

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# DISPUTE SETTLEMENT

INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

## 2.5 Requirements Ratione Materiae



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

This module has been prepared by Mr. Alejandro A. Escobar at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this module are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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## OVERVIEW

This Module deals with the subject-matter for which ICSID was designed. It discusses how the phrase “investment disputes” in the Convention’s title is reflected in the provisions of the ICSID Convention. The key provision is Article 25 which speaks of “any legal dispute arising directly out of an investment”.

This Module looks at the characteristics a dispute must have in order to be subject to ICSID’s jurisdiction. In particular, this it examines what types of transactions may be understood as investments for purposes of the Convention. In addition, it looks at the concept of a legal dispute and at the requirement that it arise directly from an investment. The combination of these elements circumscribe the scope of application of the ICSID Convention as far as its subject-matter is concerned. In other words, they determine the extent of ICSID’s jurisdiction *ratione materiae*.

As in the other Modules on ICSID, the starting point is the text of the Convention. In addition, this Module looks at how the relevant provision was prepared, how it was explained to States at the time of its adoption, how it was relevant to the work of the ICSID Secretariat, and how it has been interpreted by arbitral tribunals in ICSID cases.

This Module will also point out some connections with other aspects of the ICSID Convention and with other instances of international dispute settlement dealing with investment. These include the consent to jurisdiction (see Module 2.3) and the Additional Facility (see Module 2.2).



## OBJECTIVES

Upon completion of this Module the reader should be able to:

- Understand the concept of jurisdiction *ratione materiae* or subject-matter jurisdiction.
- Delineate ICSID's subject-matter jurisdiction.
- Describe the concept of investment as used in the context of ICSID's jurisdiction.
- Appreciate the limits of a party agreement concerning the existence of an investment.
- Analyse the significance of definitions of "investment" in BITs and other treaties for ICSID's jurisdiction.
- Identify who makes a decision on jurisdiction *ratione materiae* in ICSID proceedings.
- List typical examples of uncontested instances of investments.
- Explain under what circumstances other activities may qualify as investments.





## INTRODUCTION

### The World Bank and ICSID

ICSID is one of the few arbitration institutions with a specialized subject-matter jurisdiction. The focus of ICSID's jurisdiction is exclusively on disputes arising from international investment. The reason for this lies in the origin of ICSID under the auspices of the International Bank for Reconstruction and Development (IBRD, the World Bank). Article I of the IBRD's Articles of Agreement provides that its purposes include the facilitation of investment of capital for productive purposes, the promotion of private foreign investment and the encouragement of international investment for the development of the productive resources of its members.

### Investment and international law

International investment has been a central subject in the development of public international law concerning state responsibility and, more generally, in international economic law. Important disagreement on the substantive international rules governing the treatment of investment has resulted in the absence of a general multilateral treaty embodying such rules (see Module 2.6). One of the few international instruments addressing substantive rules on investment to attract a general consensus among States was U.N. General Assembly Resolution 1803, on Permanent Sovereignty over Natural Wealth and Resources, of 1962. At about the same time, the ICSID Convention was being devised as the procedural dimension of a set of international rules dealing with investment issues.

### ICSID arbitration and conciliation

The requirements of subject-matter jurisdiction apply both to arbitration and conciliation proceedings before ICSID. But ICSID conciliation has turned out to be very rare (see Module 2.2). Therefore, this paper refers only to arbitration and to arbitral tribunals.

#### Summary:

- **ICSID's jurisdiction is limited to investment disputes.**
- **ICSID was created under the auspices of the World Bank in connexion with its concern for the promotion of private investment as a factor for development.**



# 1. ICSID'S SUBJECT-MATTER JURISDICTION

## Article 25

Article 25(1) of the ICSID Convention provides in relevant part:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

## Three elements

The jurisdiction *ratione materiae*, or subject-matter jurisdiction, of the Centre under Article 25(1) is thus defined as “any legal dispute arising directly out of an investment.” Therefore, ICSID’s subject-matter jurisdiction, as defined in Article 25(1), has three components:

- (a) the requirement of a legal dispute;
- (b) the requirement that the legal dispute arise directly out of the underlying transaction; and
- (c) that such underlying transaction qualify as an investment. These three elements will be covered in separate sections of this Module.

## Articles 41, 36

ICSID practice under Article 25 of the Convention derives primarily from the power of an arbitral tribunal to decide on its own jurisdiction (Article 41), and also from the screening function of ICSID’s Secretary-General (Article 36) (see Module 2.7).

## Additional Facility

The 1978 Additional Facility Rules of ICSID (see Module 2.2) authorize the Centre to administer arbitration and conciliation proceedings for certain disputes that fall outside the jurisdiction of the Centre. These include legal disputes between a State (or a constituent subdivision or agency of a State) and a national of another State “which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.”<sup>1</sup> The significance of the Additional Facility in the context of subject-matter jurisdiction is discussed below in a separate section.

### Summary:

- **Subject-matter jurisdiction under the ICSID Convention is defined in terms of a legal dispute arising directly out of an investment.**
- **The Additional Facility provides for the settlement of certain disputes that fall outside this definition.**

<sup>1</sup> See *Additional Facility Rules Article 2(b)*, 1 ICSID Reports 218.



## 2. LEGAL DISPUTE

### Dispute

The existence of a dispute is a basic premise for the jurisdiction of any international judicial or arbitral institution. A dispute requires a minimum of communication between the parties. This communication must have revealed a disagreement on a point of law or fact. A failure to respond to demands by the other side may also signify a dispute. In addition, a disagreement between the parties should have some practical relevance and should not be merely theoretical.

### Legal

The requirement that there is a legal dispute is an absolute requirement for ICSID's jurisdiction. It is independent of the chosen method of dispute settlement under the Convention and applies even if a tribunal is authorized to decide on the basis of equity rather than law (see Module 2.6). Therefore, the requirement that there is a legal dispute needs to be met irrespective of whether the parties have agreed to submit a dispute to arbitration or to conciliation, and even if they have agreed under Article 42(3) that the dispute may be decided *ex aequo et bono*.

### Political and commercial disputes

At the time of the Convention's drafting, developing countries expressed a desire to avoid creating an international mechanism to which "merely" political or commercial disputes could be submitted. In order to be submitted to ICSID, disputes would have to be of a legal character. The Report of the Executive Directors spells this out by explaining that the disputes "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."

### Legal nature of dispute

This is not a difficult requirement to meet. Most economic disputes can be formulated also in terms of a legal right or obligation. But the requirement that the dispute be a legal one underlines the function of ICSID dispute settlement as a means of providing a legal remedy. Findings of fact are often a necessary corollary to this function. In practice, the requirement of a legal dispute has not presented difficulties for arbitral tribunals.

### Legal basis

The Centre once received a request for arbitration that did not clearly indicate the legal basis of the dispute it sought to submit to the Centre. The request alleged that the respondent State had increased logging levies, thereby upsetting the claimant's expectations under a logging concession. The request did not cite a relevant legal provision. In fact, the concession contract attached to the request specifically provided that logging levies could be increased. The Secretariat asked the requesting party for clarification on this point, but the request was not pursued and was eventually withdrawn.<sup>2</sup> In this situation, it might have been argued that there was an implied clause under which levies should

<sup>2</sup> Unpublished.

not be increased unreasonably so as to upset the economic balance of the concession.

**Claims for renegotiation**

A similar situation could present itself if a request were to seek the renegotiation of an investment contract. The request would need to argue that there was a legal right or obligation to renegotiate.

**Summary:**

- **There must be a concrete dispute between the parties on a point of law or fact.**
- **A claim must be formulated in terms of a legal right or obligation.**
- **A claim presented in terms of a commercial or political dispute is not admissible.**

### 3. ARISING DIRECTLY

#### Directness

The ICSID Convention requires that disputes submitted under its provisions be disputes “arising directly” out of an underlying transaction which qualifies as an investment. Therefore, transactions and claims that are only peripherally or indirectly linked to an investment operation will be outside ICSID’s jurisdiction. This requirement may be seen as reflecting the focus of the Convention on investment disputes and its establishment of a specialized dispute settlement mechanism for the purpose of encouraging international investment.

#### Links with other requirements

The requirement of directness is thus linked with other elements of ICSID jurisdiction. It is linked to the existence of an investment from which the dispute must arise directly. This requirement is additional to the parties’ consent to submit disputes to ICSID.<sup>3</sup> It has been correctly observed that the requirement of directness is analytically distinct from such other jurisdictional elements.<sup>4</sup> Nevertheless, the treatment of this requirement by ICSID tribunals has been undertaken mostly in conjunction with the requirements of the existence of an investment and/or consent to jurisdiction.

#### General obligation

In *Amco v. Indonesia*, the Tribunal had to deal with a counter-claim by the respondent State alleging liability of the claimant for tax fraud. It found that it had to

*...distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former, in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.*

*The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.*

*For these reasons the Tribunal finds the claim of tax fraud beyond its competence ratione materiae.<sup>5</sup>*

#### Direct investment

Another ICSID tribunal has observed that the expression “directly” relates to the connexion between the dispute and the investment out of which it arises,

<sup>3</sup> Clause 1 of the ICSID Model Clauses, which is the basic submission clause in regard to future disputes, refers to “any dispute arising out of or relating to this agreement.” The ICSID Model Clauses may be consulted on ICSID’s website at [www.worldbank.org/icsid](http://www.worldbank.org/icsid); see also 4 ICSID Reports 357 at 359/60.

<sup>4</sup> Schreuer, C., *The ICSID Convention: A Commentary*, Article 25, para. 67.

<sup>5</sup> *Amco Asia et al. v. Indonesia, Resubmitted Case, Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 543, 565.*

and not to the character of the underlying investment. That is to say, the expression “directly” does not mean that the investment must be a direct foreign investment.<sup>6</sup>

**Reasonable  
proximity to  
investment**

The Commentary on the Convention has usefully pointed out that the requirement of directness means that a dispute must be “reasonably closely connected” to an investment.<sup>7</sup> This approach has been confirmed by at least one recent decision examining a complex transaction.<sup>8</sup> It would suggest that a dispute “arising directly” out of an investment is not necessarily the same as a dispute arising “immediately” out of an investment.

**Summary:**

- **The legal dispute must be reasonably closely connected to the underlying investment transaction.**
- **Issues arising from generally applicable rules of the host State’s law may not meet this requirement.**
- **The investment need not be a foreign direct investment.**

<sup>6</sup> Fedax N.V. v. Republic of Venezuela, *Decision on Jurisdiction*, 11 July 1997, 37 ILM 1378 (1998), at 1383, para. 24.

<sup>7</sup> Schreuer, *Commentary, Article 25, para. 67*.

<sup>8</sup> Ceskoslovenska Obchodni Banka, A. S. v. Slovak Republic, *Decision on Jurisdiction*, 24 May 1999, 14 ICSID Review – FILJ 251 (1999) at 275-76.



## 4. INVESTMENT

### a) Definition of Investment

#### Absence of definition

The concept of investment is central to the ICSID Convention's subject-matter jurisdiction. Therefore, it may seem surprising that the Convention does not offer any definition or even description of this basic term.

#### Drafting history

The Documents Concerning the Origin and the Formulation of the Convention<sup>9</sup> record the background of this omission. The chairman of the sessions in which the Convention was prepared, Aron Broches, was reluctant to include a definition of "investment" since the parties' agreement to submit disputes to ICSID would in any event always be required. Nevertheless, a series of proposals led to the following definition of investment in Article 30 of the Convention's First Draft: "[A]ny contribution of money or other assets of economic value for an indefinite period, or, if the period be defined, for not less than five years."<sup>10</sup>

#### Decision to omit a definition

This definition was not satisfactory to all participants. Some found it too imprecise, while others wished to introduce qualifications addressing elements such as profit and risk or the host State's development interests. Yet others found that the definition could be unnecessarily restrictive. A more detailed definition was drafted, but a proposal that omitted any definition of the term eventually prevailed.

#### What kinds of investment to include

One of the main reasons for resisting a definition of investment in the Convention was the fear that it could give rise to lengthy jurisdictional discussions even if the parties' consent to submit a dispute to ICSID was well established. The concerns did not necessarily involve the notion of investment itself, but rather what kind of investment would be a suitable subject-matter for the ICSID system. Proposals were made for minimum amounts, or for the exclusion of investment that pre-dated the Convention. Mr. Broches felt that this aspect of the Centre's jurisdiction was appropriately left to be controlled by the requirement of consent. He subsequently remarked "that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction."<sup>11</sup>

#### Report of the World Bank Executive Directors

The relevant passage of the World Bank Executive Directors' Report accompanying the Convention reads as follows:

*27. No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes*

<sup>9</sup> See *History of the Convention and the description in Schreuer, Commentary, Article 25, paras. 80-86.*

<sup>10</sup> *History, Vol. I, p. 116.*

<sup>11</sup> Broches, A., *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 *Columbia Journal of Transnational Law* 263 at 268 (1966).

*of dispute which they would or would not consider submitting to the Centre (Article 25(4)).<sup>12</sup>*

In fact, a number of attempts were made in the preparation of the Convention to include a definition of “investment” but they all failed.<sup>13</sup>

#### Objective requirement

Therefore, the approach adopted in the Convention gives potential parties to ICSID arbitration wide discretion to describe a particular transaction, or a category of transactions, as investment. Ultimately, however, the requirement of an investment is an objective one.<sup>14</sup> The parties’ discretion results from the fact that the notion of investment is broad and that its contours are not entirely clear. But the parties do not have unlimited freedom in determining what constitutes an investment.<sup>15</sup> Any such determination, while important, is not conclusive for a tribunal deciding on its competence. Under Article 41 of the Convention, a tribunal may examine on its own motion whether the requirements of jurisdiction are met.

#### Typical features of investment

While it is not possible to give a precise definition of “investment” it is possible to identify certain typical features.<sup>16</sup>

- The project should have a certain duration.
- There should be a certain regularity of profit and return.
- There is typically an element of risk for both sides.
- The commitment involved would have to be substantial.
- The operation should be significant for the host State’s development.

These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.

#### Summary:

- **The ICSID Convention does not contain a definition of the term “investment”.**
- **During the Convention’s drafting such a definition was attempted but eventually abandoned.**
- **The absence of a definition gives the parties a certain discretion to characterize their transaction as an investment.**
- **Nevertheless, the requirement that there is an investment is an objective one and the parties are not free to bring just any dispute to ICSID.**
- **Even without a precise definition, the concept of investment may be described with the help of a few typical criteria.**

<sup>12</sup> 1 ICSID Reports 23, 28.

<sup>13</sup> Schreuer, *Commentary, Article 25, para. 86.*

<sup>14</sup> *Ibid. at para. 90.*

<sup>15</sup> *Ibid. at para. 89.*

<sup>16</sup> *Ibid. at para. 122.*

## **b) Party Agreement**

### **Explicit agreement**

As pointed out above, the parties have a certain discretion in describing their transaction as an investment although this discretion is not unlimited. Clause 3 of the ICSID Model Clauses (see Module 2.3) contemplates an express stipulation in the parties' arbitration agreement to the effect that the transaction to which the agreement relates is an investment:

#### ***Clause 3***

*It is hereby stipulated that the transaction to which this agreement relates is an investment.<sup>17</sup>*

Such an express provision may help to dispel doubts especially in the case of complex transactions and will preclude a later argument that there was no investment.

### **Implicit agreement**

Alternatively, a standard ICSID arbitration clause in a contract can be regarded as an understanding that the transaction to which the agreement relates is an investment. Otherwise the ICSID clause would not make any sense.

### **BITs**

A large number of bilateral investment treaties (BITs) contain advance consents by States to submit disputes with covered investors to ICSID (see Module 2.3). Usually these BITs also contain a provision explaining what is to be understood as investment. Most bilateral investment treaties contain a general statement or definition followed by a non-exhaustive list of categories of covered investments. A typical provision in a BIT on the concept of investment would read as follows:

*For the purposes of this Agreement:*

- (a) *“investment” means every kind of asset and in particular, though not exclusively, includes:*
- (i) *movable and immovable property and any other property rights such as mortgages, liens or pledges;*
  - (ii) *shares in and stock and debentures of a company and any other form of participation in a company;*
  - (iii) *claims to money or to any performance under contract having a financial value;*
  - (iv) *intellectual property rights, goodwill, technical processes and know-how;*
  - (v) *business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.<sup>18</sup>*

### **Multilateral treaties**

Other treaties, such as Article 1139 of the North American Free Trade Agreement (NAFTA), define investment by means of an exhaustive, although broad, list of categories.<sup>19</sup> The Energy Charter Treaty in Article 1(6) follows

<sup>17</sup> 4 ICSID Reports 360.

<sup>18</sup> Dolzer, R./Stevens, M., *Bilateral Investment Treaties* 229 (1995). See also *Asian-African Consultative Committee: Model Bilateral Agreements on Promotion and Protection of Investments, Art. 1*, 23 ILM 237, 242 (1984).

<sup>19</sup> 32 ILM 605, 647 (1993).

the model of BITs in defining investments.<sup>20</sup>

**Two requirements  
ratione materiae**

An investor wishing to avail herself of the offer of ICSID arbitration in an investment treaty will have to show that two distinct requirements *ratione materiae* are met: the transaction out of which the dispute arises must be an investment under the ICSID Convention. In addition, it must be an investment as defined by the applicable investment treaty.

**Limited usefulness of  
treaty definitions**

Unlike a description of a particular transaction as an investment in a contract between the parties, treaty definitions cannot provide an assurance that they cover a given transaction. They are drafted in general terms and use general categories. In addition, the treaty terms are sometimes circular, using phrases such as “investment means every type of investment” or “every type of asset invested.” Provisions such as these merely illustrate the forms that an investment may take. For purposes of the ICSID Convention, the existence of the investment may have to be ascertained by other criteria. The categories of investment treaties and the scope of the Convention do not always coincide. For instance, some BITs grant a right of admission to covered investors. By contrast, the ICSID Convention does not cover investments that are merely prospective or planned.

**Limitation to certain  
investment disputes**

An agreement between the parties concerning the subject-matter of their submission to ICSID’s jurisdiction may be narrower than the Convention would allow. For instance, a treaty may offer consent to jurisdiction only for approved projects. Some BITs provide for dispute settlement by ICSID only for certain categories of investment disputes like questions concerning the amount of compensation in case of an expropriation.

**Summary:**

- **The parties may describe their transaction as an investment in an agreement.**
- **Where jurisdiction is based on a treaty, it is not possible to assure that the parties agreed to regard the particular transaction as an investment.**
- **The definition of “investment” in a BIT does not necessarily coincide with the meaning of that term under the ICSID Convention.**
- **The parties’ consent to jurisdiction may relate to only certain categories of investment disputes.**

**c) Article 25(4)**

**Article 24(4)**

Article 25(4) of the ICSID Convention provides:

*Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider*

→

<sup>20</sup> 34 ILM 360, 383 (1995).

*submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).*

**Information purposes only**

The Report of the World Bank Executive Directors explains that the notification foreseen in Article 25(4) of the Convention is for information purposes only. There might be classes of investment disputes that governments might consider unsuitable for submission to ICSID. Article 25(4) is designed to avoid the risk of misunderstanding as to what types of investment disputes a Contracting State might be expected to submit to ICSID. The Report says in relevant part:

*31. ...The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.<sup>21</sup>*

**No effect on jurisdiction**

Therefore, notifications under Article 25(4) of the Convention by themselves neither restrict nor expand the jurisdiction *ratione materiae* of the Centre. In case of a conflict between a declaration under Article 25(4) and an expression of consent by the parties, the latter would prevail.

**Summary:**

- **Notifications by Contracting States under Article 25(4) concerning classes of disputes that they would consider submitting to ICSID's jurisdiction are for information purposes only.**
- **Such notifications do not constitute consent. Neither would such a notification affect consent validly given.**

## **d) Decision on Subject-Matter Jurisdiction**

**Secretary-General's screening power**

Under Article 36(3) of the Convention, the Secretary General shall register a request for arbitration unless he finds that the dispute is manifestly outside ICSID's jurisdiction. This screening power includes the possibility of a finding that there is manifestly no investment.

In 1999, the ICSID Secretary-General refused registration of a request for arbitration in respect of a dispute arising out of a supply contract for the sale of goods. The Secretary-General found that the transaction manifestly could not be considered an investment and, therefore, that the dispute was manifestly outside the jurisdiction of the Centre. The dispute did not arise directly out of any other transaction that could be regarded as an investment (e.g., ownership of equity in the company party to the contract).<sup>22</sup>

<sup>21</sup> Report of the Executive Directors, 1 ICSID Reports 29.

<sup>22</sup> Shihata, I.F.I./Parra, A., *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Review – FILJ 299 at 308 and note 27 (1999).

**Tribunal's decision on jurisdiction**

Under Article 41 of the ICSID Convention, the tribunal is competent to decide on its own jurisdiction. Despite the seemingly simple wording of the Convention's Article 25 on jurisdiction, ICSID tribunals have repeatedly had the opportunity to deal with issues of subject-matter jurisdiction. Tribunals have examined the central issue of the concept of investment under the ICSID Convention in the context of ICSID arbitration clauses contained in contracts as well as in cases brought on the basis of investment treaties.

**The claim as presented**

ICSID tribunals have addressed questions concerning the classification of the dispute as presented by the parties, in order to determine whether they are within ICSID's subject-matter jurisdiction.

In *Amco v. Indonesia*<sup>23</sup>, the respondent objected to ICSID's jurisdiction arguing that the tribunal was being asked to decide a lease dispute between two private parties. The tribunal upheld its jurisdiction over a claim for expropriation of a hotel lease carried out through armed military action. The tribunal held that,

*...in order for it to make a [preliminary] judgement ... as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented...*<sup>24</sup>

**Initiative**

A tribunal may examine its competence not only in reaction to an objection to jurisdiction by a party but also on its own initiative.<sup>25</sup> In contested proceedings this will rarely be necessary. But if the respondent fails to appear and plead, the tribunal may have to actively look into its subject-matter jurisdiction.

In two uncontested cases, the tribunals on their own motion stated their understanding that the dispute arose directly out of an investment. In the first case, the dispute concerned a taxation measure which was inconsistent with the provisions of a mining concession, under which a foreign company had "invested substantial amounts."<sup>26</sup> In the second case, the tribunal had no doubt that amounts paid out to develop a timber concession and related undertakings could serve as a basis for a dispute arising directly out of an investment.<sup>27</sup>

**Summary:**

- **The Secretary-General, as part of his screening function, will look at the question whether a request for arbitration is manifestly**

<sup>23</sup> *Amco Asia et al. v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at 404-05.*

<sup>24</sup> *At p. 405.*

<sup>25</sup> *Arbitration Rule 41(2), 1 ICSID Reports 172.*

<sup>26</sup> *Kaiser Bauxite Company v. Jamaica, Decision on Jurisdiction, 6 July 1975, 1 ICSID Reports 296 at 303.*

<sup>27</sup> *Liberian Eastern Timber Corporation v. Republic of Liberia, Award, 31 March 1986, 2 ICSID Reports 346 at 350.*

**outside the Centre’s jurisdiction because it does not relate to an investment.**

- **A tribunal making a decision on its jurisdiction will look at the question whether the dispute arises from an investment.**
- **A tribunal may look at this question not only in reaction to a jurisdictional objection by a party but also on its own motion.**

## **e) Non-Contentious Instances of Investment**

### **Implicit confirmation**

As mentioned before, ICSID tribunals have the power to consider on their own motion whether a dispute arises directly out of an investment, even without an objection by the respondent. Therefore, cases in which the question of subject-matter jurisdiction did not arise as an issue may be regarded as confirming that the dispute before the tribunal did indeed concern an investment.

Readily recognizable types of investment in ICSID cases have consisted in mining and petroleum concessions. These account for just over 15 per cent of all cases. Power generation and distribution enterprises have been another frequent category. Another, though less numerous category, has been industrial manufacturing ventures. Food production and processing has been the subject of a handful of ICSID cases.

The services sector has provided another group of categories, including shipping, port and transport services, waste management and disposal, hotel and resort management, exportation and duty free enterprises, funeral services, and banking. Civil construction, involving roads, buildings and other infrastructure projects (such as property development), has been similarly accepted as investment activity. Finally, financial transactions have also been the subject-matter of ICSID cases. This last category will be further described below.

### **Summary:**

- **In a considerable group of cases the existence of an investment was beyond doubt.**

## **f) Service-Related Investment and Construction Works**

### **Services and construction**

The establishment of an investment abroad, for example by constituting an enterprise and transferring capital to it, may serve the purpose of providing services, for instance in the banking sector. Parties have argued repeatedly that this may lead to a legal dispute arising out of an investment. Parties have argued similarly that contracts for the provision of construction works may be regarded as investments for the purpose of ICSID jurisdiction.

In *SOABI v. Senegal*, the tribunal had to determine the scope of an



ICSID clause contained in one of several instruments governing the investment operation. The Tribunal found that the ICSID clause covered the entire investment operation. A dispute settlement clause in a subsequent agreement between the same parties relating to the construction of a building provided for dispute settlement by domestic courts. The tribunal upheld its jurisdiction, finding that the clause in the subsequent agreement only covered a narrow category of disputes. It added that the subsequent agreement “was limited to construction of a building to be paid for by the client as work progressed, and could thus not be said to be an agreement concerning investments.”<sup>28</sup>

### Construction contracts

Despite some debate as to whether construction works can qualify as investment for the purpose of the Convention, the issue was not raised by the parties in two cases involving road construction projects.<sup>29</sup> The tribunals confirmed their jurisdiction.

### Investment under BIT and ICSID Convention

In *Salini v. Morocco*,<sup>30</sup> two objections to subject-matter-jurisdiction were raised. The first was that construction contracts did not fall under the definition of investment contained in the bilateral treaty which formed the basis for consent. The second objection was that construction contracts did not qualify as investment under the ICSID Convention.

As regards the first objection, the tribunal rejected an interpretation of the BIT based on the host State’s domestic law. It held that the contract fell within the categories listed in the treaty.

The tribunal then turned to the second objection, i.e. that the contract did not qualify as an investment under the ICSID Convention. It considered the criteria generally identified by commentators for defining investment under the Convention. These were: a contribution, a certain duration, participation in the risks of the operation, and (based on the preamble of the ICSID Convention) that the operation should contribute to the development of the host state. The tribunal found that each of these criteria were met by the construction contract.

### Risk element

As regards the element of risk, the tribunal added the following observation:

<sup>28</sup> *Société Ouest Africaine des Bétons Industriels v. Senegal, Award, 25 February 1988, 2 ICSID Reports 190 at 219.*

<sup>29</sup> *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras, Award, 19 October 2000 (unpublished); and Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 27 September 2001, 16 ICSID Review – FILJ 469 (2001). A significant feature of the project in the latter case was that it included a concession for the operation of the highway by the claimant.*

<sup>30</sup> *Salini Costruttori SpA. & Italstrade SpA. v. Kingdom of Morocco, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002).*



*It matters little in this respect that the risks have been freely agreed to. It similarly matters little that the contractor's remuneration is not tied to the exploitation of the work being constructed. A construction project that spans several years and whose cost cannot be established with certainty beforehand creates a manifest risk for the contractor.<sup>31</sup>*

### Summary:

- **Investments may be made in the services sector.**
- **Construction activities may qualify as investment if they meet the usual criteria, especially risk.**

## g) Trade-Related Investment

### Investment in foreign trade

International economic law has acknowledged the links between trade and investment, but has developed different regimes for each. A company or individual may establish a foreign investment in a country in order to conduct international trade, that is, to import and export goods into and from that country. If a given dispute concerns a measure affecting that activity, it may be argued that the dispute arises out of an investment.

### Relevance of non-ICSID cases

Issues of this kind have been discussed in cases brought under the investment chapter of NAFTA. These have not been ICSID cases, but rather cases conducted under the UNCITRAL Arbitration Rules. Although they do not involve an interpretation of the ICSID Convention, these cases would indicate that measures that regulate international trade can lead to a dispute arising out of an investment. Therefore, these decisions will be important if similar issues are submitted to ICSID.

In the case of *Pope & Talbot, Inc. v. Canada*,<sup>32</sup> Canada argued that there was no investment dispute. Such a dispute would arise only when a measure is “primarily aimed” at investors or investments. In Canada’s view, the NAFTA investment chapter made a sharp distinction between trade in goods issues and investment issues. Canada acknowledged, however, that the claimant did in fact have an investment in Canada. The tribunal held that its subject-matter jurisdiction could be established on the basis of the claims as presented to it. The tribunal added that there was

*...no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other.*

Canada also argued that the measures complained of did not, for the

<sup>31</sup> para. 56 at p. 208.

<sup>32</sup> *Pope & Talbot, Inc. v. Canada, Award On Motion to Dismiss Re Existence of an Investment*, 26 January 2000, <http://www.naftaclaims.com>

same reasons, “relate to” an investment or investor as required by NAFTA. The tribunal held that, first, trade measures could directly affect and be applied to a particular enterprise; and, secondly

*...the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors.*

In *S.D. Myers, Inc. v. Canada*,<sup>33</sup> Canada argued that the claim was barred because the measures complained of were controlled by the NAFTA chapters dealing with trade in goods and cross-border services. The tribunal, citing a similar doctrine in WTO decisions, held that

*different chapters of NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict,*<sup>34</sup>

As regards trade in goods, the tribunal held that a

*measure that relates to goods can relate to those who are involved in the trade of those goods and who have made investments concerning them.*<sup>35</sup>

The tribunal saw a clear link between the measure complained of and the claimant’s investment plans.

### Summary:

- **An investment may be made in order to conduct international trade.**
- **Under these circumstances, a measure primarily directed at trading activities may lead to an investment dispute.**

## h) Financial Instruments

### Loans as investments

Commentators on the Convention have, on the whole, agreed that loans can qualify as investments. Two decisions on jurisdiction by ICSID tribunals have discussed the circumstances under which financial transactions can be regarded as investments under the Convention.

In *Fedax v. Venezuela*,<sup>36</sup> the claimant initiated proceedings on the basis of the 1991 Netherlands-Venezuela bilateral investment treaty, alleging that Venezuela had failed to pay amounts due on promissory notes which had been endorsed to the claimant. Venezuela objected that the promissory notes, held by the claimant, did not constitute an investment,

<sup>33</sup> *S.D. Myers, Inc. v. Canada, Partial Award, 12 November 2000, 40 ILM 1408 (2001).*

<sup>34</sup> *At p. 1441.*

<sup>35</sup> *Loc. cit.*

<sup>36</sup> *Fedax N.V. v. The Republic of Venezuela, Decision on Jurisdiction, 11 July 1977, 37 ILM 1378 (1998).*

either under the terms of the ICSID Convention or under the terms of the bilateral investment treaty.

Venezuela argued that the purchase by Fedax of the promissory notes did not qualify as an investment because it did not amount either to direct foreign investment or to portfolio investment carried out through approved stock market transactions. Venezuela argued that the meaning of investment as an economic term entailed “the laying out of money or property in business ventures, so that it may produce a revenue or income.” (para. 19)

The tribunal reviewed the relevant drafting history of the Convention, cases and commentary. It further observed that the Operational Regulations of the Multilateral Investment Guarantee Agency (MIGA), also a World Bank Group organization, applied to medium or long-term loans.

The tribunal concluded that, in principle, loans can be covered as investments under the ICSID Convention:

*Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. (para. 29)*

The tribunal noted that the capital involved was “relatively substantial,” was committed for a certain duration, entailed regular returns in the way of interest payments, and involved risk as evidenced by the fact that payments on them were outstanding. (para. 43)

In *CSOB v. Slovakia*,<sup>37</sup> the respondent objected that the dispute did not arise out of an investment in the sense of the ICSID Convention. The Czech and the Slovak Republics, which are both shareholders in CSOB (a Czech bank), concluded a Consolidation Agreement as part of its privatization. Under this agreement, CSOB transferred its non-performing loans in Slovakia to a specially constituted Slovak collection agency, and at the same time extended a loan to that agency for the price of the transfer. The Slovak Republic undertook to cover the agency’s losses so that it would be able to repay the loan extended to it by CSOB. CSOB alleged that the Slovak Republic had failed to abide by this undertaking.

The Slovak Republic argued that CSOB’s loan to the Slovak collection agency did not involve a transfer of resources into the Slovak Republic and, therefore, did not constitute an investment. (para. 76)

<sup>37</sup> *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, Decision on Jurisdiction, 24 May, 1999, 14 ICSID Review-FILJ 251 (1999).*

The Tribunal first observed that the Slovak Republic's undertaking, viewed in isolation, did not constitute an investment because it did not "involve any spending, outlays or expenditure of resources by CSOB in the Slovak Republic" (para. 69), although an investment did not require "a physical transfer of funds." (para. 78) The tribunal offered the following guidance for identifying an investment:

*[A] dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment. (para. 72)*

The Tribunal examined the terms of the Consolidation Agreement and concluded that there was a "close link" between the Slovak Republic's undertaking and CSOB's loan to the Slovak collection agency. (para. 75) The Tribunal found that loans were not, in principle, excluded from the broad notion of investment under the Convention, but that this did not mean that any loan could therefore qualify as an investment. (paras. 76-77) The Tribunal found that CSOB's loan to the Slovak collection agency constituted a working asset which enabled CSOB to develop its business there. (para. 87) The Tribunal concluded that

*the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention. This is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure. (para. 88)*

The tribunal concluded that CSOB's claim and the related loan facility made available to the Slovak collection agency were closely connected to that goal and qualified as an investment under the Convention. (para. 91)

### Summary:

- **Loans and similar transactions may qualify as investment if they meet certain criteria.**
- **These criteria include substantial expenditure, risk, duration and relevance to economic development.**

## i) Pre-Establishment and Admission Disputes

### Pre-contract expenditures

Prospective investors may expend significant sums in the negotiation phase leading up to the conclusion of an investment agreement or a concession contract. If a dispute arises before the agreement materializes and negotiations are interrupted, will the project expenditures qualify as an investment for the purpose of ICSID jurisdiction?

### Denial of admission

The problem is highlighted by the fact that some treaties grant potential investors a right to establishment under certain circumstances.<sup>38</sup> This raises the question whether these entry rights are covered by the concept of investment under the ICSID Convention.

In *Mihaly v. Sri Lanka*,<sup>39</sup> the two parties had been engaged in negotiations concerning a project for the construction of a power generation plant in Sri Lanka. These negotiations had matured to a point where Sri Lanka issued letters to grant exclusivity to the claimants for the negotiation of the relevant contracts. Each of those letters, however, contained a caveat stating that its terms did not constitute an obligation binding on any party and that they were subject to the conclusion of the respective contracts. Negotiations were protracted and ultimately terminated by Sri Lanka. Mihaly argued that Sri Lanka had breached its obligations under the United States – Sri Lanka BIT and claimed its expenditures for the preparation of the project as an investment. Sri Lanka objected that Mihaly's alleged expenditures did not qualify as an investment either under the ICSID Convention or under the United States–Sri Lanka BIT.

The tribunal found that a crucial and essential feature of the transaction was the care taken to point out that none of the documents granting exclusivity created contractual obligations, combined with the fact that the grant of exclusivity never matured into a contract. The tribunal concluded that this was a clear indication that the expenditure of moneys would not be considered to be an investment admitted in Sri Lanka. It added that, had a contract been concluded, it could well be that expenses incurred during negotiations could be capitalized as part of the investment. In this case, however, they did not constitute an investment in the context of the specific obligations assumed by the parties.

### Summary:

- **Expenses arising from merely prospective or planned investments are not within ICSID's subject-matter jurisdiction.**
- **A project must have been formalized or actually started in order to qualify as an investment.**

<sup>38</sup> See Dolzer/Stevens, *Bilateral Investment Treaties*, 50-57. See also Arts. 1102 and 1103 of the NAFTA..

<sup>39</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, 15 March 2002, 17 ICSID Review – FILJ 142 (2002).



## 5. ADDITIONAL FACILITY

### Scope ratione materiae

In 1978 the Administrative Council of ICSID adopted the Additional Facility Rules (see Modules 2.2 and 2.4). These Rules authorize the Centre to administer arbitration and conciliation proceedings for certain categories of disputes that are not covered by the ICSID Convention. One category of such disputes relates to the absence of ICSID's jurisdiction *ratione materiae*. Under Article 2(b) of the Additional Facility Rules these are legal disputes between a State (or a constituent subdivision or agency of a State) and a national of another State

*which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.*<sup>40</sup>

### No cases

So far, cases under the Additional Facility have not addressed disputes that fall outside the ICSID Convention's scope because they do not meet the requirements for jurisdiction *ratione materiae*.

### Approval of access

Access to the Additional Facility requires the approval of ICSID's Secretary-General. Article 4(3) of the Additional Facility Rules states that the Secretary-General shall give this approval only if he is satisfied (a) that the above conditions have been met, and (b) "that the underlying transaction has features which distinguish it from an ordinary commercial transaction."

### More than ordinary commercial transaction

Therefore, under this provision the Additional Facility will be available only for a dispute that arises from activity that is more than an ordinary commercial transaction even if that activity does not qualify as an investment. It follows that an investment, for purposes of the ICSID Convention, should at least be distinguishable from ordinary commercial transactions, since not even the Additional Facility Rules are available for these.

### Summary:

- **The Additional Facility provides for a dispute settlement mechanism for cases that are outside ICSID's jurisdiction *ratione materiae*.**
- **Even these disputes must arise from transactions that are distinguishable from ordinary commercial transactions.**

<sup>40</sup> 1 ICSID Reports 218.





## 6. ANCILLARY CLAIMS

### Article 46

ICSID tribunals have the power to deal with ancillary claims. These include incidental and additional claims and counter-claims. The relevant provision is Article 46 of the ICSID Convention:

*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*

### Purpose

The purpose of this provision is to allow an ICSID tribunal to consider closely related aspects of a dispute and thus avoid the need to institute separate proceedings. This provision does not in any way extend ICSID's jurisdiction. It merely delineates the competence of a tribunal in regard to the scope of a particular dispute submitted to it.<sup>41</sup> Even a closely related ancillary claim must be within ICSID's jurisdiction.

### Article 25 governs

Therefore, jurisdiction *ratione materiae* of the Centre under Article 25 of the Convention, must exist to enable a tribunal to consider ancillary claims. The incidental or additional claim or a counter-claim must arise directly out of an investment. In addition, under Article 46 of the Convention, it must arise directly out of the subject-matter of the particular dispute as submitted to the tribunal.

### Types of ancillary claims

Examples of ancillary claims that arise directly out of the subject-matter of the dispute would be expenses from third party contracts serving the purpose of the investment operation, interest on the amount claimed and procedural costs.

### Summary:

- **An ICSID tribunal will deal with an ancillary claim that is closely related to the original dispute.**
- **The ancillary claim must be within ICSID's subject-matter jurisdiction.**

<sup>41</sup> Schreuer, *Commentary, Article 46, para. 4.*



## TEST MY UNDERSTANDING

After having studied this Module the reader should be able to answer the following questions. Most answers should go beyond a simple yes/no alternative and would require a brief explanation.

1. How is the subject-matter jurisdiction of ICSID defined?
2. How do you identify the existence of a dispute?
3. What distinguishes a legal dispute from other types of disputes?
4. What is the difference between a dispute arising directly out of an investment and a dispute arising from a direct foreign investment?
5. Does the ICSID Convention define the concept of “investment”?
6. Can you describe an investment for purposes of the ICSID Convention?
7. Do the parties have an unlimited discretion in agreeing that a particular transaction is an investment?
8. Are definitions of “investment” in a BIT or other treaty determinative of the concept under the ICSID Convention?
9. Is it conceivable that a particular transaction is covered by the definition of “investment” in a BIT but is still outside ICSID’s subject-matter jurisdiction?
10. What is the effect of notifications under Article 25(4) of the ICSID Convention?
11. Who makes a decision regarding ICSID’s jurisdiction *ratione materiae*?
12. Will an ICSID tribunal only examine its competence *ratione materiae* if prompted by a jurisdictional objection?
13. Give examples of transactions that are undoubtedly investments.
14. Can construction activities constitute investments? If so, under what circumstances?
15. Can one always clearly distinguish between trade-related disputes and investment disputes?
16. Can financial operations like loans constitute investments? If so, under what circumstances?
17. Can operations preparatory to investments be regarded as investments under the ICSID Convention?
18. Does the Additional Facility offer procedures for the settlement of disputes that are outside ICSID’s jurisdiction *ratione materiae*? If so, under what circumstances?
19. Does an ICSID tribunal have the power to deal with claims that are closely related to the principal claim submitted to it?
20. If so, does this power constitute an extension of subject matter jurisdiction?



## HYPOTHETICAL CASE

### Tiport v. Arcadia

Tiponesia and Arcadia are both ICSID Contracting States. While both are developing countries, Tiponesia has enjoyed high economic growth over the past fifteen years, whereas Arcadia in the same period has seen lapses into negative growth, high debt and political instability. Since 1996, a Bilateral Investment Treaty has been in force between Arcadia and Tiponesia, providing for the submission of investment disputes to arbitration under the ICSID Convention.

For the past seven years, Tiport, a Tiponesian multinational company, has been providing technical and management consultancy services to the Arcadian Port Agency (APA), under a 1995 Cooperation Agreement. In early 2001, the Government of Arcadia invited Tiport to acquire a 35 per cent share in APA, as part of the first steps of a privatisation programme. Tiport began negotiations with the Arcadian Government for an arrangement whereby Tiport would appoint the majority of APA's Board of Directors while acquiring only 35 per cent of APA's shares. These negotiations were ultimately unsuccessful and Tiport desisted from acquiring shares in APA, which remained owned entirely by the Government of Arcadia.

Following the negotiations, in June 2001, Tiport and APA concluded a Credit Facility Agreement, under which Tiport made available up to US\$100 million. The Credit Facility was to have multiple uses, including the payment of any sums due to Tiport by APA. The Government of Arcadia was a guarantor under the Agreement.

In July 2001, APA and the Arcadian Government awarded to Tiport a public contract for the construction of a pier and port terminal in Arcadia. Construction was completed, and the pier and port terminal were delivered to APA, in August 2002. At that time, APA owed Tiport an amount of US\$7 million in outstanding fees under the 1995 Cooperation Agreement, and US\$50 million under the construction contract. APA had drawn from the Credit Facility to make an initial payment under the construction contract and to pay two invoices under the Cooperation Agreement, but the Government had very promptly repaid Tiport the amounts drawn.

In September 2002, following political upheaval and a change of government in Arcadia, the new Arcadian administration informed Tiport that it would not pay, and would challenge its obligation to pay, any outstanding amounts under the Cooperation Agreement or the construction contract. Tiport initiated ICSID arbitration proceedings against the Government of Arcadia under the Bilateral Investment Treaty. In the proceedings, Arcadia argued that ICSID lacked jurisdiction because the dispute did not arise directly out of an investment.

→

What arguments could each party make in support of its position on subject-matter jurisdiction?

## FURTHER READING

### Books

- **Dolzer, R./Stevens, M.**, *Bilateral Investment Treaties* (1991).
- **Schreuer, C.**, *The ICSID Convention: A Commentary* (2001).

### Articles

- **Amerasinghe, C. F.**, The Jurisdiction of the International Centre for the Settlement of Investment Disputes, 19 *Indian Journal of International Law* 166 (1979);
- **Broches, A.**, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 *Recueil des Cours* 331 (1972-II);
- **Delaume G R.**, Le Centre International pour le règlement des Différends relatifs aux Investissements (CIRDI), 109 *Journal du Droit International* 775 (1982);
- **Delaume, G R.**, ICSID Arbitration: Practical Considerations, 1 *Journal of International Arbitration* 101 (1984);
- **Parra, A. R.**, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 *ICSID Review—Foreign Investment Law Journal* 287 (1997);
- **Shihata, I. F. I./Parra, A. R.**, The Experience of the International Centre for Settlement of Investment Disputes, 14 *ICSID Review—Foreign Investment Law Journal* 299 (1999).

### Documents

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States:  
<http://www.worldbank.org/icsid/basicdoc/9.htm>
- ICSID Cases:  
<http://www.worldbank.org/icsid/cases/cases.htm>
- ICSID Model Clauses:  
<http://www.worldbank.org/icsid/model-clauses-en/main.htm>
- ICSID Additional Facility:  
<http://www.worldbank.org/icsid/facility/facility.htm>

## Cases

- *Amco Asia et al. v. Indonesia*, Decision on Jurisdiction, September 25, 1983, 1 ICSID Reports 389.
- *Amco Asia et al. v. Indonesia*, Resubmitted Case, Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports 543, 565.
- *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras* (ICSID Case No. ARB/99/8), Award, 19 October 2000 (unpublished).
- *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 27 September 2001, 16 ICSID Review – FILJ 469 (2001).
- *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review – Foreign Investment Law Journal 251 (1999).
- *Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, 11 July 1997, 37 ILM 1378 (1998).
- *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction, 6 July 1975, 1 ICSID Reports 296.
- *Liberian Eastern Timber Corporation v. Republic of Liberia*, Award, 31 March 1986, 2 ICSID Reports 346.
- *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, 15 March 2002, 17 ICSID Review – Foreign Investment Law Journal 142 (2002).
- *Pope & Talbot, Inc. v. Canada*, Award On Motion to Dismiss Re Existence of an Investment, 26 January 2000, <http://www.naftaclaims.com/>.
- *S.D. Myers, Inc. v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408 (2001).
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- *Société Ouest Africaine des Bétons Industriels v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 190.