jurisdiction of ICSID in situations whereby one of the jurisdictional requirements of ICSID under Article 25(1) of the ICSID Convention as to ICSID membership is not fulfilled. Therefore, the purpose of the Additional Facility Rule (AFR) is to provide for dispute settlement where either the host state or the state of the investor's nationality is not a contracting state to the ICSID Convention[63]. Therefore, the Administrative Council of ICSID issued Additional Facility Rule (AFR) in 1978 that opened access to ICSID Additional Facility Jurisdiction in the following three categories of grounds:[64]

- Conciliation or arbitration of investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Conciliation or arbitration of legal disputes which do not directly arise out of an investment provided that at least one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Fact-finding proceedings between a state and a national of another state.

Procedural Questions of ICSID Jurisdiction

Procedural questions of ICSID jurisdiction are simply mechanisms, institutional regulations, and rules available for the implementation of the substantive rights and obligations enshrined under the ICSID Convention. In general perspective, therefore, the procedural questions of ICSID jurisdiction comprised of several issues, such as the initiation of arbitration proceedings, the constitution of the arbitral tribunal, replacement and disqualification of arbitrators, the procedure of conducting arbitrations, issues of provisional measures, issues of an award, annulments, and issues of cost of arbitration[65]. The procedural provisions of the ICSID Convention range from Articles 36 to 55 of the ICSID Convention and ICSID's Regulations and Rules adopted by the Administrative Council of ICSID are part of the procedural question jurisdiction of ICSID[66].

Consent: A critical Base for ICSID Jurisdiction (*jurisdictio Voluntatis*)

Consent to jurisdiction is one of the principal lines that demarcate arbitration from judicial proceedings. In this regard, ICSID's jurisdiction might not be an exception from arbitrations in general. Rather the issue is how consent to ICSID's arbitration jurisdiction is obtained. Article 25 of the ICSID Convention underlined the significance of consent.

⁶²Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 164-165.

⁶³Christoph H. Schreuer and Loretta Malintoppi supra note 6 above at 167.

⁶⁴UNCTAD, ICSID: Dispute Settlement, Selecting the Appropriate Forum, UNCTAD/EDM/Misc.232/Add.1, 2003 at 19, available at www.unctad.org.

⁶⁵UNCTAD, ICSID: Dispute Settlement, Procedural Issues, UNCTAD/EDM/Misc.232/Add.1, 2003, available at www.unctad.org.

⁶⁶Ibid.

Besides, the same provision vividly proclaimed “... the parties to the dispute consent in writing to submit to the [ICSID]...” But the ICSID Convention has no clear provisions indicating how consent is given for ICSID jurisdiction. Practically, the consent for ICSID’s jurisdictions is given in three ways[67]. The first way of giving consent to the ICSID jurisdiction is a contractual clause (direct agreement) between states and foreign investors[68]. The second technique to give consent to ICSID dispute settlement is municipal legislation (investment code) of host states that offers an ICSID dispute settlement forum for foreign investors[69]. The other technique of giving consent to ICSID jurisdiction is through treaties, such as Bilateral Investment Treaties (BITs) or through regional multilateral treaties like Energy Charter Treaty[70]. Among the modalities of giving consent to ICSID’s jurisdiction, BITs are the most common that account for about 60% of the cases that conferred ICSID jurisdiction[71].

Among the investor-state agreements or treaties that confer consent to ICSID jurisdiction, the umbrella clause is one of the formulations that protect the investors. Thus, in the next sections of this short essay, I will see shortly inconsistencies and arbitral tales of ICSID focusing on umbrella clause and the short essay will conclude in reviewing the possible reasons behind arbitral inconsistencies, the future of umbrella clause and emerging claims of reform.

INCONSISTENCIES and ARBITRAL TALES of ICSID: FOCUS on JURISDICTION BASED UPON UMBRELLA CLAUSE

Inconsistencies and Arbitral Tales of ICSID: A short General Overview

Since the first investment arbitration case of ICSID, *Holiday Inns v. Morocco* had been registered as the first case in ICSID’s history in 1972, there were hundreds of cases registered and decided within the jurisdiction of ICSID. But till now, there is no coherence or consistency among the arbitral decisions of ICSID[72]. Giovanni Zarra by citing Jansen Calamita explained two possible ways for the lack of coherence in investment arbitration: that is, “(a). periodically producing awards which are inconsistent concerning the interpretation, and application of similar, if not identical, provisions other International Investment Agreements (IIAs); (b). by producing awards which are occasionally inconsistent in their interpretation and application of International Investment Agreements (IIAs) which have been the subject of prior interpretation and application”[73]. Let I here cite three pairs of ICSID Tribunal decisions that clearly show incoherence and arbitral tales.

The first pair of cases that can be mentioned as arbitral tales of ICSID investment dispute arbitration is the post-2001 Argentine Economic Crisis investment dispute cases[74]. Following the 2001 Argentine catastrophic financial crisis, more than 40 cases were presented before ICSID based on BITs signed with the investor’s home state[75]. Among the arbitral proceeding of ICSID assumed jurisdictions by the 1991 BIT of Argentina-United States of America (USA), the critical issue was whether the law of necessity as a circumstance precluding wrongfulness in international law, decided by ICSID Tribunals in irreconcilable ways in Argentine economic crisis cases of 2001. While looking at the following 5 pairs of ICSID Tribunal cases of the Argentine financial crisis, a decision of an arbitral tale was made among the Cases. The ICSID Tribunals in *CMS v. Argentina*[76], *Continental Casualty Company v. Argentina*[77], *Enron v. Argentina*[78], and *Sempra v. Argentina*[79] Cases stated that “Argentina couldn’t invoke necessity in situations of economic crisis according to the 1991 Argentine BIT[80] and rules of customary international law”[81]. On the other hand, in *LG & E v.*

⁶⁷ UNCTAD, ICSID: Dispute Settlement, Consent to Arbitration, UNCTAD/EDM/Misc.232/Add.2, 2003 at 6, available at www.unctad.org.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ The ICSID Caseload Statistics *supra* note 32 above.

⁷² Giovanni Zarra, “The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?”, *17 Chinese Journal of International Law (2018)* at 140.

⁷³ N. Jansen Calamita, *The (In) Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime (2016)*, (ssrn.com/abstract= 2945881), 2 as cited by Giovanni Zarra *supra* 69 above at 140-141.

⁷⁴ Concerning the post-2001 Argentine Economic Crisis Case and the ICSID System, see Burke-White, William W., “The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System” (2008), Faculty Scholarship at Penn Law, 193.

⁷⁵ *Id* at 1.

⁷⁶ ICSID Case No.ARB/01/8.

⁷⁷ ICSID Case No.ARB/03/09.

⁷⁸ ICSID Case No.ARB/01/3.

⁷⁹ ICSID Case No.ARB/02/16.

⁸⁰ Article XI of the Argentine – USA BIT provision provides: “This treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest.”

⁸¹ Giovanni Zarra *supra* note 69 above at 151. Among the possible defenses of customary international law, Argentina invoked necessity under Article 25 of the International Law Commission (ILC) of the Draft Articles on State Responsibility. Article 25 of ILC Provides:

- (1) Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act:
 - (a) Is the only way for the state to safeguard an essential interest against a grave and imminent peril; and

Argentina[82], the Tribunal departed from its conclusion that given in *CMS v. Argentina & other Cases* above that “Argentina was facing a state of necessity on 1 December 2001 to 26 April 2003 that Argentina was exempted to pay indemnity to the investor falling to such to state organ”[83].

The second pair of cases that can be mentioned as arbitral tales of ICSID investment arbitration was in *Teco Guatemala Holdings v. Guatemala*[84], and *IberdrolaEnergia v. Guatemala*[85] emanated from Guatemala’s decisions on an increase in electricity tariff schedule in 2008 [86]. Following the 1998 legal framework of Guatemala that promotes private investors in reforming the energy sector, TECO and Iberdrola purchased the majority of the shares of the Guatemalan Electricity Distribution company (EEGSA), one of Guatemala’s two state-owned energy companies responsible for providing power to Guatemala’s Central Region and, including its capital city[87]. After 2009, Guatemala’s government electric tariff review and increase in tariff schedule resulted in disagreement because post-privatization electric prices were exceedingly high, followed by government subsidies to low-income consumers, new foreign investments installing fossil-fuel-based electricity producers (then the producers of renewables capacity) got attention and investment shifted to fossil-based power producers that companies *TECO* and *Iberdrola* became uncompetitive[88]. Therefore, in 2009 *TECO* (a US company) based on US-Dominican Republic –Central American Free Trade Agreement (US-CAFTA-DR), and *Iberdrola*(a Spanish company) based on a BIT between Spain and Guatemala, after notified Guatemala of their intent to institute a claim before ISDS, claimed against electricity tariff decisions. The arbitral tale of the Tribunals was owing to the different decisions and treatment of these claimants through their claim and cause of action were quite similar[89]. *Iberdrola* in its claim against Guatemala before ISDS by argued that Guatemala’s actions violated the country’s several obligations under the Spain-Guatemala BIT those arising under the treaty’s provisions on expropriation, fair and equitable treatment, and full protection and security, but the ISDS Tribunal rejected the claim that no breach of international law, rather the claims are issued related to Guatemalan’s domestic law issues of technical, financial and legal concerns, in other words, most claims of *Iberdrola* were rejected on questions of jurisdiction[90]. But, a contradictory outcome of a parallel case in *TECO v. Guatemala* was delivered by another Tribunal, one of the instances of an arbitral tale of ICSID’s investment dispute arbitration. In *TECO v. Guatemala*, the Tribunal after accepted the claim within its jurisdiction challenged the government’s failure to provide satisfactory reasons regarding its tariff decisions that the government’s failure to provide reasons is both a matter of domestic and international law, thus the decisions taken was arbitrary and lacked due process[91]. The Tribunal in *TECO v. Guatemala* decided on the merit that TECO was entitled to its share and though the claim proceeded to annulment and Guatemala’s claim remained rejected.

Umbrella clauses: conception, arbitral tales on its interpretation, and it's future

The conception of Umbrella Clauses and Model Provisions

Umbrella clause is one of the legal concepts of international investment law that provides additional protections for investors by extending the obligations of host states in a commonly cited insertion of “observe any obligations the host state has assumed” as an international law obligation [92]. Umbrella clause is one of the most contentious questions in investment arbitrations. Thus, what is meant by the legal concept of an umbrella clause? Yannaca-Small enumerated the other formulation of the nomenclature of umbrella clauses as “*mirror effect clause*”, “*elevator clause*”, “*parallel effect clause*”, “*sanctity of contract*”, “*respect clause*”, and “*pactasuntservanda*”[93]. This nomenclature of umbrella clauses developed by different professionals in their academic discourse as well in their practical engagements, such as in

(b) Does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international committee as a whole.

(2) In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The state has contributed to the situation of necessity.

⁸²ICSID Case No.ARB/02/01.

⁸³ Giovanni Zarra Supra note 69 above at 150.

⁸⁴*Teco Guatemala Holdings v. Guatemala*, ICSID Case No.ARB/10/2, Award, December 19, 2013 (*Teco v. Guatemala*).

⁸⁵*IberdrolaEnergia v. Guatemala*, ICSID Case No.ARB/09/5, Award, August 17, 2012 (*Iberdrola v. Guatemala*).

⁸⁶Lise Johnson and Lisa Sachs, “Inconsistency’s many forms in investor-state dispute settlement and implications for reform”, Columbia Center on Sustainable Investment (CCSI) Briefing Note), Columbia University, 2018, available at https://www.ccsi.columbia.edu/files/2018/11/inconsistencies_IDS_Briefing_Note_11.28.18.pdf.

⁸⁷*Id* at 1-2.

⁸⁸*Ibid*.

⁸⁹*Ibid*.

⁹⁰*Id* at 4.

⁹¹*Id* at 5.

⁹²Yannaca-Small, K. (2006), “Interpretation of the Umbrella Clause in Investment Agreements”, OECD Working Papers on International Investment, 2006/03, OECD Publishing, available at <http://dx.doi.org/10.1787/41543814578>. Concerning Umbrella Clauses, further see Velimir Zivkovic, “Contracts, Treaties, and Umbrella Clauses: Some Jurisdictional Issues in International Investment”, *Belgrade Law Review*, 4/2012, available at <http://ssrn.com/abstract=2119861>; Jarrod Wang, “Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contracts, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes” 14 *Geo. Mason. L. Review* 1(2006), 137-179.

⁹³Yannaca-Small supra note 89 above at 3.

drafting investment protection treaties. For instance among others, E. Gaillard in his historical examinations of the origins of umbrella clauses noticed that, from the intention of the parties, it can be inferred that “the intent to characterize the breach of a contract as a breach of international treaty obligations by the host states – such intentional clauses with ‘mirror effect’”[94]. Ibrahim H. I. Shihata on the other hand explained the elevating effect of umbrella clauses as “contractual undertakings will elevate to international obligations via an umbrella clause of treaties”[95]. The remarks by C. Schreuer can be taken as granted that explained umbrella clauses are contractual commitments that provide additional protection to the investor and “put the contractual commitments under BIT’s protective umbrella”[96]. Therefore, umbrella clauses are clauses that require each contracting states to observe all investment obligations entered into with investors from other contracting parties[97].

What type of formulations of legal provisions traced from BITs as well as multilateral treaties? Unfortunately, the first Bilateral Investment Treaty in the history of an international investment treaty[98], the BIT between Germany and Pakistan of 1959, under its Article 7 proclaimed the umbrella clause as:

“Either party shall observe ‘any other obligations’ it may have entered into concerning investments by nationals or companies of the other party.”

Among the multilateral treaties, the Energy Charter Treaty of 1994, the final sentence of Article 10(1) provides:

“Each contracting party shall observe any obligations it has entered into with an investor or an investment of an investor of any other contracting party.”

The other two important umbrella clauses of BITs are relevant here for the discussion of the arbitral tales on the interpretation of umbrella clauses are the BITs between Pakistan with Switzerland and Pakistan with the Philippines. The 1995 Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments of Article 11 under its caption ‘*Observance of Commitments*’ provides:

Either contracting party shall constantly guarantee the observance of the commitments it has entered into concerning the investments of the other contracting party.

On the Other hand, the 1997 Agreement between the Government of the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments under its Article X (2) provides:

Each contracting party shall observe any obligation it has assumed concerning specific investments in its territory by investors of the other contracting party.

Thus, what are the principal legal connotations that can be taken from the legal architecture of umbrella clauses? What effect and legal implications these umbrella clauses have? The first connotation from the architecture of umbrella clauses is their mandatory nature that is intended to create an international obligation of a reciprocal nature[99]. Secondly, the focus of the umbrella clause is on the obligations undertaken by the state, not on the obligation of private-level parties[100]. The third connotation of the umbrella clause is the possibility that creates for foreign investors direct access to international law[101].

Arbitral Tales of Umbrella Clause on its Interpretations: SGS’s Saga as Evidence

The Arbitral practice on umbrella clauses beyond the wide debate and discussions among commentators and drafters on BITs and Umbrella clauses, the first ICSID’s case that addressed the umbrella clause was the 1988 case of *Fedax NV v. Republic of Venezuela*[102] instituted based on the BIT between the Netherlands and the Republic of Venezuela[103]. In this case, though the Tribunal assumed jurisdiction based on the 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Venezuela, the tribunal unnoticed that there was an umbrella clause in the BIT between the Netherlands and Venezuela that the umbrella clauses left untouched and the Tribunal entertained the case from only from the perspective contractual commitments and decided contractual obligations should be observed[104].

⁹⁴Id at 8.

⁹⁵Id at 7.

⁹⁶Id at 8.

⁹⁷Jarrold Wang supra note 89 above at 138.

⁹⁸For the history, analysis and practical application of umbrella clause, you can also see Anthony Sinclair, “Umbrella Clause” in: Marc Bungenberg, and JornGriebel (eds.), *International Investment Law*, Hart Publishing, 2015, pp. 887-958.

⁹⁹Yannaca-Small supra note 89 above at 9; Anthony Sinclair supra note 95 above at 888.

¹⁰⁰Yannaca-Small supra note 96 above.

¹⁰¹Anthony Sinclair supra note 96 above.

¹⁰²*Fedax NV v. Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998.

¹⁰³Anthony Sinclair supra note 95 above at 891; Yannaca – Small supra note 96 above at 15.

¹⁰⁴Yannaca –Small supra note 89 above at 13.

The ICSID Tribunals tried to interpret the meaning and the conception of umbrella clauses in the claims of *SGS S.A* (formerly *Société Générale de Surveillance*), a multinational company headquartered in Geneva, Switzerland which provides inspection, verification, testing, and certification services in 2003 and 2004 against Pakistan and Philippines respectively[105]. Therefore, it was in *SGS v. Pakistan*[106] and *SGS v. Philippines*[107] cases that the ICSID Tribunals for the first time gave separate and detailed decisions on the meaning and effect of the umbrella clauses[108]. Thus, the interesting standpoint for academic discussions for the last decade was the two arbitral tribunals reached divergent conclusions on whether an umbrella clause extended the jurisdiction of investment tribunal to pure contractual breaches. In *SGS v. Pakistan Case*, the tribunal followed ‘a narrow interpretation’ approach that it rejected SGS’s contention that Article 11 of the Pakistan-Switzerland BIT umbrella clause elevated breaches of a contract to breaches of a treaty[109]. The *SGS v. Pakistan* tribunal reached this conclusion as follows:

The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor concerning a contract it has concluded with a state (widely considered to be a matter of municipal rather than international law) are automatically ‘elevated’ to the level of breaches of international treaty law[110].

Anthony Sinclair identified and analyzed four grounds in the above ICSID’s Tribunal on its rejection of SGS’s claim on the effect of the umbrella clause. According to the analysis by Anthony Sinclair, the grounds for rejection were:[111]

- *First, as a textual matter, the tribunal noted that Article 11 of BIT between Pakistan and Switzerland did not so many words declares that ‘breaches of contract are automatically elevated’ to the level breaches of international law;*
- *Secondly, the tribunal suggested the proposed legal effect attributed to the umbrella clause by the claimant would render superfluous the other substantive protections of BIT;*
- *Thirdly, the tribunal refused to accept that umbrella clause could supersede jurisdiction agreements inserted in contracts between the investor and the state, which is understood the umbrella clause would do;*
- *Fourthly, the tribunal was the fear that to give effect to the claimant’s view of the umbrella clause raised the possibility of opening the ‘floodgates’ exposing states to unexpected and expansive international responsibility*[112].

On the other hand, year after the *SGS v. Pakistan Case*, the other arbitral tribunal in *SGS v. Philippines Case* by applied and followed ‘a wider interpretation approach’; accepted SGS’s allegations based on the Philippines-Switzerland BIT and concluded that the breach of the BIT for the host state included contractual commitments that assumed concerning specific commitments[113]. Therefore, in *SGS v. Philippines* case of a government contract for pre-shipment (Customs Inspection Services – CISS Agreement), the arbitral tribunal accepted that it had jurisdiction to hear and decide the case being the claim was the breach of Article X (2) of the Philippines – Switzerland BIT and the object and purpose of the BIT required that the umbrella clause be found to have an effective meaning[114]. Similarly here, Anthony Sinclair tried to pinpoint and analyzed the reasoning delivered by the arbitral tribunal in finding the reasons behind why the similar causes of actions decided differently in these SGS’s saga of claims. About four justification analyses were identified by Anthony Sinclair from the decisions of *SGS v. Philippines* arbitral tribunals[115]. The analyses on justifications were:

- *First, on a simple textual analysis, the arbitral tribunals at *SGS v. Philippines* ‘provisional conclusion’ was that Article X (2) ‘means what it says’.*
- *Secondly, the tribunal was informed by the context, in which the umbrella clause arose, and the object and purpose of the treaty that is the tribunal considered that given the BIT was intended to achieve the promotion and reciprocal protection of investment, and it is legitimate to resolve uncertainties to favor the protection of covered investments.*
- *Thirdly, the tribunal emphasized in particular, the value to investors of an international law remedy was the respect of obligations that may be governed by the internal law of the host state that is the function of the umbrella clause of the BIT is to provide assurances to foreign investors.*

¹⁰⁵ Anthony Sinclair supra note 100 above. The *Société Générale de Surveillance*, here in after referred as ‘SGS’.

¹⁰⁶ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.

¹⁰⁷ *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.

¹⁰⁸ Anthony Sinclair supra note 100 above.

¹⁰⁹ Yannaca-Small supra note 89 above at 15.

¹¹⁰ ICSID Case No. ARB/01/13, 18 ICSID rev-FILJ, 307 (2003); Yannaca-Small supra note 106 above.

¹¹¹ Anthony Sinclair supra note 95 above at 892-893.

¹¹² Ibid.

¹¹³ Yannaca- Small supra note 89 above at 18-19.

¹¹⁴ Anthony Sinclair supra note 95 above at 894.

¹¹⁵ Ibid.

- *Fourthly, the contracting party entered into binding commitments towards investments, the tribunal's view was that a subsequent breach of those commitments could give rise to a treaty claim under Article X (2) of the Philippines – Switzerland BIT [116].*

From the above tale of SGS's ICSID arbitral tribunal, the most vivid picture is that ICSID's inconsistency without convincing justifications for a double –standard interpretation of umbrella clauses. I believe that the wider interpretation approach of an umbrella clause seems the proper approach that fits the intent of the architecture of such clauses while internationalization and stabilization of investment contracts are in mind. While looking at the genesis and development of umbrella clauses since the 1950s advises of the giant personalities, such as the advice by Sir Elihu Lauterpacht to the draft settlement agreement involving the Anglo-Iranian Oil Company (“AIOC”), the 1959 Abs – Shawcross Draft Convention of Investments Abroad (“Abs-Shawcross Draft”) to the present surfaced BITs, the intent mainly focused on “extending investor-state contracts to allow obligations arising under contractual obligations characterized as treaty obligations”[117]. On the other hand, Crawford identifies four schools of thought on the interpretation of umbrella clauses that can be taken as ‘characteristics as to interpretations’, such as *the restrictionist, the sovereign centric, the integrationist, and the internationalist approaches*[118]. According to Crawford's classification, the four schools of thought as to the interpretation of umbrella clauses provides:[119]

The restrictionist approach adopts “an extremely narrow interpretation of umbrella clauses, holding that they are operative only where it is impossible to discern a shared intent of the parties that any breach of contract is a breach of BIT.” On the other hand, the sovereign-centric school “seeks to limit umbrella clauses to breaches of contract committed by the host state in the exercise of sovereign equality.” The Integrationist School provides that “an umbrella clause is operative and may form the basis a substantive treaty claim, but it does not convert a contractual claim into a contract claim.” The internationalist approach entertains that “the effect of umbrella clauses is to international investment contracts, thereby transferring contractual claims into treaty claims directly subject to treaty rules”[120].

Therefore, from the above conceptual and theoretical overview as well as arbitral perspective, there is no wide consensus as to the conception, interpretation as well as the effect of the umbrella clause. What about the present status and trend towards umbrella clauses? Is there a trend of increasing the negotiation and reached an agreement on the umbrella clause to have a platform as well as implementation?

The Future of Umbrella Clauses: A Dark future or otherwise?

According to the United Nations Conference on Trade and Development (UNCTAD), the number of International Investment Agreements (IIAs) signed between the years 1980-2017 reached 3,322 agreements (2,946 Bilateral Investment Treaties – BITs and 376 Treaties with Investment Provisions – TIPs other than BITs), among them 2,638 were in force[121]. On the other hand, while looking at the evolution of umbrella clauses, among the BITs signed between 1959 and 2016, more than 40% of BITs had umbrella clauses[122]. But now, the trend and landscape of the ‘new generation of investment agreements’ seems to change. According to UNCTAD, among the 54 signed new investment agreements since December 2015, only two (3.7%) BITs contained umbrella clauses, namely the Austria - Kyrgyzstan BIT and the Japan –Iran BIT[123]. What is the implication of such types of exclusions of umbrella clauses from the new generation of BITs? Is it really a dark time coming for umbrella clauses?

Among the new generation of BITs of post-2015 that survived “the new landscape of umbrella clause exclusion” the 2016 Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic has a clue that under Article 11(1) provides:

Each contracting party shall observe any obligation it may have entered into concerning specific investments by investors of the other contracting party. This means, inter alia that the breach of a contract between the investor and the host state will amount to a violation of this treaty.

¹¹⁶ Ibid.

¹¹⁷ Jarrod Wong supra note 89 above at 148-149.

¹¹⁸ A.F.M. Maniruzzaman, “The Pursuit of Stability in International Investment Contracts: A Critical Appraisal of the Emerging Trends”, 1 Journal of World Energy Law & Business 2(2008) at 150.

¹¹⁹ Id at 151.

¹²⁰ Ibid.

¹²¹ UNCTAD, Recent Developments in the International Investment Regime, 2018, available at <https://unctad.org/en/publicationsLibrary/diaepcbiaf20181-en.pdf>, accessed on 15 May 2020.

¹²² UNCTAD Investment Policy Hub, Mapping of IIA Clauses, 2020, available at <https://investmentpolicy.unctad.org/1031/mapping-of-ii-a-clauses>, accessed on 15 May 2020.

¹²³ Raul Periira de Souza Fleury, “Closing the Umbrella: A Dark Future for Umbrella Clause?”, Kluwer Arbitration Blog, October 13/2017, available at <http://arbitrationblog.kluwerarbitration.com/2017/10/13/closing-umbrella-dark-future-umbrella-clauses>, accessed on 15 May 2020.

The above umbrella clause of Austria-Kyrgyz Republic BIT vividly elevated a breach of a contract as the breach of a treaty that arbitral tribunals will never be in doubt to interpret this provision as an umbrella clause that has an effect of creating international law obligations from contractual obligations. But the 2017 Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment has no new type of legal drafting of umbrella clause unlike the Austria – Kyrgyz Republic BIT that under its Article 6 titled ‘observance of obligations’ provides:

Either contracting party shall observe any obligation it has entered into concerning investments of investors of the other contracting party.

What are the possible reasons mentioned for this recent new generation of BITs probably made dark the future of umbrella clause? Among other possible justifications, the inconsistency of decisions by arbitral tribunals on the interpretation and effect of umbrella clauses like SGS’s saga and other arbitral tribunals discussed above. This short essay will end up by reviewing the possible reasons behind the inconsistencies and suggesting some of ICSID’s institutional reforms.

WHY INCONSISTENCIES IN ICSID’S TRIBUNAL PRACTICES? A QUEST for INSTITUTIONAL REFORMS

Arbitral inconsistencies and incoherence: why for?

ICSID’s 50 years of arbitral experience is not simple to fully analyze the arbitral tribunals’ case database from the perspective of coherence and consistency of arbitral decisions. But from the above discussions of this short essay and other similarly mentioned and cited academic works and reviews, there have been a variety of inconsistent decisions in ICSID’s investment treaty arbitrations that creates uncertainty and damages the legitimate expectations of investors and sovereigns[124]. Susan D. Franck categorized the inconsistent cases of arbitral decisions into three: (1). Cases involving the same facts, related parties, and similar investment rights, (2). Cases involving similar commercial situations and similar investment rights, and (3). Cases involving different parties, different commercial situations, and the same investment rights[125]. Thus, what possible justifications can be mentioned behind the ICSID’s arbitral inconsistencies? The first reason possibly is the absence of a precedent system in international investment law and the non-existence of standard and multi-lateralized investment treaty rules[126]. The precedent system, understood as the doctrine of *stare decisis* in common law jurisdiction, can have high practical importance in arbitral decisions of investment treaty arbitration. But there are practical difficulties in applying the precedent system in investment arbitration such as the absence of the doctrine of precedent in the field of public international law, lack of full transparency of investment treaty arbitration, a fragmented substantive source of international investment law[127]. Therefore, though the principle of precedent has the potential to mitigate the arbitral inconsistency in international investment law, the above-mentioned obstacles quest parallel institutional reforms.

The second problem that adds a negative power for arbitral inconsistency is the absence of an appellate system in international investment arbitration. The jurisprudence of international investment law recognizes only the procedural rule of annulment that is mandated only for considering the procedural legitimacy of the tribunal decisions not on the substantive corrections[128]. Thus, there are arguments forwarded from pro-appellate facilities for international investment arbitrations though such type of proposal needs institutional reform of at least amendment of the ICSID Convention and BITs in general[129].

The third top challenge contributing to arbitral inconsistencies is a fragmented substantive law in the international investment landscape that is the proliferation of Bilateral Investment Treaties in the legal landscape of international investment law. It is already mentioned above that there are about 2,638 investment treaties actively in force in our globe with ample differences as to, for example, the standard of investment protection and other issues. Why the effort of multi-lateralization of investment agreements is not still a finished project? Thus, multi-lateralization effort of strengthening the substantive laws of international investment should be strengthened.

¹²⁴Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent decisions”, 73 *FORDHAM LAW REVIEW* 4(2005) at 1558, available at <https://ir.lawnet.fordham.edu/flr/vol73/iss4/10> .

¹²⁵Ibid.

¹²⁶Beata Gessel Kalinowska Vel Kalist and Konrad Czeh (eds.), *The Role of Precedent in Investment Treaty Arbitration*, in: Barton Legum, *The Investment Treaty Arbitration Review*, 4th ed., 2019 Law Business Research, pp. 155-162.

¹²⁷Id at 155-157.

¹²⁸Article 52(1) of the ICSID Convention.

¹²⁹Concerning a proposal of an appellate mechanism for international investment arbitration, see Christian J. Tams, “An Appealing Option? The Debate about an ICSID Appellate Structure”, *Essays in Transnational Economic Law*, Martin Luther University, 2006, available at <https://www.telc.jura.uni-halle.default/files/antbestand/Heft57.pdf> .

A Quest for ICSID's Institutional reforms

The procedural legal framework of international investment law, in addition to arbitral decision inconsistencies, faced quite several criticisms that quest institutional reforms. From the perspective of criticisms, the frequently cited ones are lack of transparency and predictability, no efficient mechanism of review of awards in addition to inconsistency of arbitration awards. Giovanni Zarra, in the recent work on the issue of incoherent in investment arbitration proposed reforms aimed at granting harmonization and coherence in international investment law^[130]. Giovanni Zarra presented three sets of reforms as proposals as follows:

First, the establishment of an investment court system about single investment treaties that the idea is recently on the way to application in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. Second, establishing a multilateral investment court involving the biggest possible number of countries as a proposal advanced by the European Commission. Third, proposed an appellate body that able to know appeals for errors of laws and facts contained in awards issued by arbitral tribunals^[131].

Therefore, the quest for reforming the institutional challenges of ICSID is not now a novel idea. There are clear and acute concerns to mitigate the challenges and criticisms that the international investment law legal regime faced that reform seems inevitable. But, what should look like the extent of the reform? Is it a total reform that will change the whole paradigm of the international investment law regime or rectifying the current acute pitfalls of the regime? In my opinion, as it is already discussed in the historical memory of ICSID and its half-century achievements, it will never be underestimated and illogical to hurry for its total demolition.

CONCLUDING REMARKS

The international investment law and its policy prescriptions are progressively developed in the last 50 years. Especially though fragmented, the development of a substantive aspect of Bilateral Investment Treaties (BITs), the procedural landscape of ICSID, and the arbitral jurisprudence had got momentum in the last half a century. But the multilateralization of the substantive law of international investment law is still at the stage of struggle for its consolidation and coherence. The ICSID tribunal practice though developed substantially, but lacks consistency and predictability. In this regard, the demand for uniform application and interpretation of umbrella clauses has also suffered serious inconsistencies as witnessed in *SGS's claim* against Pakistan and the Philippines. Besides, a serious concern of a quest for institutional reform of the international investment law regime is a serious issue currently.

In this paper therefore, I believe that international investment law especially ICSID's jurisprudence is a very interesting area of international law that worth study and discussing. Besides, it is my belief that foreign direct investment is one of the crucial factors that contributes to development that warrants the best protection for foreign investors. In doing so, therefore, critical challenges of the international investment law regime have to be improved and the decisions of arbitral tribunals should be transparent and predictable. But the initiatives on ICSID's reform should strike a balance at the treatment of the sick side of the institution in surgery mood, not on total amputation. Recently, new paradigms are also noticed in addition to a quest for reform, such as the new generations of BITs that ignored umbrella clauses from their obligations. What implication it has for the future development of investment protection clauses, such as umbrella clauses? Is dark time is coming? Or is it not possible to reform the areas of inconsistencies that the international law regime is now suffered from? I believe that it is possible to rectify the drawbacks of institutional challenges of ICSID in particular and international investment law in general. Thus, internal reform should be incited within the mandate of ICSID to rescue its acute weakness syndromes.

¹³⁰Giovanni Zarra supra note 69 above at 142.

¹³¹Id at 142-145.