Analysis of the main problems and issues in arbitration of the foreign investment disputes: the concept of investment dispute and multiplicity of arbitration disputes relating to the same investment

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Abstract

Perhaps the most important problem with arbitration as a means of settling investment disputes, is to identify the concept of the investment dispute, identify parties, and indicate the criteria that are adopted to determine whether we are going to invest or not. Accordingly, we have identified in this research what is meant by an investment dispute, the parties to that dispute, and the criteria upon which to determine whether there is an investment or not, including: 1) The capital contribution to the host country's economy over a certain period of time that allows for the building of continuous links between the investor and the host country; 2) Giving the investor the right to exercise real influence and control over the management of his investment project; 3) This investment generates income; 4) Investment is at particular risk and 5) Stimulating the economic development of the host country. We have also identified the other problem facing arbitration in investment disputes, namely, the multiplicity of arbitration disputes relating to the same dispute, and the need to apply the positive and negative impact of binding force of *res judicata* and to deny other solutions to this problem.

Keywords: Arbitration, investment dispute, foreign investor

1. Introduction

Parties to foreign investment contracts often use various alternative means of settling investment disputes between States and foreign investors. It is rare to recourse to state jurisdiction to settle investment disputes between host States and foreign investors because they do not trust the national jurisdiction of host States.

With the need of States for foreign investment, alternative means of settlement of investment disputes have been accepted by host States for investment. At the domestic level, States in their domestic legislation have become more receptive to the use of alternative means of settling investment disputes, as evidenced by Article 12, paragraph 1, of UAE Federal Law No. 19 of 2018 on Foreign Direct Investment (FDI), which stipulates that: "without prejudice to the right to litigation, conflicts and disputes arising from the FDI project may be settled by all alternative means of dispute settlement." Article 43 of Jordan's Investment Law No. 30 of 2014 also states that: "Investment disputes between the government bodies and the investor shall be settled amicably within a period of no more than six months. Otherwise, the parties to the dispute shall raise the dispute at the Jordanian Courts or settle the dispute in accordance with the Jordanian Arbitration Law, or refer to alternative means of dispute settlement by the agreement of the parties."

At the international level, many States have entered into bilateral, regional and international investment agreements such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention 1965). There is hereby established the International Centre for Settlement of Investment Disputes. Article 1 (2) of this Convention stipulates that: "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes…."

As for the Arab States, several conventions have been concluded to encourage investment at the level of the League of Arab States, starting with the Inter-Arab Investment Guarantee Corporation Convention, (IAIGC) which came into force on April 1, 1974. This Convention includes a special Annex on the procedures for the settlement of investment disputes, whether through negotiations, conciliation or arbitration (see Articles 2 and 3 of the Annex). Arbitration may only be resorted to after the means of settlement through negotiations have been

exhausted. Arbitration may only be used after conciliation cannot be agreed upon.

Moreover, the Unified Agreement for the Investment of Arab Capital in the Arab States was signed in 1980 and amended in 2013; the amended Agreement came into force on 24 April 2016. This amended Agreement has undoubtedly allowed the parties to agree on the appropriate means for the settlement of investment disputes. In the event that no means of settling investment disputes is not agreed upon or if the dispute cannot be settled by the means agreed upon among the investment parties, those disputes will be settled through the Arab Investment Court (AIC). (See Articles 22 and 23 of the Amended Unified Agreement.)

Arbitration is one of the most important alternative means of settling investment disputes between the host State and the investor. Using this means highlights many problems, the most important of which is the problem of determining the legal nature of the dispute whether it is an investment dispute or not, as well as determining its parties. Secondly, the problem of multiplicity of arbitration procedures, such as a dispute between State (X) and the investor before the International Center for the Settlement of Investment Disputes (ICSID) - Washington, the subject matter of which is a breach of the obligations arising from the investment agreement that binds the investor State to the host State, another dispute, the subject matter of which is a breach of the obligations applicable to the investment contract between the host State and the investor, is raised before another arbitral tribunal. How is the problem of multiplicity of procedures resolved? What if an award is handed down in one dispute, what is the impact of the award on the other dispute?

In order to solve all the above-mentioned problems, we will follow the analytical approach in addressing the following topics according to the following division:

1- Determining the concept of investment dispute, its parties and nature.
2- Multiplicity of arbitration procedures.

2. The Concept of Investment Dispute, its Parties and Nature

2.1 The Concept of Investment Dispute[1]

Investment disputes[2] are defined as: "disputes arising as a result of economic, political and social changes, which may result in conflicts of interest leading to intervention, as well as a result of a failure in the expectations for joint ventures. The parties may not be able to cooperate due to external pressures, cultural differences or differing expectations about the outcomes of the joint venture to be implemented. They also arise in implementing some contracts because of the imbalance between rights and obligations and eventually the lack of justice."[3] Regarding this definition, it is noticeable that it expanded on defining the concept of investment disputes, as it went further within the definition to list the causes for the dispute at a time when it has been supposed to define the meaning of the dispute emerging from investment contracts.

Investment disputes are also defined as: "disputes arising between the foreign investor and the government as a result of legal problems that affect the investor, thereby generating an investment dispute after which a particular entity is resorted for settlement. Such disputes occur when the host State guarantees the investment to the foreign investor in order to encourage investment on its territory as well as a set of incentives and tax exemptions, and then that State returns and violates one of these guarantees, incentives or exemptions."[4]

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[1] It should be noted that despite the importance of the Washington Agreement established for the International Center for Settlement of Investment Disputes (ICSID), the arbitration under the Center's supervision is still raising several important legal problems, particularly those issues related to the rules of the Center's substantive jurisdiction, the first paragraph of Article 25 in the Washington Agreement stipulated on the necessity that the dispute before the Center be directly associated to one of the investments, while the Agreement did not specify what is meant by the investment, which is considered an essential and indispensable issue for determining the center's Jurisdiction of case-matter. For more information, see Ahmed Qasim Farah & Rasha Hattab: "The Concept of Investment in Washington Agreement of 1965 between the Absence of the Text and the Conflicting Jurisprudences of the International Center for Settlement of Investment Disputes: A Critical Analytical Reading", Journal of Legal Sciences, University of Sharjah, Volume 17, no. 1, June 2020, pp. 803-807.

[2] "When the ICSID Convention was drafted, the delegates debated the definition of investment at length, without being able to reach an agreement on what an "investment dispute" should mean." Veijo Heiskanen, Of capital import: The definition of investment in international investment law. In Anne K. Hoffmann (Ed.), Protection of Foreign Investments through Modern Treaty Arbitration: Diversity and Harmonisation, (ASA Special Series; No. 34). Association Suisse de l'Arbitrage, 2010, p. 52.

[3] Taha Ahmed Ali, "Settlement of International Economic Disputes: A Legal Political Study of the Role of the International Center for Settlement of Investment Disputes", Dar El Jamaa El Jadida for Publishing, Alexandria, 2008, p. 11.

[4] Hafiza El-Sayed Haddad, "Contracts between States and Foreign Persons, Defining Their Nature and their Legal System", Dar Al-Fikr Al-Jami'y, Alexandria, 2001, p. 131.

It is noted that this definition does not contain and elaborate on elements of a legal definition. In order for a dispute to be considered an investment dispute, two prerequisites should be met: First, the investment dispute must be legal, thus excluding political disputes, and those arising from a conflict of interest between the parties. The dispute must, therefore, relate to the rights and obligations of the parties, and must relate to a legal right or obligation, or the consequences of a breach of a legal obligation. Second: The dispute should arise directly from the investment process, investment agreements are aimed at encouraging private foreign investments by working to settle disputes between host States and foreign investors. Investment disputes may arise as a result of the host State's breach of an investment guarantee to the foreign investor, for example, in the case of the confiscation of investment companies and enterprises subject to the investment project, the seizure of the invested funds and their transfer to public property, the failure to pay appropriate and remunerative compensation for such funds, or the carrying out of expropriation without payment for such funds.[5]

In order for us to have an investment, the following criteria must be met[6] : 1) The capital contribution to the host country's economy over a certain period of time that allows for the building of continuous links between the investor and the host country; 2) Giving the investor the right to exercise real influence and control over the management of his investment project; 3) This investment generates income; 4) Investment is at particular risk and 5) Stimulating the economic development of the host country. This requires the State to create the appropriate conditions to encourage foreigners to make economic benefits and contributions in the host State, and that the host State provides protection for the fruits of those benefits and contributions. The dispute over investment in which the said criteria are met, is therefore, an investment legal dispute.

Eventually, the investment dispute can be defined as: a dispute that arises among the parties to the investment contract, it is mostly between the host country and the foreign investor or its nationals, this is due to a lack of commitment of one of the parties to implement the obligations

[5] Sherzad Hamid Harouri, "Investment Disputes between the Judiciary and Arbitration", Dar Al-Fikr Al-Jami'y, Alexandria, 2017, p. 31.

[6] See decision of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4.

incumbent upon him as stipulated in the terms of the contract concluded between them. This definition shows the scope of the investment dispute in terms of persons and the causes that lead to the emergence of these disputes. [7] Whereas a dispute arises between foreign companies engaged in investment activity with a foreign capital[8] with the host country or with one of its nationals, regarding the causes for this dispute, they are multiple, it may be the result of a party's violation of rights or breach of the obligations as stipulated in the investment contract, or a change in the political or economic conditions or social changes in the host country, while companies usually adhere to what has been agreed upon and the continuation of their contractual relations without the need to amend the texts of the agreement, or for the host country to conduct substantive amendments in its national legislation in a way for public interest achievement, or a premature termination or unilateral action by one of the parties or of force majeure beyond the will of the parties thereto, which results in significant damage to the other party and requires the affected party to be compensated for damages suffered as a result of such violations or actions.

2.2 Parties to the Investment Dispute:

The relationship between the parties to the dispute raises some difficulties, due to the disparity and inequality in the legal positions of the parties to the dispute, where it is raised between two unequal parties. One of the parties to the dispute is the State, a sovereign person with special advantages, both within the framework of domestic laws and under international laws. The second party is often a foreign legal person who, despite his economic and financial power, does not enjoy any sovereignty or advantage and is not considered a person in general international law, i.e. a foreign investor.[9] Accordingly, we will refer to the parties to the dispute as follows:

First party: The contracting State is a party to the dispute:

[7] For more on the reasons for the investment dispute, see Mustafa Muhammad Al-Dosky, "Settlement of Foreign Investment Disputes by Amicable and Judicial Means, a Comparative Study", Dar Al-Kotob Al-Qanoniya, Egypt – UAE, 2016, pp. 57-82.

[8] See the definition of the "foreign capital" in Article 1 of the UAE Federal Law No. 19 of 2018 on Foreign Direct Investment (FDI).

[9] Hafiza El-Sayed Haddad, op. cit., p. 153, and Sherzad Hamid Harouri, op. cit., p. 48.

The existence of the State as a party to foreign investment disputes makes it characterized by privacy and complexity, particularly with regard to the appearance of its sovereignty, which strengthens its legal status, in addition to the foreign investor's adherence to arbitration as a means of settling his dispute with the host State, away from the national jurisdiction of the host State, because of his ignorance of the litigation procedures or his lack of confidence in the independence and impartiality of the judges of the host State, in addition to the inability to recourse to international justice directly because it is competent to consider disputes between persons of international law.[10]

Article 25 (1) of the International Center for Settlement of Investment Disputes Convention (ICSID Convention) stipulates that: "The jurisdiction of the Centre shall extend to any legal dispute, arising directly out of an investment, between a Contracting State, (or any constituent subdivision or agency of a Contracting State, designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." Accordingly, investment contracts are concluded between a State or one of its institutions with a foreign investor, therefore, they differ from international trade contracts, which are concluded between subjects of private law[11], and the State is a direct party to the investment dispute as a result of the breach of its obligations in the investment contract. This status is not limited to the State as a stand-alone legal entity[12], but extends to the constituent institutions of the State and the bodies it designates as well.[13]

The participation of a contracting State in arbitral proceedings is therefore a fundamental prerequisite for the Center's jurisdiction to be held, and the expression of the contracting State is not limited to the government of the investment host State, but extends to the institutions or bodies of the State, which the latter designates for the Center - that is, to be known and designated for the Center by the State - but the Convention

[10] Issam Eddin Al-Qassabi, "The Particularity of Arbitration in Investment Disputes", Dar Al-Nahda Al-Arabiya, Cairo, 2005, p. 20.
[11] See Issam Eddin Al-Qassabi, op. cit., p. 35.
[12] See Article 3 (1) of the UAE Federal Law No. 19 of 2018 on Foreign Direct Investment (FDI).
[13] See Bashar Mohammed Al-Assad, "Contracts for Investment in Private International Relations", Al-Halabi's Human Rights Publication, Beirut, 2006, p. 22.

does not contain any reference to the concept of these state agencies, even if Article 25 (1) of the Convention attempts to remove some ambiguities by giving the State the freedom to determine the institution or bodies that it represents in the proceedings by appointment to the Center.[14]

Among the awards issued by the international arbitration bodies on this issue, the award issued by the ICSID[15] in the dispute between the Turkish "ATA Construction, Industrial and Trading Company" and the government of the Kingdom of Jordan on May 18, 2010, where the issue of the subordination of the state's public agencies and bodies was raised. The Jordanian government stated that when the contract was concluded in 1998, it owned the majority of the shares in the Arab Potash Company (APC), but on October 16, 2003, it sold half of its share to a Canadian company, and when the dispute arose, APC was not owned by the Jordanian government.

The arbitral tribunal ruled that: "After October 2003, Jordan no longer held a majority interest in APC. Yet, even after having sold half of its shareholding in APC, the Government of Jordan continued to exercise a preponderant role in the conduct of APC's activities. Nothing is more telling in this regard than the offer extended by Jordan to (but refused by) the Claimant after the evidentiary phase of this proceeding to submit the ongoing Dike No. 19 dispute to a new commercial arbitration in lieu of proceeding in the Jordanian courts."[16] It should be noted that the arbitral tribunal relied on the criteria of control and supervision in determining the extent of the company's subordination to the Jordanian government.

The second party: national of another contracting State (foreign investor):

The rules of international law prevented the investor (individual) from suing the host State before the international judiciary, whether that person - the foreign investor – is a natural or legal person, except through his state to use the diplomatic protection prescribed to him, although it was not appropriate to settle investment disputes, but international law

[14] See Hafiza El-Sayed Haddad, op. cit., p. 45, Ramadan Ali Abdul Karim, "Legal Protection for Foreign Direct Investments", National Center for Legal Issues, Cairo, 2011, p. 108. Bashar Mohammed al-Asaad, op. cit., p. 30.

[15] ICSID Case No. ARB/08/2.

[16] Full details of the award available at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C264/DC1491_En.pdf.

had evolved in this area as it found a means to give the investor the right to file a lawsuit against the host State as a party to the dispute. The Disputes ICSID Convention authorized an investor to sue the host State before international courts as a party to the dispute without the need for his own State, as stipulated in Article 25, Paragraph 2 (a), of the ICSID Convention in 1965 for the jurisdiction of ICSID, by which it stated that a national of another contracting State means:

"Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute."

A natural person must be a national of another contracting State and not be a national of the State party to the dispute, i.e., to have foreign nationality on both dates: the date on which the resort to arbitration was agreed with the ICSID and the date on which the request for arbitration was registered with the secretary-general of the Center. He must have foreign nationality on both dates, and if he has foreign nationality on one of the two dates without the other, he is not entitled to apply for arbitration with the host State for investment, before the Center. The reason for this is to prevent the investor from manipulating and renouncing his original nationality upon acquiring a foreign nationality, in order to claim that he is a foreigner at the time of the request for arbitration.[17] Therefore, the text stipulated that the investor must be a foreigner on the two mentioned dates simultaneously[18]. Consequently, the natural investor who holds the nationality of the host State shall be excluded from the scope of personal jurisdiction and may not sue his State before the Center[19].

Article 25, Paragraph 2 (b), of the ICSID Convention states:

[17] For more details about a natural person who is a dual national of the state party see Lucy Reed, Jan Paulsson, Nigel Blackaby , Guide to ICSID Arbitration, The Netherlands: Kluwer Law International, 2011, p. 27.

[18] Sherzad Hamid Harouri, op. cit. p. 33.

[19] See the definition of the "foreign investor" in Article 1 of the UAE Federal Law No. 19 of 2018 on Foreign Direct Investment (FDI).

"Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

It should be noted from this paragraph that, in principle, for the juridical person[20] to be a party to the dispute, the person in question is required to have the nationality of a contracting State other than the State party to the dispute, except in the case in which the juridical person has the nationality of the contracting State party to the dispute, but the parties agree to consider him as a national of another contracting State as it is under control of the authorities of a foreign State.

2.3 The legal nature of the investment dispute:

Determining the legal nature of the investment dispute is useful in explaining the legal system governing it, and its impact on determining the quality of arbitration to which these disputes are subject, as well as examining the extent to which the State can be considered a party to arbitration with the foreign investor, as well as with regard to the procedures followed during the course of the arbitration process and the arbitral award and its enforcement and the determination of the applicable law.

The jurisprudence on determining the legal nature of the investment dispute has varied. There are those who classify foreign investment contracts as administrative contracts, since the State, as a sovereign State, is a party to them. The investor is committed to running a public facility, and that contract includes exceptional clauses that are not familiar in contracts regulated by private law, such as the right to own property and tax exemptions. The State or one of its institutions is the

[20] For more details about the concept of juridical person see Chester Brown and Ashique Rahman, Juridical Persons and the Requirements of the ICSID Convention. In Crina Mihaela Baltag (Eds.), ICSID Convention After 50 Years: Unsettled Issues, The Netherlands: Kluwer Law International, 2017.

main party in investment contracts, regardless of their commercial, industrial, agricultural or other activities.[21]

Consequently, disputes arising therefrom are of a general nature, in the sense that they are subject to public law, since the State or one of its institutions is a public person under public law within the State, and the State, as a sovereign person, has exceptional benefits that the other foreign party does not have. If the State contracts with a foreign investor to establish a railway line, the aim is to achieve a public interest, in which case the State appears in the contract as a public authority. It is known that contracts concluded by the State in this form are considered as administrative contracts, as they aim to run or organize a public facility subject to the provisions of public law, because the State imposes its powers, and the contract contains exceptional and unfamiliar conditions in private law.[22]

According to the proponents of this view, foreign investment contracts are administrative contracts, subject to public law, and thus deviate from the stable principles that govern contracts within the scope of private law, such as the principles of *pacta sunt servanda*, the power of will and the equality between the parties to the contract.

On the other side, there are those who have argued that foreign investment contracts are private law contracts, regardless of the existence of the State or a person in public law as a party to the contract, since this does not change its own nature, as it assumes that the legal status of the parties is equal and that the State is a party as a legal person in private law, and therefore investment contracts have special nature, since both parties to the contract are persons under private law[23].

Accordingly, there has been a number of consequences, the most important of which is that the terms for the formation of the contract and its implications are subject to the rules of civil law or commercial law, as the case may be. In addition, the parties have wide latitude in the choice

[21] Ghassan Rabah, "International Commercial Contract: Oil Contracts: A Comparative Study on State Contracts with Foreign Investment Companies," Dar Al-Fikr Al-Lubnani, Beirut, 1988, p. 386. Abdelbaqi Hassan Abdel Hamid, "Arbitration in International Administrative Contract Disputes", Ph.D., Faculty of Law, Ain Shams University, Cairo, 2013, p. 38.

[22] Ghassan Rabah, ibid, p. 391 and Abdelbaqi Hassan Abdel Hamid, ibid, p. 40.

[23]Ghassan Rabah, ibid, p. 389 and Aibut Mohando Ali, "Legal protection for foreign investments in Algeria", PhD thesis, Mouloud Mammeri University, Tizi Ouzou, 2006, p. 622.

of the law applicable to the contract, as well as in the selection of the settlement mechanism for investment disputes. Accordingly, it can be argued that the parties are bound by the contract on the basis of the principle of *pacta sunt servanda*. The settlement prevails over the principle of the power of will, whereby the contract constitutes the law of the parties to the investment contract, as well as having a self-sufficiency and the ability to free the investment from the national constraints of the investment in the host State.

In practice, the contract is based on balanced rights and obligations between the parties, without the contracting State having powers to distinguish it from the other party. These contracts are not accepted by their nature as an exceptional condition by the administration. Consequently, the investment contracts concluded by the State with the foreign investor in the manner of private law are governed by private law. According to this approach, the personality of the State shall be determined according to the desired objective, namely, if the objective of foreign investment is to benefit the State's interest, then we shall be subject to the intervention of the State as a public person in the investment contract. If the objective of foreign investment is to achieve a private benefit without prejudice to the interest of the State, we shall be subject to the intervention of the State as a private person in the investment contract. In the latter case, the foreign investor is reassured that his legal status is equal to that of the contracting State, on the understanding that no contract to which the State or one of its institutions is a party is considered an administrative contract, which may be subject to the provisions of private law if the State does not express its desire to apply the provisions of public law. Moreover, the legislator has granted the investor advantages that are in his interest to face the State. As for the exceptional and unusual terms that give the contract administrative status, it is decided for the benefit of the administration and not for the benefit of the contractor, and the state cannot practice the methods of public law on foreign investors under the pretext of its sovereignty, because the sovereignty of the state is limited in scope within its territory over its nationals rather than foreigners. Outside this scope, it is on an equal footing with the foreign contracted investor. Proponents of this view believe that, in order for the State to be a party to the administrative contract, the contract must relate to the activity of a public facility in

terms of its establishment, organization or operation, and therefore foreign investment contracts are not considered a public facility, since the investment activity does not operate regularly and its objective is not to provide a public benefit. Foreign investment contracts provide for the provision of public services and not for satisfying the needs of the public.[24]

There is a jurisprudence that considers investment contracts to be of a mixed nature, incorporating rules of private and public law. Rules relating to, for example, loans, leases, insurance and companies are private rules, and rules relating to taxation, the environment and the external remittances are public rules. If an investment contract includes some public rules and some private rules, then we are going to deal with an investment contract of a mixed nature.[25]

The investment contract usually goes through several stages as it requires pre-concluded and subsequent procedures and conditions related to the two laws, whose provisions overlap to regulate the investment process and are subject to the rules of public law when obtaining an investment license from the competent authority; because the administrative license must be obtained, as well as granting tax exemptions and financial facilities, non-expropriation and the investor's commitment to preserving the environment and transfer of technology and expertise. At the same time, they are subject to the rules of private law, such as borrowing, leasing of land or equipment, and trading of stocks and bonds. It is noted that the State enters into the investment contract as a double personality. Therefore, some describe this situation, in which the public nature is mixed with the private nature of some legal relations, as the gray area separating the rules of public and private law.[26]

After presenting these trends regarding the legal nature of foreign investment disputes, there seems to be a doctrinal disagreement about this, due to their failure to define the foreign investment contract, is it an administrative contract or a private law contract or of a mixed nature? In our view, the foreign investment contract appears to be of a

[24] Tariq Bin Hilal Albu Saidi, "The Legal Nature of Concession and Investment Contracts Concluded by the State according to the B.O.T. System", Al-Shari'ah and Law Journal, United Arab Emirates University, Issue number 36, October 2008, p. 61.
[25] Ibid, p. 63.
[26] Aibut Mohando Ali, op. cit., p. 622.

mixed nature because it combines the characteristics of both private and public laws.

Disputes arising therefrom are of a private nature and their settlement is subject to the rules of private law without administrative law, despite the fact that the State or one of its institutions is a party to the dispute; the aim of foreign investment is to stimulate economic development in the host State. We base this view on the following justifications:

1. Although the rules of private law and the rules of administrative law overlap in investment disputes, there is an important element that distinguishes these disputes and gives them their own nature, namely, the economic element, which is the existence of capital, and the goal that the investor seeks to achieve by transferring his capital from his State to the host State. Therefore, investment contracts between the State and the foreign investor are a license granted to the foreign investor to invest his money for profit in exchange for a set of privileges and rights granted by the State, while the foreign investor assumes a set of obligations.
2. There is a certain specificity that is added to disputes arising from investment contracts, including the legislative stability clause, the contractual clauses that constitute the law applicable to the contract, and the legislative clauses that are at the heart of the internal law of the State, under which the State pledges to the foreign investor not to modify the contract or to repeal the law applicable to the contract and other conditions. The majority of investment disputes are also subject to arbitration for settlement, on the basis of the arbitration clause of the investment contract, which is the case in private law contracts without administrative contracts, since the latter may not, as a general principle, include the arbitration clause, and the settlement of disputes arising therefrom is by administrative jurisdiction without recourse to international arbitration.
3. The term “investment contracts” cannot be confused with the term “State contracts” in its broad sense. Although investment contracts are the original subject of state contracts, state contracts are not limited to investment only. The state may contract with a

natural person in a certain field, which is not the case for investment contracts. For this reason, Article 25 of the ICSID Convention granted the parties (the State and investor) with the privilege to determine in advance the disputes that are subject to or that are not subject to the jurisdiction of the Center since ratification, acceptance or approval of the Convention or at any later date.

3. Multiplicity of arbitration procedures.

The scope of the investment dispute between the State and the investor is determined by the source of the breach of the obligations of either of them. For example, if the source of the breach of obligations is the bilateral investment agreement between the investor State and the host state, the subject of the dispute before the arbitral tribunal is whether or not there is a breach of the bilateral investment agreement, but if the source of the breach is the contract between the host State and the foreign investor, then the subject of the dispute is the breach of the terms of that contract. The question that looms large is what effect is the arbitral award in the arbitration dispute that the contract entails on the existing arbitration dispute concerning the breach of the investment agreement between the State and the foreign investor and vice versa, and what is the effect of the arbitral liability before the arbitral tribunal for breach of contractual obligation, and that which exists before another arbitration court to breach the contractual obligation of the bilateral investment agreement between the foreign investor State and the host state of the investment?

The answer to these questions will be as follows:

3.1 The impact of the award in the arbitration dispute originating from the contract on the existing arbitration dispute originating from the investment agreement between the parties to the dispute:

Here we assume that a dispute was referred to arbitration before the Sharjah Arbitration Center, the source of the breach is in the investment contract concluded between the Government of the United Arab Emirates

and a Jordanian investor. At the same time, a dispute was filed before the Washington Center for the Settlement of Investment Disputes on the pretext that the government of the United Arab Emirates violated the terms of the investment agreement between Jordan and the Emirates. What are the proposed solutions for such an assumption?

It is known that such a question is always raised and that its question is not considered surprising because of the agreement of the parties to settle their dispute by recourse to arbitration. In the absence of an agreement, States shall initiate in their investment laws the possibility of settling the dispute by alternative, amicable means of dispute settlement. This is considered a binding positive response and, if accepted by the other party, the arbitration agreement shall then be concluded. Bilateral investment agreements may provide for recourse to arbitration to settle the dispute between the foreign investor and the host State of the investment, thus envisaging an award by the arbitral tribunal competent for the contract dispute, as well as an award by the arbitral tribunal at the Washington Center in the dispute arising from the breach of the bilateral agreement.

The ICSID Convention or the arbitration procedure do not contain any provision that addresses such a presumption. We therefore consider it is necessary to refer to the awards of the Center in order to find a solution. In this regard, we find that, according to the awards of the ICSID Center, there is no effect of the arbitral award of an arbitral tribunal in a dispute concerning the investment contract on the arbitration procedures before the Washington Center for Dispute Settlement, because of the difference in the source of the dispute, the subject of the award of the arbitral tribunal is the investment contract, and the subject of the case before the Washington Center is the breach of an international agreement (the bilateral investment agreement between the investor and the host State for the investment). The subject of the two cases is therefore different, and, therefore, the award of another arbitral tribunal before the ICSID Center has not become *res judicata*.

In the case of *MALICORP LIMITED V. LA RÉPUBLIQUE ARABE D'ÉGYPTE* [27] the arbitration court at the ICSID Center has jurisdiction

[27] *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18.

over the dispute, despite an arbitration award by the Cairo Regional Centre for International Commercial Arbitration, which nullified the agreement between the Egyptian State and the Malicorp company that was established in Britain and Northern Ireland, on the basis of the statement that the arbitration court of the Washington Center, in accordance with the terms of Article 25 of the Status Convention and Article 8 of the arbitration agreement, and the applicant's application for violation by the defendant of Articles 2 and 5 of the 1975 bilateral investment agreement between Egypt, Britain and Northern Ireland, declared its jurisdiction. With regard to the validity of the arbitral award issued by the Cairo Regional Center for International Commercial Arbitration, the arbitration court declared that none of the parties is permitted to file a new dispute among the same litigants, and that dispute relates to the same right, in subject matter and cause before another arbitration court, and since the authentic terms of the res judicata were not achieved due to the failure of the two conditional units of the subject and the cause, it declared that it would not discuss the invalidity of the contract that was *res judicata* by Cairo Center, and rejected the plaintiff's company request, where the subject of a claim was for compensation for the expropriation procedures, arguing that the termination of the contract by the Egyptian Republic is not considered an expropriation, and this means that in this case, the Washington Center for the Settlement of Investment Disputes respected only the positive impact of the authoritative res judicata, It did not respect the negative impact of the principle of authenticity of *res judicata*. The same solution adopted by the Washington Center for Settlement of Investment Disputes has been followed by the Arbitration Institute of the Stockholm Chamber of Commerce.[28]

There is no doubt that this resolution is not in accordance with the law, since there is no so-called division of the subject matter of the case in view of the sources of rights, as the subject matter of the case is determined by the plaintiff's request.[29]

[28] See *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003.

[29] Walid Ben Hamida, L'arbitrage Etat-investisseur face à un désordre procédural: la concurrence des procédures et les conflits de juridictions, Annuaire Français de Droit International, volume 51, 2005, pp. 564-602.

Accordingly, the ICSID Center is competent to adjudicate investment disputes in accordance with the terms of the Washington Agreement for the Settlement of Investment Disputes, regardless of whether the source is a contract, national law, bilateral agreement, or multilateral agreement in the field of investment. If a dispute is submitted to have been reviewed by another arbitral tribunal, and the two cases involve the unity of parties, the subject and the reason, the new case must be dismissed for pre-adjudication, and this result is undisputedly regarded as an application of respect for the principle of *res judicata*.

It should be noted, that some bilateral investment agreements permit parties to resort to the ICSID Center in the event of no satisfactory award within a certain period of time by either party, whether it is issued by the courts of the host state for investment or by the domestic dispute settlement centers of the host state for capital[30], which would impede the multiplicity of proceedings before arbitral tribunals. There are also bilateral agreements that provide for a certain hierarchical arrangement that would prevent the dispute from being submitted to multiple arbitral tribunals at the same time. For example, Article 15 (4) of an agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the United Arab Emirates on the promotion and mutual protection of investments for 2016, which states that: "The investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

a) The International Centre for the Settlement of Investment Disputes having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington D.C. on March 18, 1965, and the additional facilities for the administration of conciliation, arbitration and fact-finding procedures; or
b) The Court of Arbitration of the International Chamber of Commerce; or
c) An international arbitral or Ad Hoc Arbitration tribunal to be appointed by a special agreement or established under the

[30] See Article 9 (2) of the Agreement for the Promotion and Protection of Investments between the UAE and Jordan for 2009.

Arbitration rules of the United Nations Commission on International Trade Law; or

d) If after a period of three months from written notification of the claim, there is no agreement to one of the above alternative procedures listed under sub Article (c), the dispute shall at the request in writing of the investor concerned, be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force".

Therefore, we believe that the authority of the award issued by the arbitral tribunal before the ICSID Center should not be recognized, in the sense that the Washington Center may not reconsider the dispute in respect of which an award has been rendered by an international or national arbitral tribunal, if the dispute arises before the Center between the litigants themselves without their characteristics changing and relating to the same right as the subject matter and reason, this is what's called the negative impact of the authenticity of the *res judicata*, according to which it is prohibited to reconsider the dispute with an initial claim in which the same dispute is raised again, provided that in each of the two previous and subsequent lawsuits, the unity of the litigants, the subject and the cause are available. The negative effect of the authenticity of *res judicata* is not applied in the case any of these terms is violated.

Whereas with regard to the positive impact of the authentic of the *res judicata* - which is the original effect of the authenticity for *res judicata* - it is not a requirement to arrange it when raising the dispute again before the center and the unity of the litigants, the subject and the cause, it does not need to adhere to it the availability of the litigants' unity, the subject and the cause, rather, it may be adhered to even if the subject matter of the previous lawsuit differs from the subsequent lawsuit, as it is sufficient to acknowledge what the previous *res judicata* has decreed, it means that the arbitral court before which the dispute was subsequently raised does not discuss what has already been decided by the arbitration tribunal. Since the courts of the Center are not considered as bodies to appeal before them with provisions of other arbitral bodies.

If, however, an arbitral award has already been issued by an arbitral tribunals of the Center and this award has been issued for breach of a contractual obligation or for breach of the terms of the BIT, this judgment shall be recognized as *res judicata* before any other arbitral tribunal which considers the same dispute with the same subject and reasons between the same litigants. The arbitral tribunal should not accept this lawsuit as respect for the principle of the negative impact of the authenticity of the *res judicata*. In the event that the conditions of authenticity are not met, the arbitration court must respect the issues that were discussed before one of the other courts of the center in respect of the principle of the positive impact of the authenticity of the *res judicata*.[31]

3.2 The impact of the existing arbitration dispute originating from the contract on the existing arbitration dispute originating from the investment agreement between the same parties to the dispute:

This presumption shall be achieved when the parties submit two arbitral proceedings before the same or two different sides, which shall be jointly with the same litigants, or/and the subject or/and the reason. This presumption shall undoubtedly entail a multiplicity of arbitral proceedings and may give contradictory arbitral awards. We will, therefore, show examples of the above-mentioned presumption and attempt to provide appropriate solutions.

[31] It should be noted that it is not right to go deeply in the distinction between the positive and negative impact of the arbitration verdicts as they are two opposite sides of one issue, if the plaintiff adheres to it, he is based on its positive impact, and if the defendant adheres to it, it was in implementation of its negative impact, but this does not negate that the action of The negative impact of the authenticity of the thing judged, which is the inadmissibility of reconsidering the dispute that has already been decided upon, it requires the availability of certain conditions branched on the basis of the judgments relativity, these are the unity of the opponents, the cause and the subject. As for the implementation of the positive impact of the arbitration verdicts, it does not require the availability of those conditions, on the contrary, because it is either as a result of establishing the authenticity of some types of verdicts, or as a result of establishing the evidentiary force of the verdicts in general. For further reading, see Abdel Hakam Fouda, The Authenticity of the res judicata and its Power in Civil and Criminal topics, Publisher Mansha'at al-Maaref in Alexandria, Edition 1994, p.p. 639-640.

A. If an investor-State X arbitral dispute is filed before the ICSID Center, and an arbitral tribunal is formed to adjudicate the dispute, and the dispute is caused by a breach of the terms of the bilateral investment agreement, which links the investor's State with the investment host State, then another dispute between the investment host State and the investor is referred to as a breach of the investment contract, shall we subject to multiple arbitral proceedings or not? The answer to this question will be ostensibly negative, on the pretext that the reason for the two lawsuits is different. But is there anything that prevents the arbitral tribunal that considers the dispute related to the breach of the terms of the bilateral investment agreement from considering whether the dispute constitutes an investment dispute or not? Suppose that the arbitral tribunal competent to consider the dispute caused by the breach of the investment agreement concluded that the dispute is not an investment dispute, contrary to the arbitral award issued by the tribunal formed to consider the dispute caused by the breach of a contractual obligation, is this considered a reason for the contradiction between the provisions? As a result, we propose that, in the absence of a solution in the rules of law governing arbitral proceedings before the ICSID Center, in particular if multiple disputes are linked, even if they have multiple sources, or if they originate from one source and are submitted to various arbitral tribunals of the same arbitration status, they be integrated[32] if the following conditions are met:

1. A request shall be submitted by one of the parties to the competent administrative authority of the Arbitration Center for the initiation of consolidation or integration proceedings.
2. Consolidation shall take place if the parties agree in writing to consolidate or if all the counterclaims or claims are based on a single arbitration agreement, or if such claims are based on more than one arbitration agreement. The arbitral proceedings are arising from or relate to a single legal relationship and the competent

[32] See Article 8 of the ICDR International Arbitration Rules at the International Center for Dispute Settlement. Available at: https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf. See also Article 10 of the Arbitration Rules of the Sharjah International Commercial Arbitration Centre, Issue II. Available at: http://tahkeem.ae/contents/files/rule_a.pdf . See also Article 10 of the Amended International Chamber of Commerce Arbitration Rules. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

authority of the arbitration center regarding consolidation resolution has found that the arbitration agreements are compatible or can be reconciled.

3. The consolidation resolution must take into account the requirements of justice and effectiveness of the proceedings.
4. The consolidation should take place in the first arbitral award of the lawsuit unless the parties decide otherwise.

On the other hand, despite the importance of this solution, it is limited in application. It is applied only if the procedures that the parties agreed to apply, or if the procedures in force at the arbitration center allow for the consolidation of multiple arbitral cases. We therefore hope that all States will work broadly to include consolidation or integration of arbitral actions in bilateral or multilateral investment agreements, with the aim of preventing the contradiction between the arbitral provisions[33].

B. If an arbitral proceeding is instituted before an arbitral tribunal at the ICSID Center, and the same proceeding is then filed between the same litigants and it relates to the same right as the same subject and reason before another arbitral tribunal, is it possible to resort to the principle of referral of jurisdiction in order for a single arbitral tribunal to have jurisdiction over the dispute?

We believe that there is nothing in theory to prevent a party from referring jurisdiction to the arbitral tribunal before which the dispute was finally submitted for referral to the arbitral tribunal before which the dispute was first submitted, on the grounds that such a plea shall be submitted to the arbitral tribunal during its consideration of the determination of its competence or not.[34] If an arbitral tribunal decides not to have jurisdiction over the dispute, the plea for the referral of jurisdiction is no longer of significant importance, but if both bodies accept their competence to consider the dispute, there is no legal objection to the provision to refer the jurisdiction to the arbitral tribunal to which the dispute was first brought when determining its competence to consider the dispute.

[33] Mathias Audit, "La coexistence de procédures contentieuses en matière d'investissements. étrangers", Anuario Colombiano de Derecho Internacional (ACDI), Volume 10, 2017, p. 352.

[34] See Sigvard Jarvin and Annette Magnusson, SCC Arbitral Awards, 1999-2003, JurisNet, LLC, USA, 2006, p. 427 and Jean-Jacques Arnaldez, Yves Derains, and Dominique Hascher, Collections of ICC Arbitral Awards, 2012-2015, Wolters Kluwer, ICC case, N 8733 IN 2003.

However, the application of the principle of referral of jurisdiction in arbitration is very difficult for several reasons, including:

1. The application of this principle requires the unity of the litigants, the subject and the reason of the two arbitral proceedings. For example, if an arbitral case is filed by Company X against the host State before the ICSID Center, where the subject matter of the lawsuit is related to the compensation claim as a result of breaching the bilateral investment agreement between the country of which the State holds its nationality and the host country for the investment, and another lawsuit was filed by one of the shareholders of the same company against the same State and based on the same agreement, the plea for referral will not be accepted on the pretext that the litigants union is not realized in the two lawsuits.
2. The plea for referral before the ICSID Center will not be accepted, as in practice the arbitral tribunal of the Center can ask the host State to suspend the domestic arbitration proceedings at least until the determination of its jurisdiction, as requested by the Center from the Islamic Republic of Pakistan in the in *SGS v. Pakistan* case to suspend the domestic arbitration proceedings in accordance with the PSI[35] arbitration agreement.
3. The absence of legal provisions in the ICSID Center governing the referral of jurisdiction, as well as the legal rules governing arbitral proceedings, whether at the level of local, regional or international arbitration centers.

C. It is not conceivable to consolidate or merge between two arbitration lawsuits filed with two arbitral tribunals of different centers if they are united in the subject, reason or litigants, as there is no superior to the arbitral tribunal on the subject of investment.

We conclude from all the foregoing that the referral of jurisdiction or consolidation has its flaws. Therefore, we hope that when agreeing on bilateral or multilateral investment agreements, States will provide for a gradual pyramid that organizes the process of recourse to the competent judicial authorities so that the case may not be brought before multiple

[35] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

jurisdictions at the same time, and may not be submitted to another party unless a ruling is not satisfied by any of the parties as provided for in Article 9 of the Investment Agreement between Jordan and the United Arab Emirates, or the parties are allowed to choose one of the means of dispute settlement, as for example, set forth in Article 15 of the Investment Agreement between Ethiopia and the United Arab Emirates.

4. Conclusion

An investment dispute means a dispute that arises between foreign companies and the host State or its subsidiaries as a result of any economic activity, whether financial, commercial, industrial or other aspects of economic activity with foreign capital. Arbitration is the most common method of settling such disputes.

While arbitration in investment disputes faces many problems, perhaps the most important of which is the problem of determining the criteria upon which to say that there is an investment dispute or not, and to solve this problem, we proposed criteria through which to determine whether the dispute is related to an investment or not, and these criteria can be summarized as follows: 1) The capital contribution to the host country's economy over a certain period of time that allows for the building of continuous links between the investor and the host country; 2) Giving the investor the right to exercise real influence and control over the management of his investment project; 3) This investment generates income; 4) Investment is at particular risk and 5) Stimulating the economic development of the host country.

The other problem is the multiplicity of the arbitration procedures. We proposed the application of the principle of *res judicata* and the non-consideration of the new arbitral case in the event of a ruling on the same case between the same litigants, and there was unity in the subject matter and the reason between the two lawsuits. But in the event the unity in the subject or cause between the two lawsuits is disturbed or breached, the positive impact of the authenticity of *res judicata* must be applied and acknowledging what has been *res judicata* of the first verdict.

If the same case is heard by the Arbitration Court (X) and the Arbitration Court (Y), the notion of consolidation or integration between the two claims must be applied if the two tribunals belong to a single

arbitration Center, but if the arbitration centers are to be varied, the idea of referral should be taken. If the notion of referral is found to be difficult to apply, we propose that bilateral investment agreements provide for a gradual pyramid that regulates the process of recourse to the competent judicial authorities so that the case may not be brought before several judicial authorities at the same time, and that the dispute may not be brought before another party unless the tribunals make an unsatisfactory judgment.