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# Special Report on ICSID Jurisdiction*

**Introduction.**
Objections on the jurisdiction of the arbitral Tribunals are, *inter alia*, an usual cause of delays of proceedings between investors and host States handled by the International Center for Settlement of Investment Disputes (ICSID).

**Requirements for ICSID jurisdiction**
According to article 25 of the ICSID Convention (the Convention), for the Center to have jurisdiction certain requirements need to be satisfied: a) the dispute needs to be of legal nature; b) the dispute needs to arise directly out of an investment; c) the non-State party to the dispute needs to be a national of another Contracting State (since 1978 ICSID has had a set of additional facility rules that allow disputes in which either the State party to the dispute or the State whose national is party to the dispute are not a Contracting State or disputes that did arise directly out of an investment to be submitted to arbitration); and d) consent to submit the dispute to ICSID needs to be granted by both parties in writing.

**ICSID decisions on jurisdiction.**
Although the Convention states the requirements for jurisdiction, the lack of definition of many terms has left many issues open. The ICSID Tribunals have addressed some of them.

a) **Disputes between investor and State:** ICSID handles disputes between investors and States, not disputes between investors nor disputes between States.

In the CSOB case (Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic, No. ARB/97/4, award of May 24, 1999), the arbitral Tribunal analyzed the issue of a dispute submitted by a State owned company. The Slovak Republic alleged that CSOB was acting as an agent of the Czech Republic and the claim had to be dismissed because the dispute was between States.

The Tribunal determined that *per se* a mixed economy company or government owned corporations are not disqualified as a national of another Contracting State unless it is acting as agent of its government or performing governmental functions.

In the Maffezini case (Emilio Agustín Maffezini v. Kingdom of Spain, No. ARB/97/7, award of January 25, 2000), the Tribunal analyzed the issue from a different point of view. In this case Spain alleged that ICSID lacked jurisdiction because the dispute was not between an individual (Maffezini) and a State (Spain) but between an individual and a Corporation (SODIGA).

The Tribunal stated that to determine if an entity was a State's organ and its doings attributable to the latter two tests were required: structural and functional. If on analyzing the structure of an entity it seems that it is not a State's organ because the State has used a corporate veil, the analysis needs to be turned to the function of the entity. If the entity is in charge of State's functions, then the entity will be considered an organ of the State.

b) **Disputes about investment:** Disputes that do not arise directly out of an investment are outside the authority of ICSID.

In the CSOB case the Slovak Republic argued that the dispute did not arise directly out of an investment but of an agreement that guaranteed obligations of another entity named Slovak Collection Company.

The Tribunal stated that investments are usually operations composed of various interrelated transactions. The transactions by themselves might not qualify as an investment. However when a dispute is brought before ICSID the Tribunal needs to look at the overall operation and not solely at the particular transaction. If the whole operation can be qualified as an investment, even if it is not a direct investment, and the dispute arises directly out of that operation through the particular transaction, ICSID will have jurisdiction.

In the second decision on objection to jurisdiction of that case, the Tribunal pointed out that although it had jurisdiction over a dispute that arose directly out of an investment through a specific transaction, the jurisdiction extended only to the dispute as per the terms of the consent of the parties. Therefore, the Tribunal did not acquire jurisdiction with regard to each agreement concluded to implement the wider investment operation.

c) ***Ratione temporis:*** For ICSID jurisdiction the claim has to be submitted after the date the other party consented, provided the dispute arose after the date the parties consented to be the critical date.

In the decision on objection to jurisdiction of the Feldman case (Marvin Roy Feldman v. United Mexican States, No. ARB(AF)99/1, award of December 6, 2000),

the Tribunal of ICSID additional facility[1] stated that its jurisdiction was extended to that dispute as per the consent of the parties. The North America Free Trade Agreement (NAFTA) governed that case. Accordingly, ICSID or its additional facility had jurisdiction only to acts or omissions that had occurred after NAFTA entered into force, not to previous acts or omissions. But if the acts or omissions are a continuation of previous acts or omissions, the Tribunal might have jurisdiction on the part of it that occurred after NAFTA's date of entry into force.

In the Maffezini case the Tribunal established a difference between dispute and claim. The Tribunal quoted the International Court of Justice on the Eastern Timor Case and concluded that a dispute is a disagreement over a legal or factual point able to be submitted as a specific claim. Subsequently, the Tribunal stated that as per the terms of the Bilateral Investment Treaty (BIT) governing that investment, i.e., Argentina-Spain, disputes and claims that arose before its entry into force will not be subject to ICSID. The Tribunal then pointed out that the critical date separated the dispute from previous events that were not a dispute of legal content or of interests.

In the first decision of the CSOB case the Tribunal stated that "it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted".

In Tradex (Tradex Hellas, S.A. v. Republic of Albania, No. ARB/94/2, award of December 24, 1996.), the decision on objection to jurisdiction addressed the issue of timing of the dispute. The Tribunal decided that disputes usually arise before a claim. If the date of the claim filing is previous to the date of the consent, the Tribunal did not have jurisdiction.

**d) Nationality.**

For ICSID to have jurisdiction the legal investment dispute needs to be between a Contracting State and a national of another Contracting State. If the dispute is between a national of the Contracting State involved in the dispute and that State ICSID will not have jurisdiction. That is why the criteria to determine when a person or a juridical person is a national of a State are crucial. Furthermore, according to the ICSID Convention any juridical person with the nationality of the Contracting State party to the dispute can have the treatment of a national of another Contracting State if it is under foreign control and the parties have agreed to such treatment. However, the ICSID Convention does not provide for definition of foreign control.

When an individual had nationality from one State and residence from another State. In the Feldman case the Tribunal mentioned that nationality and residence were different concepts. Nationality was the main connecting factor between a State and an individual. It also stated that nationality prevailed over permanent residence in matters of standing.

Nationality of an entity when there is foreign control.
In the AUCOVEN case (Autopista Concesionada de Venezuela, C.A. (AUCOVEN) v. Bolivarian Republic of Venezuela, No ARB/00/5, award of September 27, 2001), the Tribunal was asked to address the issue of foreign control of a company with the nationality of the host State. The Tribunal emphasized the role of the consent of the parties and their ability to condition jurisdiction to the acquisition of the majority of the shares by a national of a Contracting State.

The nationality of the company that acquired the majority of the shares was determined as per the most common criterion, i.e., place of incorporation.

Nationality when there is a group of companies.
In the Banro case (Banro American Resources, Inc and Societé Aurifére du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, No. ARB/98/7, award of September 1, 2000.), the company with the nationality of the other Contracting State and the company giving the consent and in connection with whom the host State gave consent to arbitrate disputes involving them were not the same.

The Tribunal established that a company could transfer to a subsidiary the consent it had granted to submit a dispute to ICSID as per the terms of the agreement where consent was originally granted. However, for the consent to be transferable the consent had to be previously granted. In the case in point the consent could not have been granted nor transferred because the parent company did not have the nationality of a Contracting State. Thus, if a claimant lacked the nationality of a Contracting State, ICSID could not have jurisdiction. The Tribunal also considered the possibility of the claimant having the nationality of a Contracting State but not having granted consent and the possibility of the host State granting consent but not including disputes involving the claimant. In both cases the Tribunal stated that it lacked jurisdiction.
On reaching a conclusion, the Tribunal established differences with two previous cases: a) where request to

[1] Mexico is not a signatory of the ICSID Convention. Thus it is not bound but the Convention but can agree to settle disputes as per the additional facility rules of ICSID.

submit a dispute to ICSID was submitted by a member company of a group of companies while the consent was expressed by another company of the group and b) when following the transfer of shares the request to submit the dispute to ICSID came from the transferee company while the consent had been given by the company making the transfer. The Tribunal stressed that in general it tends to be less formalistic and that ICSID is more willing to work its way from the subsidiary to the parent company rather than the other way around. "Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality' ".

e) **Consent:** Consent is the cornerstone of the jurisdiction of the center[2].

The consent needs to be provided in writing, but there is no indication that there is one way preferred over another. The consent can be given in a treaty, a contract or local law. In the Olguin (Eudoro Armando Olguin v. Republic of Paraguay, No ARB/98/5, award of August 8, 2000.), CSOB and Tradex cases the Tribunals have referred to the possibility of the consent being granted by the State in a BIT. That will not grant jurisdiction per se to ICSID, for the consent of the investor will be lacking. But once the investor files a claim with the Center, it is considered that the two parties have consented to submit the dispute to arbitration before ICSID.

In the first decision on objection to jurisdiction in the CSOB case, the Tribunal also referred to the possibility of the consent being granted in a local investment law. It mentioned that under some laws that consent is deemed an offer to be accepted as soon as the foreign investor files an investment application.

The Tribunal concluded that in that case consent had been given in a contract by incorporating by reference the provisions of a BIT although the treaty might not have been in force on the international plane. It stated that the will of the parties should be honored. Thus by referring to a BIT, the parties intended to incorporate its provisions to their agreement, in order to provide international arbitration as their chosen dispute-settlement method.

In the Tradex case the Tribunal also stated that consent could be given unilaterally by a Contracting State in its national laws. The consent will become effective at the latest if and when the foreign investor files its claim with ICSID.

In the second CSOB case decision on objections to jurisdiction, the Tribunal confirmed its jurisdiction regarding the dispute submitted by claimant to the extent that the same arises under a second-tier obligation agreement. Therefore the jurisdiction of the Center could not extend beyond the consent of the parties and consequently could not reach the principal agreement. The Tribunal based its decision on the principle of the relative effects of a contract, on the fact that there was no provision for arbitration in the principal contract and on the principle of effectiveness and finality of jurisdiction.

The consent needs to be expressed by the parties to the dispute. In the case of group of companies, for example when a subsidiary has granted consent and a parent company files a claim, the Tribunals have considered those two happenings as made by a group of companies, provided that the consent was given in writing, timely and by a national of another Contracting State or an entity considered so.

As the BANRO case pointed out, Tribunals do not accept the view that their competence is limited by formalities, but rather base their decisions on a realistic assessment. However, the Tribunals take that approach when consent has been granted in compliance with the requirements of the Convention and when the nature and logic of the ICSID system is not affected.

A Most Favoured Nation (MFN) clause of a BIT can be used to extend ICSID jurisdiction. In Maffezini, the Tribunal analyzed the MFN clause of the Argentina-Spain BIT in connection with the provisions of the Chile-Spain BIT, which did not require exhausting certain period of time before filing a claim.

The Tribunal noticed two principles: *res inter alios acta* and *ejusdem generis*. According to the first one the treaties are valid among the parties. According to the second one, the effect of a treaty can be extended via MFN clause to treaties of the same nature. The Tribunal ruled that in the absence of express provisions to the contrary, the provisions of investment disputes of another treaty of the same nature can be extended to an investor of a third country because the purpose of the BITs is to protect foreign investors and their rights, and because the provisions of investment disputes settlement are inextricably related to investment protection. The Tribunal also stated some exceptions to the ruling such as when consent to arbitration is conditioned to exhaustion of local remedies, when the parties have the option to choose between local remedies or international arbitration or when the parties have chosen an institutional arbitration.

[2] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention, March 18, 1965

The Tribunals have also addressed the conditional consent. In the AUCOVEN case ICSID did not have jurisdiction until a condition subsequent had been satisfied. The parties, through agreement established the condition and the criteria to determine its fulfillment.

The Tribunal decided in favor of the parties granting consent to submit a dispute to the jurisdiction of ICSID upon condition of the investor being subject to foreign control. The parties defined foreign control as the holding of majority of shares of the investor's local company by nationals of a Contracting State.

The parties can bring additional or ancillary claims to ICSID provided they have not consented otherwise and the additional or ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Center. In the Feldman case, the arbitral Tribunal stated that for an ancillary claim to be within the jurisdiction of ICSID, it should be within the scope of the arbitration agreement of the parties and should be presented in principle not later than in the reply.

In sum, through their consent expressed in writing the parties to the dispute set the terms of the jurisdiction of ICSID.

f) **Other issues on jurisdiction**:

- Exhaustion of local remedies.

In Maffezini, the Tribunal stated that according to article 26 of the ICSID Convention a Contracting State could condition its consent to ICSID arbitration on prior exhaustion of domestic remedies. However, if the State has not conditioned its consent to that requirement, it will not be applicable and disputes could be submitted to ICSID arbitration with no need to previously exhaust local remedies. The Tribunal also mentioned that if the requirement to exhaust local remedies was a condition for ICSID's jurisdiction its absence did not prevent the dispute to be submitted to ICSID. The condition only created an additional step to be fulfilled before ICSID could have jurisdiction.

- Principle of effectiveness and finality of jurisdiction.

In the CSOB case the Tribunal in the second decision on objections to jurisdiction addressed the principle of effectiveness and finality of jurisdiction. The Tribunal admitted that the principle of effectiveness and finality of jurisdiction implied that when a tribunal has jurisdiction over a matter it could be extended to secondary or incidental questions provided it is necessary to adjudicate the dispute over which it has jurisdiction. However, the Tribunal pointed out that that principle cannot override the basic rule that arbitral jurisdiction is based on consent of the parties. In that case the consent of the parties only extended ICSID's jurisdiction to disputes between certain parties related to a specific agreement.

- Incompatibility with diplomatic protection.

In the Banro case the parent company, a national of Canada had used the mechanism of diplomatic protection while an American subsidiary submitted the dispute to ICSID.

The Tribunal stressed that "…once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor's home State no longer has the right to grant the investor diplomatic protection".

Furthermore, it was pointed out that it would be against the purpose and aim of the Convention to expose the host State and the same time, to both diplomatic intervention and arbitration. On ruling in that direction the Tribunal stated that a group of companies cannot avail itself of both diplomatic protection through its parent company and arbitration through a subsidiary.

- Authorization to invest.

In the Olguin case the Tribunal stated that an investment dispute was within its jurisdiction, because among other reasons the relevant BIT did not have any provision requiring the investments to be authorized by the host State.

**Conclusion.**

The existence of ICSID has been good for all the parties involved in foreign investments. For host States ICSID has been good to "depoliticize" the investment relations. For foreign investors ICSID has been good for it has provided a neutral forum to settle investment disputes with sovereign States.

The precedent set by the arbitral Tribunals provides certainty as to when ICSID has jurisdiction over a specific claim. That in and by itself will help make ICSID a better and more efficient dispute settlement forum.

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The views expressed here should not be attributed to the organizations with which he is affiliated.