**Mate Khvedelidze***

# Settlement of Disputes Between Foreign Investors and State by Arbitral Tribunals Established under the 1965 Washington Convention (ICSID)

*Establishing effective means of dispute resolution between investor and state is important aspect of attracting investors. In general, the countries which provide predetermined transparent procedures are preferred by the investors. It can be said, that together with legal guarantees, existence of international dispute resolution procedures are equally important for the investors.*

*Following is discussed in the article: Origins of international procedures of dispute resolution between investor and state. Establishing jurisdiction by ICSID arbitral tribunals, forms and procedures for state consent to ICSID arbitration, initiation of an arbitration claim, procedure for appointing arbitrators, rules of arbitration hearings, evidence in arbitration procedures, application for securing a claim by arbitrator and requesting information from the third parties, making a decision by the arbitral tribunal. Issue of prerequisites for admissibility of a counterclaim filed by the state against the investor is also discussed in the article. Reviewing of the abovementioned issues is equally important for providing protection of investor rights and for implementing dispute prevention mechanisms.*

***Keywords:*** *Investor, Foreign investment, Investment agreement, Investment contract, Arbitrator, Arbitration tribunal.*

## 1. Introduction

Foreign investments are an important factor for economic development of a country. States try their best to create liberal, investor and business oriented legislation, to retain local investors and attract capital of foreign investors.[1] Possibility of free movement of capital between one country to another and risks associated with it significantly determined introduction of international mechanisms for the protection of investors' rights, including the necessity of agreement on alternative forms of dispute resolution.

One of such means is various permanent and ad hoc arbitrations. In case of agreement between parties, arbitration tribunals are authorized to hear and resolve dispute arisen between investor and state. In this regard, arbitration tribunals established under 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[2] plays major role. Georgia has been a member of this convention since September 6, 1992.[3]

In the last decades, in order to promote and provide protections for foreign investors, bilateral and multilateral investment agreements are becoming more and more common. These agreements mostly provide international means of dispute resolution. In case of dispute, investment agreements concluded between Georgia and other states include reservations for investors to apply to the international arbitration established under the Washington Convention. For example, such reservations are included in investment agreements concluded with neighboring countries Armenia[4] and Azerbaijan.[5]

---

* PhD student at the Ivane Javvakhishvili Tbilisi State University Faculty of Law, Senior Lawyer at Law Office "J&T Consulting".

1 *Khvedelidze M.,* Impact of the Association Agreement on Investment Relations in Georgia, Journal "Justice and Law", №4(60), 2018, 66 (in Georgian).

2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 18 March, 1965.

3 <https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf> [31.01.2022].

4 Agreement between the Government of Georgia and the Government of the Republic of Armenia on Investment Promotion and Mutual Protection, Legislative Herald of Georgia, 05.06.1996, Article 9.

Arbitration tribunals, established under the Washington Convention, have already heard several cases against Georgia and at the moment there are four ongoing disputes in ICSID arbitration tribunals.[6] Despite urgency of the issue and direct and immediate connections with Georgia, dispute resolution procedures stipulated by the Convention are not sufficiently analyzed in Georgian legal literature.

## 2. Emergence of International Mechanisms for Resolving Disputes Between Foreign Investors and the State

Free movement of capital between one country to another and a need for its protection provided necessity of concluding multilateral agreements. First such attempt was 1948 Havana charter on creation of International Trade Organization (ITO).[7] Initiator of the convention was United States of America, which claimed economical dominance after the Second World War. Project of the charter was introduced in 1946 and it included protection guarantees and international mechanisms for resolving disputes. The initiation met great resistance from developing countries, resulting in ceasing support for the charter from USA and other countries.[8]

The second attempt of creating such international regulation came from private initiation (Abs-Shawcross Draft Convention)[9], aimed at creating convention that would protect rights of foreign investors, mainly through establishment of alternate dispute resolution means. Main focus was made on arbitration. This text also failed to gain international support from governments, hence, the initiative did not proceed.[10]

Next attempt occurred through Organisation for Economic Co-operation and Development (OECD) format in 1960. OECD referenced a draft concluded by Hartley Shawcross. However, unlike the mentioned project, OECD adopted major changes and prioritized interests of developing countries. Despite this, the project also failed to gain proper support.[11]

Eventually, a convention drafted by the World Bank proved to be successful. Authors considered every objection, that the previous projects were met with from various countries, resulting in their failures. After several years of work, in 1964, text of the ICSID convention was presented to the member states of the World Bank for signature and further ratification.[12] The convention was signed on in March 1965 and entered into force on 14 September, 1966.[13]

The convention does not determine rights of foreign investors, investment protection standards and guarantees. Regarding protection of foreign investments, role of the convention is manifested in determining universal mechanisms for resolving disputes between investor and state. Investors' rights and capital protection guarantees are determined by bilateral and multilateral investment agreements, that refer to the jurisdiction of the center in the event of a dispute.[14]

Entry into force of the Convention on Settlement of disputes between foreign investors and state (ICSID) laid foundation to distinct and universal dispute resolution mechanisms. As of Today, approximately

---

5 Agreement between the Government of Georgia and the Government of the Republic of Azerbaijan on Investment Promotion and Mutual Protection, Legislative Herald of Georgia, 08.03.1996, Article 9.

6 Nasib Hasanov v. Georgia (ICSID Case No. ARB/20/44; Bob Meijer v. Georgia (ICSID Case No. ARB/20/28); Telcell Wireless, LLC and International Telcell Cellular, LLC v. Georgia (ICSID Case No. ARB/20/5); Gardabani Holdings B.V. and Silk Road Holdings B.V v. Georgia(ICSID Case No. ARB/17/29).

7 1948 Havana Charter for an International Trade Organization.

8 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 50.

9 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention), https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf> [31.01.2022].

10 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 50.

11 Ibid, 50-51.

12 History of the work on ICSID convention, see, *Tsertsvadze G.,* Introduction to International Investment Law, Tbilisi, 2013, 62-64 (in Georgian).

13 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 51-52.

14 *Marcert L.,* Streitschlichtungsklauseln in Investionsschutzabkommen, *herausgegen von Bungeberg M., Hobe S., Reinish A., Ziegler A.*, Nomos Verlagsgeselschaft, Baden-Baden, 2010, 39.

65% of the existing investment disputes are resolved according to the convention.[15] Popularity of the convention drastically increased from the 1900s. Between 1966 – 1993 the center considered only 27 disputes, while, from 1993 to 2006 more than 80 disputes were resolved. As of today, more than 900 bilateral and multilateral investment agreements include reservations regarding applying the rules of ICSID center for dispute resolution.[16] By June 2019 the convention already had 163 signatory states, 154 of which have ratified the convention.[17]

ICSID convention provides investors significant benefits and advantages, that can be grouped as following:[18]

- The convention provides investor direct access to the dispute resolution mechanisms, if the dispute arises between them and investment beneficiary state;
- Dispute resolution mechanism, established under the convention, allows the dispute to be resolved independently of the local courts;
- Investor does not depend of diplomatic protections of their countries and they can independently protect their rights by applying to the ICSID center;
- Simplicity of enforcement of the decisions made by the ICSID center guarantees investor smooth and effective enforcement of the decision in case of winning the dispute.

## 3. Prerequisites for Dispute Resolution under the ICSID Convention

### 3.1. Establishing Jurisdiction under the ICSID Convention

Not every investment related dispute falls under the jurisdiction of the center, an investor filing an application must not belong to the country where the disputed investment was made. Therefore, only foreign investor is eligible to apply to the center.[19] Jurisdiction of the center is triggered if both of the criteria are met: "ratione personae" and "ratione materiae". Considering this, when the beneficiary state expresses consent for the dispute to be considered by the center, every arbitral panel is obliged to check if the dispute arose over foreign investment and whether both, investment beneficiary and the investor's native states are members of the convention.[20]

Biggest achievement of investment law lies in creation of mechanisms for resolving disputes between foreign investors and the state.[21] In order for the investor to be eligible to take their claims to arbitration, the consent regarding the jurisdiction of the ICSID center must be present.[22]

Most significant aspect of the dispute between the state and the investor is the consent of the beneficiary state to the jurisdiction of the international arbitration. The consent consists of two elements. The first is what form of dispute resolution is agreed upon, and the second is which categories of disputes can be resolved in the form agreed upon. Tribunals are obliged to establish jurisdiction only after verifying existence of both criteria.[23]

---

15 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 52.

16 *Titje C.,* International Investment Protection and Arbitration, Berliner Wissenschafts-Verlag GMBH, 2008, 22-23.

17 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 52.

18 *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 701.

19 *Rubins QC N., Papanastaisou T. N., Kinsella N. S.,* International Invsetment, Political Risk and Dispute Resolution, A Practitioners's Guide, *Mistelis L. (ed.),* 2nd ed., Oxford University Press, 2020, 367.

20 *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 700.

21 *Shan W. (ed.),* Property Rights, Expropriation and Compensation, The Legal Protection of Foreign Investment A Comparative Study, Oxford and Portland, Oregon, 2012, 59.

22 *Edson E., Banifatemi Y.,* Jurisdiction of the Centre, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez C. M. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 102.

23 *Vandelvelde J. K.,* Bilateral Investment Treaties, History, Policy and Interpretation, Oxford University Press, 2010, 433.

Consent to the jurisdiction of the ICSID center is irrevocable. This principle is stipulated by the preamble of the convention and represents one of the most important elements of the convention. Irrevocability means that consent of the both parties is necessary for the jurisdiction to be canceled.[24] The issue whether the center has jurisdiction over the dispute is determined by the arbitral tribunal considering the dispute.[25]

Jurisdiction of the center happens only in abnormal circumstances. The consent may be canceled if the investment contract, which contained the agreement on the jurisdiction of the center, between the investor and the state is terminated. However, same legal outcome regarding revocability of the consent does not apply to wrongful termination of the contract.[26]

Termination of the bilateral and multilateral investment agreement can become the basis of cancelation of the consent. However, most of the agreements stipulate that the termination of the agreement has no retroactive effect on the disputes existing before the termination, additionally, the agreements may provide for the revocation of the consent to be valid after certain period from the termination.[27] Therefore, ICSID will establish its competence in the event of an appeal within this period.

States seek to limit accessibility of the arbitration for the investor by determining certain categories and/or by exclusion of the right to appeal to the arbitration for certain disputes.[28]

The consent of a state to establish jurisdiction of the ICSID center can be revoked through withdrawal of the state from the convention. The ICSID convention is an international convention, therefore, norms of public international law apply to it. Considering this, a state has the right to leave the international convention.[29]

The so-called FORK IN THE ROAD rule is worth a separated mention, which provides an investor with the ability to choose a legal system of a beneficiary or a native state and proceed with dispute accordingly or to chose an international dispute resolution mechanism. By the rule, the investor may choose only once and by the choice they lose an access to other dispute resolution mean. For example, if the investor chooses local courts, they are deprived of the right to apply to the international arbitration.[30]

Consent to the jurisdiction of the center may be submitted in various shape or time. It is important to review these cases.

## 3.2. Methods of Consent of the Beneficiary State Regarding Submitting a Dispute to the ICSID Center

### 3.2.1. Consent through an Investment Agreement

Most of the modern investment agreements include unambiguous terms regarding transferring disputes between an investor and a state to ICSID arbitration. According to the article 8 of the 1991 investment agreement between the USA and Sri Lanka, if a dispute is initiated by an investor of either parties regarding

---

24 *Edson E., Banifatemi Y.,* Jurisdiction of the Centre, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez C. M. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 147.

25 *Takashvili S.,* Protection Standards of Foreign Investments and Compliance of National Legislation with the European and International Investment Regimes, Tbilisi, 2020, 293 (in Georgian).

26 *Edson E., Banifatemi Y.,* Jurisdiction of the Centre, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez C. M. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 147.

27 Ibid, 148.

28 *Takashvili S.,* Protection Standards of Foreign Investments and Compliance of National Legislation with the European and International Investment Regimes, Tbilisi, 2020, 301 (in Georgian).

29 *Edson E., Banifatemi Y.,* Jurisdiction of the Centre, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez C. M. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 148.

30 *Franco F., King B. (eds.),* International Investment Arbitration in a Nutschel, West Academic Publishing, 2020, 190.

the investment on the territory of the other party, the dispute is submitted to the ICSID center for dispute resolution through arbitration or conciliation procedures in all cases.[31] The first investment agreement that included a reservation on the transfer of a dispute to ICSID center was the 1968 agreement between the Netherlands and Indonesia, concluded two years after the entry into force of the convention.[32]

Another approach that is also common in investment agreements allows submitting dispute to the ICSID center not in every case, but at the request of an investor. These agreements often contain the following wording – "can be submitted", which means, that the investor can either apply to a local court of the beneficiary state or to ICSID center. These reservations became subject of a dispute in some cases. For example, an investment agreement between the Netherlands and Senegal included such reservation "can be submitted". In the case Millcom and Sentel v Senegal, where a defendant Senegal appealed that every domestic remedy has not been exhausted by the investor before applying to the arbitration center, if such necessity would still prevail. ICSID tribunal did not share this position and stated, that, considering the existence of such reservation, such mandatory two-stage system did not exist, thus the investor was eligible to apply to the ICSID center directly, without exhaustion of every domestic remedy.[33]

### 3.2.2. Consent through an Investment Contract

Unlike bilateral or multilateral investment agreements, where the parties are subjects of the international law, agreements regarding certain aspects of an investment can be concluded directly between an investor and a state. Various issues regarding the investment, dispute resolution mechanisms and a consent of the state to ICSID center can be agreed on through these agreements. In practice, this is the way to encourage investors to invest in important economical areas of the state and in exchange gain conditions and access to dispute resolution mechanisms adapted to the necessities of the investor.[34]

Most commonly, states conclude investment contracts and determine jurisdiction of the ICSID center, when the investor is at least a medium-sized enterprise and the investment is made in an important economical sector or an amount of the investment is substantial.[35]

### 3.2.3. Consent based on the domestic law of the state

Since 1980s, before the broad acceptance of the investment agreements, some developing countries, aiming to attract and encourage foreign investments, established investors protection and international dispute resolution mechanisms through domestic legislations.[36] For example, in case of a dispute with an investor, consent to the jurisdiction of the ICSID center is established through domestic legislation in South Sudan.[37] One of the famous examples is 1993 Albanian law regarding foreign investments, where it was expressly stated, that Albania has given the consent in advance to applying the rules of ICSID center in case of a dispute with an investor.[38] When the similar stipulations exist in national legislations, establishment of competence by the tribunals are based on these legislations.[39]

---

31 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 315.

32 *Salacuse W. J.,* The Law of Investment Treaties, 2nd ed., Oxford University Press, 2015, 422.

33 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 315-317.

34 Ibid, 321.

35 *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1225.

36 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 321. Waibel M., Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1225.

37 *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1225.

38 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 321.

39 *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1225.

Not every state provides unambiguous legislations that provide clear consent to international mechanisms of dispute resolutions. One of the disputes was caused due to ambiguous rules of Egypt's legislation. On the so-called Pyramids case, ICSID arbitration tribunal did not agree with Egypt's positions, that the consent given through domestic legislation had not and could not have importance for the tribunal, claiming that such consent should have been given through implementation of separate agreement. The tribunal referred to the article 25 of the convention and explained, that the procedures of the investment dispute are of a higher hierarchy, hence, while the consent to ICSID arbitration to consider the case existed, every other form of dispute resolution were excluded.[40] In order to avoid further disputes, it is advisable that similar stipulations include detailed instructions regarding specific arbitrations.[41]

Other than that, the main issue with having such reservations is that the states can change or completely undo their domestic legislations any time, without agreement with other countries or individuals. In that case, naturally, the following question must be asked, whether the changes in the state's legislation terminates already expressed consent to submitting disputes to international arbitral tribunals, when the dispute already exists? According to a common opinion in a legal literature, state's consent to submitting dispute to the ICSID center is irrevocable, therefore it is not affected by the changes in the domestic legislation. This interpretation is in unison with the goals of the ICSID convention, however, this issue has not been considered yet, thus the case law on this issue does not exist.[42]

It must be said, that in the last two decades precedents of establishing jurisdiction of the ICSID center according to the domestic legislations are significantly reduces, which can be explained by the significant rise of popularity of the bilateral and multilateral investment agreements.[43]

### 3.2.4. Consent after the Dispute has Arisen

Consent to ICSID center can be expressed not only through bilateral and multilateral investment agreements, but also with the investment contract between investor and the state or by the domestic legislation.[44] Also, the consent to ICSID center or to other arbitrations can be expressed by the investment beneficiary state after the dispute has already arisen.[45]

From the viewpoint of the investor, the prospect of the beneficiary state consenting to the arbitration after the dispute has already arisen, does not provide high standards and senses of protection. In practice, the states do not express much enthusiasm to international dispute resolution mechanisms after the dispute arises. Considering this, agreement after the dispute arises is not guaranteed and is mere right of the parties to submit the dispute to international bodies.[46] Considering the abovementioned, in spite of the possibility to agree on the jurisdiction of the ICSID center after the dispute arises, the parties prefer pre-agreements.[47]

## 3.3. Additional Facilities to Resolve Disputes according to the ICSID Convention

In order for the investor to gain access to the international dispute resolution mechanisms to resolve through arbitration or conciliation according to the ICSID convention, mere existence of the consent to the

---

40 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 328.

41 *Takashvili S.,* Protection Standards of Foreign Investments and Compliance of National Legislation with the European and International Investment Regimes, Tbilisi, 2020, 295 (in Georgian).

42 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 330.

43 *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1226.

44 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 52.

45 Ibid.

46 Ibid.

47 *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1224-1225.

ICSID jurisdiction is not sufficient. The investment beneficiary state, as well as the state of the investor must be the members of the convention.[48] In practice, number of issues arose from this approach, considering this, amendments became necessary. Goal of the changes was to provide means to consider disputes that fell outside the jurisdiction of the ICSID convention. 1978 amendments to the convention provide such possibilities to resolve disputes through ICSID arbitration or conciliation, when one of the parties, the beneficiary state or the investors' state is a member of the convention.[49]

The aforementioned amendments are of great importance regarding NAFTA[50], as only the USA is the member of the ICSID convention, on the other hand, Canada and Mexico are not. Considering this, according to the ICSID Additional Facility rule, while the USA is the member of the convention, the convention is available to the Canadian and Mexican investors if they initiate the dispute against the USA, on the other hand, same applies to the investors from the USA, regarding disputes with other two countries. However, if the Canadian and Mexican investors are not eligible to rely of the ICSID Additional Facility rules, if they decide to bring up disputes against Canada or Mexico.[51]

It is important to note, that a decision made according to the so-called Additional Facility rules is different to a decision made under the ICSID convention.[52] The consequential difference is manifested in the fact, that the decision made according to the ICSID convention is enforced in the same way as a decision of a supreme court of the member state, however, 1958 New York Convention[53] will be applied to a decision, made according to the Additional Facility rules, therefore the decision will be enforced according to the common rules for enforcement of the arbitral decisions under the aforementioned convention.[54] By 2018, 160 states, which recognize simplified procedures for recognition and enforcement of the arbitral judgements, were member of the New York Convention. In addition, the convention applies only to international arbitration and it does not cover judgements made by domestic arbitral tribunals.[55]

## 4. Request for Arbitration and Hearing the Case in ICSID Arbitration Tribunal

### 4.1. Exclusivity

Arbitration is considered to be an ancient means of resolving disputes, where parties submit the dispute to the third parties (arbitrators), in order the dispute to be resolved under the pre-agreed rules and procedures. Arbitration plays major role in resolving international commercial disputes between investors and states.[56] The ICSID arbitration is not classic institutional arbitration, however it provides parties the rules for dispute resolution and tribunal formation rules.[57]

According to the ICSID convention, parties' consent to ICSID arbitration implies on exclusion of other means of legal procedures, which means, that only the arbitration tribunal, established under the convention, is authorized to review the dispute. Superiority of the ICSID tribunal extends not only to domestic courts, but

---

48 *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 704.

49 Ibid, 704.

50 1994 North American Free Trade Agreement of which the members are the USA, Mexico and Canada. The agreement was valid until 2020 and has been replaced with new trilateral agreement – United States – Mexico – Canada Agreement (USMCA).

51 *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 705.

52 Ibid, 706.

53 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

54 *Franco F., King B. (eds.),* International Investment Arbitration in a Nutschel, West Academic Publishing, 2020, 547.

55 Ibid.

56 *Salacuse W. J.,* The Law of Investment Treaties, 2nd ed., Oxford University Press, 2015, 411-412.

57 *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 925.

also to other international dispute resolution means.[58] In the case Attorney-General v Mobil Oil NZL ltd, courts of New Zealand pointed to the authority superiority of the jurisdiction of the center and the government of New Zealand undertook parallel dispute procedures in domestic courts. Eventually, the Supreme Court of New Zealand suspended the hearing of the case until the ICSID tribunal had determined its jurisdiction.[59]

In the case Maritime International Nominees Establishment v. Republic of Guinea, ICSID tribunal decisively determined exclusive jurisdiction of the center with respect to domestic courts.[60] According to the convention, as a prerequisite to the arbitration, concluding contracting state can demand domestic administrative or judicial means to be exhausted. Otherwise, jurisdiction of the ICSID tribunal shall prevail over every other dispute resolution means.

### 4.2. Request for Arbitration and Constitution of the Tribunal

Numerous investment agreements provide reservations that the right of the investor to access international dispute resolution means arises once a certain period of time elapses since the emergence of the dispute. Most widespread term is 6 (six) months and after the term investor acquires the right to submit the dispute to the arbitration. In this term parties try to settle the dispute in various ways in order to avoid litigation from the investor.[61]Article 9 of the Agreement on the promotion and reciprocal protection of investments between the Government of the Republic of Georgia and the Government of the People's Republic of China[62] provides similar reservation, setting 6 months term for negotiations.

Despite of terms for negotiations provided by certain investment agreements, according to the common opinion, investor has the right to apply to arbitration if it is clear that the negotiations will not yield results and/or investor sustains significant damages.[63]

Procedures of initiating modern arbitration hearings are mostly two-staged. On the first stage, investor notifies beneficiary state in written on the commencement of a dispute and disputed matters. After that, the investor appeals to the agreed arbitration center and launches procedures for selecting arbitrators.[64]

In order to launch arbitration proceedings, investor of the member state must notify the General Secretary in written. Notice must include information about the disputing parties with their designations. Information regarding disputed matters and document of consent, which establishes parties' consent to arbitration, according to the arbitration rules of the ICSID convention, must also be submitted.[65] If the arbitration claim is filed by a legal entity, consent to commence the dispute, issued by the relevant internal body must be submitted.[66]

Establishing competence of the center is decisive. General secretary registers application regarding initiation of arbitration proceedings, unless, according to the information at hand, the scope of dispute goes beyond the jurisdiction of the center. General secretary immediately informs the parties on registration or

---

58 *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 700.

59 Ibid, 701-702.

60 Ibid.

61 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, first ed., Oxford University Press, 2008, 117.

62 Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Republic of Georgia and the Government of the People's Republic of China, Legislative Herald of Georgia, 01.03.1995.

63 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, first ed., Oxford University Press, 2008, 118.

64 Ibid, 120.

65 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1314-1315.

66 Ibid, 1315.

refusal to register the application.[67] Under the article 36 of the convention, registration of the arbitration applications is within the competence of the general secretary of the center.[68]

Arbitration tribunal shall consist of an odd number of arbitrators appointed according to the agreement of the parties. The odd number of the arbitrators is a necessary requirement. A dispute may also be considered by a single arbitrator. General secretary is involved in the process of selecting arbitrators. As soon as either party appoints the arbitrator, the secretary immediately notifies the appointed arbitrator and, if the arbitrator agrees, notifies the parties.[69]

If the parties fail to agree on the number of the arbitrators and on the rules for appointing arbitrators, the tribunal will consist of three arbitrators. In this case, each of the parties select one arbitrator, the third arbitrator is appointed through agreement of the parties and is given an authority to chair the tribunal.[70] Article 39 of the convention determines, that the majority of the arbitrators must not be a citizen of the state which is a party to the dispute, or the state, citizen of which is a party to the dispute. This rule does not apply if the arbitrators were appointed by agreement of the parties.[71]

After the general secretary registers the arbitration application, arbitration tribunal shall be constituted as soon as possible. If tribunal fails to be staffed in 90 days, or during the term agreed by the parties, after general secretary notifies the parties on registration of the application, president of the World Bank, at the request of one of the parties, and if possible, after consulting both parties, appoints arbitrators who were not yet appointed. Arbitrators appointed by the chairman, according to this article, shall not be citizens of the state which is a party to the dispute, or the state, citizen of which is a party to the dispute.[72] President of the World Bank appoints arbitrators on the recommendation of the general secretary from the members of an arbitration panel in 30 days after receiving the request of one of the parties.[73]

The convention provides parties with possibility of appointing arbitrators which are not in the arbitrators' list. Arbitrator must be the member of the list, if the appointment is made by the president of the World Bank, in case of disagreement between the parties.[74] Arbitrator, appointed by the parties, who is in the list should be distinguished by their moral qualities, should have competence in the field of law, trade, commerce and finances. There must be trust in the arbitrators' ability to make independent judgements. It is especially important for the arbitrator to have competence in law.[75]

It is mandatory for the arbitrators to declare in written, that there is no conflict of interest or such other circumstances, that will influence their decision making. This obligation even when such circumstances did not exist before and arose during the arbitration proceedings.[76]

### 4.3. Place and Language of Arbitration

One of the main issues, that could have major importance to the parties, is place and language of arbitration. Selecting one and another is related to recourses and costs.

Generally, place of arbitration is headquarters of the World Bank, Washington. The parties may freely agree on another place, that may be institutional arbitration or any public or private arbitration. Parties can

---

67 Ibid, 1314.
68 Convention on the Settlement of Investment Disputes between States and Nationals of other States.
69 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1322.
70 Ibid, 1322-1323.
71 Ibid, 1323-1324.
72 Ibid, 1321-1322.
73 Ibid, 1321-1322.
74 Ibid, 1321-1323.
75 Ibid, 1323-1324.
76 Ibid, 1321-1324.

also agree on any other place. Place of arbitration is should be agreed with the tribunal, which on the other hand consults with the general secretary.[77]

Unlike other arbitration, to which lex arbitri rules are applied and the place of arbitration is supervised by local courts, ICSID tribunal is free from this regulation and the domestic legislature does not apply to the procedural rules of the arbitration.[78]

Under the ICSID arbitration rules[79], official languages are English, Spanish and French. The parties can also agree on other language of arbitration, with the consent of the tribunal. The parties may also select two languages and in case of nonagreement, the tribunal will use both languages.[80]

### 4.4. Hearing the Case

As a general rule, at first, arbitration is presented with an arbitration application and with a response of a defendant. Arbitration plaintiff refers to relevant legal norms and to the factual circumstances on which the plaintiff bases their claims. Accordingly, the defendant also presents their position, referring to the legal and factual basis, countering the plaintiff's argumentation. Rules of the most of the arbitrations demand the party to dispute the jurisdiction of the arbitration not later than receipt of the defendant's written position.[81]

If the jurisdiction of the arbitration is disputed, the tribunal determines the issue of the jurisdiction by itself. The rule of deciding on its own jurisdiction by the tribunal is called competence on jurisdiction in legal literature.[82] Under the article 41 of the convention, any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.[83] Therefore, it is entirely possible, for the tribunal to review the case, hear the parties, examine the evidence and at the end determine that the ICSID center does not have jurisdiction over the case.

Under the ICSID arbitration rules, after the tribunal is constituted, it is obliged to conduct the first hearing in 60 days, unless otherwise is agreed by the parties. On the first hearing, generally procedural issues are settled, including order of an oral hearing. By agreement of the parties, the hearing may be held remotely, through technological means.[84]

Under the article 43 of the convention, the Tribunal may, if it deems it necessary at any stage of the proceedings, call upon the parties to produce documents or other evidence, and visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.[85] The discretion of the tribunal to require parties to present evidence is not absolute. The parties, on their own, can determine different rules for presenting evidence, by limiting or expanding powers of the tribunal.[86]

---

77 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 83.

78 Ibid.

79 ICSID Convention Arbitration Rules, 2006, <https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules> [30.01.2022].

80 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 83.

81 *Rubins QC N., Papanastaisou T. N., Kinsella N. S.,* International Invsetment, Political Risk and Dispute Resolution, A Practitioners's Guide, *Mistelis L. (ed.),* 2nd ed., Oxford University Press, 2020, 405.

82 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1344.

83 Ibid, 1348.

84 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 134.

85 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1362-1363.

86 Ibid.

On the case AGIP v Congo, ICSID tribunal considered a position of a plaintiff and recommended defendant to present full list of evidence. This way the plaintiff tried to gain access to the evidence that was kept with the defendant state. Republic of Congo rejected the recommendation.[87] On the case Vacuum Salt v Ghana plaintiff requested use of temporary measures, in order to gain access to corporate records. The records were stored in factories, that were expropriated. Ghana voluntarily accepted investor's motion to gain unhindered access to corporate records.[88]

Cases where evidence of great importance for the case is not kept with the disputed parties but with third parties are more problematic. Considering, that an arbitration as an institution subject to the parties' consent, the consent applies only to the parties and extending obligations to the third parties is serious obstacle. The issue may also be complicated if the evidence is stored in elsewhere, while the place of arbitration is another, where the jurisdiction of another state is applied. In these cases, tribunals consider parties' motions for request of evidence, examine relevance of the evidence to the case and take appropriate measures to obtain evidence. Tribunal may address these parties (third parties) and request evidence,[89] however, there is not always a legal leverage to obtain these evidences.

When it comes to types of evidence, which the parties can present for the purposes of arbitration proceedings, they are witness testimonies, expert reports, material and written evidence. According to the article 35 of the ICSID Convention Arbitration Rules, Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal. The same article obliges the witness to make the following declaration before giving his evidence: "I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."[90] Evidence gathering process during arbitration proceedings is kind of a hybrid of private law and traditions of common law systems. Standards of evidence gathering during arbitration proceedings are set under 2010 International Bar Association (IBA)[91] regulation, which stipulate rules on the taking of evidence in arbitration proceedings.[92] IBA rules are not automatically binding for the parties. They can be used as guidelines; the parties can also agree to apply these rules.[93]

The parties also have a right to present oral explanations and arguments during the arbitration. Length of the hearing depends on the specifics and complexity of the case, as well as on style of arbitration. Some arbitrators prefer to gather written positions from the parties at first, and then hear oral arguments. Arbitrators agree that during oral arguments and witness questioning the parties shall have defined time in order to avoid delaying the hearing time of the case.[94]

Tribunal may also make a decision without participation of one of the parties. Agreement on ICSID arbitration is binding for both parties. Consent to ICSID jurisdiction is irrevocable and the parties are obliged to settle the dispute in the arbitration center, however, there are instances, where the defendant beneficiary states avoid participating in the arbitration proceedings. It is recognized principle, that abstaining from participating in the arbitration tribunal shall not deter dispute resolution.[95]

---

87 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 141.

88 Ibid, 141-142.

89 Ibid, 163.

90 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1365.

91 International Bar Association was founded in 1947. As of today, the association has up to 80 000 member attorneys worldwide, from 170 countries, <https://www.ibanet.org/> [31.01.2022].

92 IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 29 May 2010, International Bar Association, <https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC> [31.01.2022].

93 *Rubins QC N., Papanastaisou T. N., Kinsella N. S.,* International Invsetment, Political Risk and Dispute Resolution, A Practitioners's Guide, *Mistelis L. (ed.),* 2nd ed., Oxford University Press, 2020, 407.

94 Ibid, 408-409.

95 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F. C.,* Oxford University Press, 2008, 126.

According to the article 45 of the convention, if one of the parties fail to appear or to present their case, positions of the other party are not automatically assumed to be proven.[96] Arbitration examines evidence presented in the case. The party's refusal to appear on the case and/or failure to present their case does not deprive the other party to request examining disputed issues and dispute resolution. In addition, it is well established, that before the tribunal makes a decision, it shall notify the party and grant additional time to the party that failed to appear or refused to present their case.[97] Tribunal may not determine the additional time, if it is assured, that the party does not plan to appear or to present their positions to the tribunal.[98]

## 4.5. Making the Decision

After the hearing of the case an arbitration tribunal makes a decision. Determining exact timeframe in which the decision shall be made is rather hard, because it depends on various circumstances, including proceedings and duration of the hearing. When the parties themselves set limitations to which final decision is to be made, generally, the arbitrators ask the parties for additional time. The delay is usually caused by complexity the case and also by overloading of the arbitrators.[99]

The award is made some time after the oral hearings are concluded, generally, without presence of the parties. The arbitrators summarize the evidence, arguments and written positions. In general, first draft of the award is made by the chair of the tribunal, which is then handed to other arbitrators for comments and remarks. After the award is finalized, arbitrator, who disagrees with the decision of the majority of other co-arbitrators, writes different opinion. The different opinion has no legal force. however, it might have importance for hearing other cases.[100]

Under the article 46 of the ICSID arbitration rules, the award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.[101] It is possible, that the arbitrators might also fail to draw up the award in this term. However, neither the convention, nor the arbitration rules provide any outcome, if the arbitrators violate the timeframe for drawing up the award.[102]

The award is made by the tribunal by majority of votes. The arbitral award is drawn up in written and it shall be signed by the arbitrators that supported the award. Any member of the tribunal has the right to disagree with the decision made by the majority and to append the different opinion to the award.[103]

The award must address every issue presented to the arbitration. The tribunal must refer to the grounds the award was based on. On the case Tulip v Turkey, a tribunal (ad hoc) determined, that substantiation on the decision-making grounds is obligation according to the article 48(3) of the convention and the article 47(1) of the arbitration rules.[104]

---

96 *Hanessian G.,* The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1198.

97 Ibid.

98 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 127.

99 Ibid, 179-180.

100 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 223.

101 *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 986.

102 *Scherer M., Morris D.,* The Award, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1229.

103 *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 987-988.

104 *Scherer M., Morris D.,* The Award, The ICSID Convention, Regulations and Rules A Practical Commentary, Fouret J., *Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1243.

The award shall contain precise designations of the parties, the name of each member of the tribunal, date and place of the sittings of the tribunal, the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based and, in case of existence, indication regarding a different opinion.[105] Absence of the mandatory requisites of the award may be grounds for termination of the award according to the rules stipulated by the convention.[106]

The tribunal is obliged to answer on every question submitted to it. This obligation is stipulated under the article 48(3) of the convention.[107] After the award is drawn up, general secretary immediately sends certified copies of the award to the disputed parties. The award is deemed to be drawn up on the date the certified copies are sent to the parties. Also, pursuant to Article 49(2) of the Convention, within 45 days after the date on which the award was rendered, either party may request, a supplementary decision on, or the rectification of, the award. The tribunal is also obliged to correct any arithmetical or other technical mistakes. These corrections or other additional decisions are amended to the award and the parties are notified about them in the same way as they were notified about the award.[108] Revision period for the award, determined by the convention, begins from the day the award was drawn up.[109]

It is accepted, that the center does not have the power to publicize the decision without consent of the parties.[110] This obligation is determined under the article 48(4) of the convention, which states, that the Centre shall not publish the award without the consent of the parties. Article 48(5) of the convention provides the same provision. Necessity of the consent of the parties applies to whole text of the award.[111] Also, since 2006, the Center publishes excerpts on legal rationale. The changes were implemented to provide higher standards of transparency.[112]

## 5. Counterclaim of the State

A State can defend themselves in a dispute initiated by an investor in various ways. The State can refer to nonexistence of the investment or to the deficient jurisdiction of the arbitration. The state can state that the plaintiff is not an investor, thus does not possess the right to apply to international dispute resolution means. Other than that, the State can also imply on the breach of terms by the investor, that could have led to the countermeasures from the State.[113]

Arbitration proceedings provide platform for the counterclaim to be heard with an investor's suit. Admissibility of the counterclaim requires the same procedures such as suit. Meaning, necessity of the parties' consent to dispute resolution by the arbitration, expressed in an appropriate form.[114]

Substantively and formally the counterclaim in itself represents independent claim. Respectfully, it contains the claims that may have required independent arbitration proceedings, however, considering economic purposes of proceedings, it is filed to already existing dispute.[115]

---

105 *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 987-988.

106 *Scherer M., Morris D.,* The Award, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1247.

107 Ibid, 1241.

108 *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 990-991.

109 Ibid.

110 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1350.

111 *Scherer M., Morris D.,* The Award, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1255.

112 *Happ R*., ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 988-989.

113 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 179.

114 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 153.

It must be noted, that the counterclaims of the beneficiary states against the investors are quite rear. Hearing of the such claims by the arbitration depends on whether the parties have agreed on arbitration on such cases and whether the agreed proceedings include the possibility to file the counterclaim.[116]

The first case, where the arbitral tribunal considered counterclaim was Iran v U.S., which had major implications on development of modern arbitration law.[117]

According to the article 46 of the Convention, except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims 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.[118] Also, one of the mastermind behind the convention, Aron Broches believed that, the content of the article 46 shall not be interpreted in a way, as if the Convention extended its scopes of competency. According to Broches, the starting point was the agreement of the parties and the article 46 conveyed other provisions agreed on by the parties.[119]

On the case Klöckner v Cameroon ICSID tribunal accepted counterclaim of Cameroon for further consideration. The counterclaim was filed against investor and their local representatives. In reality, Cameroon had negotiations with foreign investor, however the contract was signed by only the local representatives. The tribunal decided, that there was unified, indistinguishable representation of the two subjects, therefore, this was the grounds for jurisdiction to accept the counterclaim against the investor and their local representatives.[120]

On the case Saluka v Czech Republic, arbitral tribunal hearing the case by UNCITRAL rules determined, that it did not have a jurisdiction over a counterclaim filed by the Czech Republic against an investor. The tribunal stated, that the agreement was made between a parent company of the plaintiff investor Nomura and independent institution, which was not part of the government of Czech Republic, therefore the State was not party to the agreement. The tribunal also stated, that the counterclaim did not have direct and obvious connection to the initial suit of the investor.[121] On this case, Czech Republic filed numerous counterclaims, in which it appealed on the breach of taxation and competition laws by the investor. Article 8 of the investment agreement between the Netherlands and Czech Republic contained provision – "every dispute". Relying on this, Czech Republic stated, that the jurisdiction extended not only to the investors claims, but also to the counterclaim of the state which fell into category of "every dispute. On the contrary, Saluka pointed to the nonexistence of "ratione materiae" of the counterclaim. Saluka referred to the article 19.3 of UNCITRAL rules, which determined, that filing of the counterclaim by the State is admissible if it was agreed on through an investment agreement and the grounds of the counterclaim was not investment agreement itself. Saluka also stated, that Czech Republic could not prove connection between the initial claim and the counterclaim.[122]

Main issues counterclaims of the States encounter are that, in most cases, the right of an investor to request arbitration arises from an investment agreement between one state to another. And the members of these agreements are States, not the investor. Considering this, rationale for counterclaims under the investment agreements is rather complicated.[123]

---

115 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 180.

116 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 154.

117 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 180.

118 *Godbole A., Kalnina E.,* Arbitration, The ICSID Convention, Regulations and Rules A Practical Commentary, Fouret J., *Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 415.

119 Ibid.

120 *Saason M.,* Investment Arbitration: Procedure, International Investment Law, Bungenberg M., *Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1337.

121 Ibid.

122 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F. C.,* Oxford University Press, 2008, 155-156.

123 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 180.

Great reaction followed the case Marco Gavazzi v Romania, where a tribunal determined the State's right to counterclaim. The point of the case was, that according to the article 8(2) of the investment agreement between Italy and Romania, only the investor had the right to refer to international dispute resolution mechanisms and to apply to the ICSID Center. However, according to the article 8(1), the right to apply to the tribunal included every dispute and the State had the right to defend itself through counterclaim.[124] The tribunal's opinion was split in two. Matter of the dispute was whether the right of the State to defend itself included filing the counterclaim. Majority of the arbitrators believed, that the provision did not provide grounds for such interpretation. Therefore, the tribunal could not have established its competency over the State's counterclaim. On the contrary, one of the arbitrators Mauro Rubino-Samartano stated, that the provision should have been interpreted in favor of the State, thus the tribunal should have established its jurisdiction.[125]

Arbitration practice shows that the counterclaims must satisfy criteria of "rationale materia" as well as "ratione personae". Besides that, the counterclaim should be derived from the same disputed matters, from which the initial claim of the investor arose, or the counterclaim must have close connections with the initial claim.[126] Tribunals indicate to the importance of the close connections between these two claims. Absence of close connections were one of the main arguments for rejecting counterclaim of Czech Republic, which was based on investor's breach of domestic legislation.[127]

On the case Roussalis v Romania the tribunal stated, that the article 9(1) of the investment agreement between Greece and Romania provided investors with the right to request arbitration against the State in case of dispute. These provisions did not establish jurisdiction of the tribunal over a counterclaim of the State.[128] Arbitrator Michael Raisman, who was selected by Romania expressed different opinion, stating that when the States agree on the jurisdiction of ICSID for each other's' investors, matter of a counterclaim must be decided not only according to the investment agreements, but also according to the article 46 of the convention. According to Raisman, in the presence of the jurisdiction of the Center, article 46 of the convention allowed possibility for the tribunal to establish its competency over the counterclaim.[129]

Opinion of Michael Raisman was shared by the tribunal on the case Goetz v Burundi and established jurisdiction of the center over the counterclaim of Burundi.[130] On the contrary, broader interpretation was provided by the investment agreement between Czech Republic and the Netherlands. According to the article 8, competency of the arbitration was established for every dispute. On the case Saluka v Czech Republic, the tribunal considered the abovementioned article and stated, that the content of the provision extended to the right to file a counterclaim, however, in order to establish the jurisdiction of the tribunal, an author of the counterclaim must be one of the members to the agreement and the disputing investor should have consented to the jurisdiction of the arbitration.[131] As it was noted, through referring to the UNCITRAL rules and to the absence of close connections of the counterclaim to the initial claim, the tribunal did not establish its jurisdiction over the counterclaim of Czech Republic against Saluka.

On the Burlinton v Ecuador case, Ecuador filed a counterclaim, in which, it appealed that the investor inflicted irreparable damages on the environment. Grounds for investor's claim was an investment agreement between USA and Ecuador. After the dispute had started, investor accepted the jurisdiction of the arbitration

---

124 *Godbole A., Kalnina E.,* Arbitration, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 421-422.

125 Ibid, 421-422.

126 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 180.

127 *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, 1st ed., *Dugan F.C.,* Oxford University Press, 2008, 155-156.

128 *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 180.

129 Ibid.

130 Ibid, 187.

131 Ibid, 183.

over the counterclaim. At the end, the tribunal ordered the investor to pay $41 million to Ecuador.[132] Investors claim was also upheld and Ecuador was ordered to pay $379.8 million to the investor.[133]

To sum up, there is no unified position regarding Raisman's theory, who interpreted article 46 of the convention broadly and formed the approach that the article 46 of the convention was sufficient for establishing the jurisdiction of the tribunal over the counterclaims. Various authors believe, that such interpretation is not coherent with the objectives of the convention.[134] Solution for that is to formulate investment agreements and investment contracts in a way, that does not leave room for tribunals' interpretations. The text of the agreements is determined by the parties themselves. They can also agree on excluding conditions or direct consents. E.g. determine that the right to file a counterclaim does not arise in any circumstances and/or that the state has right to file a counterclaim to the arbitration tribunal.[135]

## 6. Conclusion

In the last decades foreign investor protection mechanisms improved significantly. Especially popular is the dispute resolution center established under the 1965 Washington Convention. In fact, there is no more trustworthy institution. Majority of the States consent to the ICSID center in bilateral or multilateral investment agreements and contracts. One of those countries is Georgia. The close connections with Georgia is evidenced by the fact, that today there are 4 disputes involving Georgia in the ICSID Center. Considering this, it is especially important to analyze specific stages and procedures of dispute resolution.

The paper also focused on the ability of a state to file a counterclaim during an investment dispute and imperative prerequisites. Examining the ability of the state to file a counterclaim is relevant in the event of damage to the state by an investor, for the issue to be resolved with the investor's lawsuit. For the counterclaims of a state to be admitted for consideration by an arbitration tribunal, it is important that the investment agreements and contracts contain direct and unambiguous provisions regarding the jurisdiction of arbitral tribunals.

## Bibliography:


1. Agreement on the Promotion and Reciprocal Protection of Investments Between the Government of the Republic of Georgia and the Government of the People's Republic of China, Legislative Herald of Georgia, 01.03.1995.
2. Agreement Between the Government of Georgia and the Government of the Republic of Armenia on Investment Promotion and Mutual Protection, Legislative Herald of Georgia, 05.06.1996.
3. Agreement Between the Government of Georgia and the Government of the Republic of Azerbaijan on Investment Promotion and Mutual Protection, Legislative Herald of Georgia, 08.03.1996.
4. The Havana Charter for an International Trade Organization, 1948.
5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.
6. Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention), 1959.
7. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, 1965.
8. North American Free Trade Agreement (NAFTA), 1994.
9. ICSID Convention Arbitration Rules, 2006.
10. IBA Rules on the Taking of Evidence in International Arbitration, 2010.
11. United States–Mexico–Canada Agreement (USMCA), 2020.


---

132 Ibid, 188.

133 Burlington v. EcuadorBurlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.

134 *Godbole A., Kalnina E.,* Arbitration, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 423.

135 Ibid, 424.

12. *Dugan F. C., Wallace D. Jr., Rubins N., Sabahi B. (eds.),* Investor-State Arbitration, first ed., Oxford University Press, 2008, 83, 117-118, 120, 126-127, 134, 141-142, 153-156, 163, 179-180.
13. *Edson E., Banifatemi Y.,* Jurisdiction of the Centre, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez C. M. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 102, 147-148.
14. *Franco F., King B. (eds.),* International Investment Arbitration in a Nutschel*,* West Academic Publishing, 2020, 190, 547.
15. *Godbole A., Kalnina E.,* Arbitration, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 415, 421-424.
16. *Hanessian G.,* The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1198.
17. *Happ R.,* ICSID Rules, Institutional Arbitration Article by Article Comentary, *Schütze A. R. (ed.),* Verlag C.H.BECK oHG, München, 2013, 925, 986-987, 988-991.
18. *Khvedelidze M*., Impact of the Association Agreement on Investment Relations in Georgia, Journal of "Justice and Law", №4(60), 2018, 66 (in Georgian).
19. *Marcert L.,* Streitschlichtungsklauseln in Investionsschutzabkommen, herausgegen von *Bungeberg M., Hobe S., Reinish A., Ziegler A.,* Nomos Verlagsgeselschaft, Baden-Baden, 2010, 39.
20. *Reinish A., Malintoppi L.,* Methods of Dispute Resolution, International Investmemt Law, *Muchlinski P., Ortino F., Schreuer C. (eds.),* Oxford University Press, 2008, 700-702, 704-706.
21. *Saason M.,* Investment Arbitration: Procedure, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I.,* Baden-Baden, Hart Publishing, 2015, 1314-1315, 1322-1324, 1337, 1344, 1348, 1350, 1362-1363, 1365.
22. *Sabahi B., Rubins N., Wallace D. Jr. (eds.),* Investor-State Arbitration, 2nd ed., Oxford University Press, 2019, 50-52, 179-180, 183, 187-188, 223, 315, 317, 321, 328, 330.
23. *Salacuse W. J.,* The Law of Investment Treaties, 2nd ed., Oxford University Press, 2015, 411-412, 422.
24. *Shan W. (ed.),* Property Rights, Expropriation and Compensation, The Legal Protection of Foreign Investment A Comparative Study, Oxford and Portland, Oregon, 2012, 59.
25. *Scherer M., Morris D.,* The Award, The ICSID Convention, Regulations and Rules A Practical Commentary, *Fouret J., Gebray R., Alvarez M. C. (eds.),* Edward Elgar Publishing, Cheltenham, Northsmton, 2019, 1229, 1241, 1243, 1247, 1255.
26. *Tsertsvadze G*., Introduction to International Investment Law, Tbilisi, 2013, 62-64 (in Georgian).*Takashvili S.,* Protection Standards of Foreign Investments and Compliance of National Legislation with the European and International Investment Regimes, Tbilisi, 2020, 293, 295, 301 (in Georgian).
27. *Vandelvelde J. K.,* Bilateral Investment Treaties, History, Policy and Interpretation, Oxford University Press, 2010, 433.
28. *Waibel M.,* Investment Arbitration: Jurisdiction and Admissibility, International Investment Law, *Bungenberg M., Griebel J., Hobe S., Reinisch A., Kim Y. I. (eds.),* Baden-Baden, Hart Publishing, 2015, 1124-1226.
29. *Rubins QC N., Papanastaisou T. N., Kinsella N. S.,* International Invsetment, Political Risk and Dispute Resolution, A Practitioners's Guide, *Mistelis L. (ed.),* 2nd ed., Oxford University Press, 2020, 367, 405, 407-409.
30. *Titje C.,* International Investment Protection and Arbitration, Berliner Wissenschafts-Verlag GMBH, 2008, 22-23.
31. Burlington v. EcuadorBurlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.