ISSLP
Interdisciplinary Studies in Society, Law and Politics

Original Research

Jurisdiction of ICSID in Foreign Investment Arbitration

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Received: 2025-03-11 **Revised:** 2025-10-03 **Accepted:** 2025-10-10 **Initial Publish:** 2025-12-05 **Final Publish:** 2026-07-01

The ICSID Convention is one of the most important treaties in international economic law, recognizing individuals as subjects of international law and serving as a forum for the settlement of international investment disputes accepted by many states (ICSID, 1965). A foreign investor should not be concerned about entrusting the fate of an investment dispute to domestic courts. Designating the host state's judiciary as the forum for dispute resolution increases the investor's concern regarding potential lack of impartiality. In contrast, ICSID, as a neutral arbitral institution with both subject-matter jurisdiction and personal jurisdiction—along with its Additional Facility—can encompass a wide range of foreign investment disputes and reduce foreign investors' concerns regarding the impartiality of the dispute-resolution forum, especially given that it is accepted by most countries. Iran is not a party to the ICSID Convention, despite being a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and despite expressing willingness to remove legal barriers and fill legal gaps in the field of foreign investment. Nonetheless, Iran's non-accession to the ICSID Convention does not appear to be justified.

Keywords: *ICSID, settlement of foreign investment disputes, investor, host state, ICSID jurisdiction*

How to cite this article:

Heydari Moghadam, N., Fatemi, A., & Kafaeifar, M. A. (2026). Jurisdiction of ICSID in Foreign Investment Arbitration. *Interdisciplinary Studies in Society, Law, and Politics, 5*(3), 1-10. https://doi.org/10.61838/kman.isslp.429

1. Introduction

The most evident needs of foreign investment are security and legal guarantees. Naturally, investors support laws, regulations, and treaties that offer the greatest protection for their interests. Foreign investment requires building trust between the investor and the host state. A foreign investor seeks certainty, and the domestic courts of the host state do not provide such assurance. Foreign investors' doubts and concerns about the host state's judicial system often encourage them to resolve disputes through arbitration. National laws, whose purpose is to create security and attract foreign investors, do not possess sufficient effectiveness. Over time, foreign investors have concluded that domestic laws, due to their changeability or the possibility of repeal, lack the necessary guarantees. Consequently, ICSID arbitration can address the concerns of foreign investors in this regard. For this reason, ICSID arbitral practice holds significant value. This Centre has been accepted by many states, and considering ICSID's specialized dispute-resolution process, which relies on arbitration, it acts benevolently to establish a balance between the host state and the investor. Through identifying appropriate legal guarantees, it has promoted a substantial degree of confidence. Article 1 of the ICSID Convention states that the purpose of the Centre is to provide facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention. The primary objective of states in establishing this Centre, as

expressed in the Preamble, is to meet the need for international cooperation and economic development through international private investment by establishing mechanisms for international conciliation and arbitration whose ultimate aim is to prevent disputes or resolve conflicts arising between Contracting States and nationals of other Contracting States.

The most important factor in foreign investment is the trust that must be created between the investor and the host state. This Centre can provide the required assurance. After such assurance was largely achieved through the establishment of the Centre, the next issue to be addressed is its jurisdiction. The jurisdictional requirements of ICSID are set out in Article 25 of the Convention. This article lists the requirements of jurisdiction and clarifies the Centre's subject-matter jurisdiction and personal jurisdiction, specifying that the Centre's jurisdiction requires the consent of the disputing parties. This article examines the various types of ICSID jurisdiction, foreign investment, and matters falling under ICSID jurisdiction.

2. A Brief Overview of the Washington Convention and the Nature of the ICSID Dispute-Settlement Centre

The Washington Convention, also known as the ICSID Convention, was opened for signature and ratification in 1965 and entered into force on 10 October 1946 after the deposit of instruments of ratification by 20 signatory states. By 10 December 2013, the Convention had been signed by 158 states, and 150 states had ratified it and deposited their instruments of ratification with the Secretary-General of the World Bank (Ebrahimi & Soltanzadeh, 2014). The Convention provides arrangements for resolving disputes between host states and foreign investors through arbitration and conciliation, administered by the International Centre for Settlement of Investment Disputes between States and nationals of other States, headquartered at the World Bank in Washington, D.C. The Washington Convention contains carefully drafted provisions concerning the settlement of investment disputes between states and nationals of other states, significantly reducing the concerns of foreign investors (Kazemian Zadeh et al., 2024).

The ICSID Centre was established by Resolution No. 214 of 10 December 1964 of the International Bank for Reconstruction and Development, with the cooperation of the United Nations Economic Commission, and it maintains a close connection with the World Bank, since under Article 5 of the Convention the President of the World Bank serves as the Chair of the ICSID Administrative Council, though without voting rights. The Convention was opened for signature on 18 March 1965 to all member states of the World Bank, members of the Statute of the International Court of Justice, and states invited by the ICSID Administrative Council, and entered into force on 14 October 1966 pursuant to Article 68(2) after twenty states had ratified it (Jalali, 2004).

The purpose of establishing the ICSID Centre is stated in Article 1 of the Convention, which stipulates the creation of the International Centre for Settlement of Investment Disputes. The purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

The Centre has two main organs:

(a) An Administrative Council composed of representatives of member states;

(b) A Secretariat consisting of a Secretary-General, Deputy Secretaries-General, and staff.

The primary aim of states in establishing the Centre, as set out in the Preamble, may be summarized as fulfilling the need for international cooperation and economic development through international private investment by creating mechanisms for international conciliation and arbitration whose ultimate purpose is the avoidance or settlement of disputes arising between Contracting States and nationals of other Contracting States. On 25 September 1967, pursuant to Article 6(1)(a)–(c), the Administrative Council adopted several sets of rules, including:

(a) The Rules of Procedure for Conciliation and Arbitration Proceedings (Institution Rules);

(b) The Arbitration Rules;

(c) The Conciliation Rules.

These rules entered into force on 1 January 1968 and were amended in 1984. Additionally, on 29 September 2002, the Administrative Council enacted further amendments to these rules, effective 1 January 2003. Moreover, the ICSID Additional Facility Rules of 1987, as

amended, also govern the settlement of investment disputes (Jalali, 2004).

The Centre itself, like the Permanent Court of Arbitration and the International Chamber of Commerce, is a tribunal with a permanent administrative structure. The Centre is composed of Conciliation Commissions and Arbitral Tribunals. Typically, an ICSID Tribunal consists of three arbitrators: each party—host state and investor—appoints one arbitrator, and the presiding arbitrator is chosen by agreement between the parties or, failing agreement, by the President of ICSID in his capacity as President of the World Bank. Thus, the process of selecting an arbitral tribunal aligns with other international arbitration models, whether commercial or inter-state, except that Article 39 requires that the majority of arbitrators be nationals of states other than the host state and the investor's home state (Azizi, 2023). Under the 1978 Additional Facility Rules, the ICSID Secretariat is authorized to administer certain conciliation and arbitration proceedings between states and foreign nationals that fall outside the scope of the ICSID Convention. These include disputes involving a state that is not an ICSID Contracting State, or disputes that do not qualify as investment disputes, provided they are not ordinary commercial disputes. A third function of ICSID in the field of dispute settlement is the acceptance by the ICSID Secretary-General to act as the appointing authority for arbitrators in arbitrations conducted under the UNCITRAL Arbitration Rules or other ad hoc rules. Arbitration under the ICSID Convention has been the most widely used mechanism within the Additional Facility system, and it does not require mutual consent to be expressed in a single instrument such as an investment contract. This represents one of the most important developments in ICSID arbitration; the background to this development lies in the 1965 Report, which previously required consent to be in a single instrument (Andreas.F, 2009).

In the ICSID system, dispute resolution is provided through Conciliation Commissions and Arbitral Tribunals. The advantage of conciliation is that its recommendations are not binding and do not possess res judicata effect, but serve only as guidance. Conversely, the Tribunal lacks advisory jurisdiction and possesses authority solely over contentious proceedings; therefore, conciliation compensates for this limitation. ICSID itself is a tribunal with a permanent administrative structure and serves as a dispute-resolution forum. States may accept ICSID's jurisdiction while excluding specific matters from the scope of the Convention. This is confirmed by Article 25(4) of the Convention, allowing a state to specify in advance the categories of disputes that fall within the Centre's jurisdiction. Under Article 71, any state may accept the Convention on a provisional basis and terminate its membership if adverse consequences for foreign investment arise. Furthermore, if a dispute regarding the interpretation or application of the Convention cannot be resolved through negotiation or another agreed method, either party may submit the matter to the International Court of Justice under Article 64. Article 71 further states that any Contracting State may withdraw from the Convention by submitting written notice to the depositary, with withdrawal taking effect six months after receipt of the notice (Azizi, 2023).

3. Concept of Foreign Investment

The dictionary of international investment law defines foreign investment as the transfer of funds or materials from one country to another for use in establishing the facilities of an economic enterprise in the latter country in return for direct or indirect participation in the profits of that enterprise. The manner in which these funds are utilized in managing an economic enterprise constitutes the main distinction between foreign investment and international trade. In other words, the acquisition of property belonging to foreign companies, institutions, and individuals for use in the economic sectors of the host state, with returns accruing to the benefit of the foreign investor, may be regarded as foreign investment. Accordingly, foreign investment can be formulated as any form of investment made by natural or legal persons in a country other than their state of nationality (Azizi, 2023). An example of a concrete definition of investment can be seen in the Salini v. Morocco case. In that dispute, the arbitral tribunal adopted the following elements or components to define investment:

a commitment to transfer resources to the host state (in cash, in kind, or in the form of labor);

a specific duration for the operations;

participation in risks;

and contribution to the economic development of the host state (Ebrahimi & Ja'fari Nadoushan, 2018).

The ICSID award in Salini v. Morocco constitutes a turning point in the evolutionary process of ICSID case law regarding the concept of investment.

In the past, the term "investment" was used without a precise legal definition. Today, however, in order to resolve related disputes, legal definitions and criteria are provided in treaties and arbitral practice, which will be examined below.

3.1. The Concept of Foreign Investment in National Laws

In the positive laws of states, especially their investment laws, a definition of "investment" or "foreign investment" is usually provided. The existing definitions in domestic law each rest on particular foundations and components, and can generally be divided into three groups:

first, company-based or activity-based definitions;

second, transaction-based definitions;

and third, asset-based or broad definitions of foreign investment.

Since each of these models or drafting techniques employs its own specific factors and characteristics, they differ in terms of their scope of coverage. It is therefore evident that the adoption of any definitional model by the domestic legislator has a significant impact on the range of situations covered by the law, such that, with the adoption of each specific model, certain forms of foreign investment fall outside the protective measures of the law, while others are brought within its protective scope.

A large portion of foreign investment takes place through the incorporation of local companies with joint ownership by foreign persons, or through contractual joint ventures, and is based on the share and degree of participation of foreign persons in the capital or management of companies and projects. This is a common pattern and reflects a company-based or activity-based approach, which is followed, for example, in the investment laws of Namibia enacted in 1992 and 2016. By contrast, under the transaction-based approach, only those assets that have a foreign origin and are brought into the territory of the host state from abroad are regarded as foreign investment and covered by legal protections. Thus, the essential factor in this approach is the transfer of capital from outside into the territory of the host state. In the asset-based approach, control or ownership of the assets used in the investment by foreign investors is considered the key factor. In other words, only those assets used in investment projects that are directly or indirectly under the control or ownership of foreign investors are granted legal protection (Hanji & Ostadzadeh, 2017).

One of the foundations of non-contractual ICSID arbitration is the host state's national investment law, under which the host state unilaterally offers to submit investment disputes to ICSID's jurisdiction. This offer becomes effective when the foreign investor accepts it and brings its claim before ICSID (Chankseliani, 2021). National investment laws that contain such unilateral offers of consent to arbitration, including ICSID arbitration, generally provide definitions or descriptions of investments covered by the law, framed according to one of the three categories mentioned above.

3.2. The Concept of Foreign Investment in Treaties

Many multilateral, and sometimes bilateral, treaties adopt ICSID-related standards and concepts concerning investment and also provide definitions of investment. For example, the treaty between the United States of America and Argentina defines investment as any kind of direct or indirect investment by nationals or companies of one party in the territory under the ownership or control of the other party, including, without limitation, partners' property, debts and services, and investment contracts. Many bilateral or multilateral treaties have set out criteria for investment such that, if these criteria are applied in commercial contracts, they become an important factor in characterizing a commercial contract as an investment contract.

The most important multilateral treaty that provides for the international protection of investments is the 1965 Washington Convention (ICSID), which does not itself define foreign investment (Baghban Rahim, 2021).

In bilateral investment treaties, whose consent clauses today constitute the basis for many cases referred to ICSID, specific definitions of investment are also provided. A review of these treaties shows that these definitions often share common features. Typically, they begin with a broad and general description incorporating the phrase "every kind of asset," followed by a non-exhaustive list of examples. This list usually includes industrial property rights, participation in companies, financial claims, intellectual and industrial property rights, concessions or similar rights. The same approach is found in many multilateral investment treaties, which commonly employ asset-based

definitions of investment. In such treaties, a general definition is usually formulated with terms such as "every kind of asset" or "every kind of investment," followed by a list of illustrative examples of investments. For instance, Article 1(6) of the Energy Charter Treaty defines investment as every kind of asset owned or controlled, directly or indirectly, by an investor and associated with an economic activity in the energy sector, and then enumerates its examples.

3.3. *The Concept of Foreign Investment in Arbitral Practice*

Arbitral practice has tended towards redefining the balance between the interests of the investor and the host state. Arbitral tribunals have moved in the direction of excluding unlawful or illegitimate investments—especially those made through corruption, fraud, deceit, or other illegal acts—from the protective scope of investment agreements. In more recent investment arbitral practice, it is frequently observed that the responsibility of the investor, particularly in relation to compliance with the laws of the host state, is emphasized, and transparency is also counted among these responsibilities (Hosseini Azad & Askari, 2021). Foreign investment can be examined in ICSID and non-ICSID arbitral practice. Non-ICSID arbitral practice includes institutions such as the International Chamber of Commerce, the Stockholm Chamber of Commerce, and others.

In light of the awards rendered by arbitral tribunals outside the ICSID system, it can be concluded that these tribunals do not generally adopt an entirely autonomous understanding of the concept of investment. Rather, in order to identify and understand this concept, they have sought to interpret and infer it from the treaty texts and relevant instruments, by applying principles and rules of interpretation, especially those enshrined in Article 31 of the Vienna Convention on the Law of Treaties, as well as other recognized principles and rules of international law. Accordingly, the approach of arbitral tribunals outside the ICSID system to the concept of foreign investment typically reflects the approach embodied in the treaties and instruments in question (Hanji & Ostadzadeh, 2017).

The Washington Convention (ICSID) does not define investment, but in many cases efforts have been made to articulate criteria for investment and to identify common elements in the various awards. From the perspective of the Washington Convention, the criteria of a defined duration, risk, and an expected return in the investment are particularly emphasized (Baghban Rahim, 2021).

3.4. *Disputes Arising from Foreign Investment*

Disputes arising from foreign investment constitute a specific type of dispute that calls for a particular form of arbitration. As noted above, a foreign investor will invest in the host state only when it feels secure regarding its investment and expects profitability. ICSID is one of the main centres for resolving such disputes.

The dispute between the parties must be a concrete (and not abstract) and legal dispute, and this is an essential condition. ICSID tribunals have no jurisdiction over moral, political, economic, or purely commercial disputes. Article 25(1) of the Washington Convention provides that the dispute must arise directly out of an underlying transaction that qualifies as an investment. The "directly arising" requirement is an objective jurisdictional criterion independent of the parties' consent. In other words, irrespective of the parties' agreement, the dispute must not only be related to an investment but must also have a reasonably close connection with it. Investment operations typically involve several ancillary transactions and legal acts: financing, leasing of property, marketing and distribution of products, letters of credit, and tax obligations. From an economic perspective, these transactions and acts are more or less related to the investment, but the question is whether such ancillary activities can be considered as "directly" arising out of the investment for ICSID jurisdictional purposes. The answer to this question may be ambiguous and requires a case-by-case assessment. The "directly arising" requirement refers to the relationship between the dispute and the investment, not to the investment itself.

In Fedax v. Venezuela, the respondent argued that the transaction in dispute concerned debt instruments issued by the Republic of Venezuela, which did not constitute a direct foreign investment and therefore could not be characterized as an investment under the Convention. In general, it is impossible to draw a precise dividing line between disputes that directly arise out of an investment and those that do so only indirectly. Nevertheless, ICSID practice has identified certain indicators to distinguish them, such as transactions that,

although ancillary, are vital to the investment (Emami, 2018).

4. Establishing ICSID Jurisdiction

Jurisdiction and consent are two legal concepts that, despite their frequent use by arbitral tribunals, have nevertheless caused some level of confusion. In a general sense, jurisdiction may be defined as "the power of a tribunal to decide a case." In international arbitration—where the term "jurisdiction" is often used synonymously with "competence"—the tribunal's authority is generally based on the consent of the disputing parties. However, in certain circumstances, an objection to jurisdiction may be influenced by party consent, requiring the tribunal to decide the case in its entirety (Wehland.H, 2017).

The subject-matter jurisdiction of ICSID, under Article 52(1), contains three components:

(a) the dispute must be legal;

(b) the dispute must arise directly from the underlying transaction;

(c) the underlying transaction must be an investment.

Although these elements constitute indicators for determining the subject-matter jurisdiction of the Centre, the Convention provides no definition for them. Aron Broches considers this omission wise and fully consistent with the consensual character of the Convention, noting that the primary rationale is the fundamental importance of the requirement of party consent. Nevertheless, this has been the source of numerous disagreements, varying interpretations, and divergent decisions in ICSID jurisprudence (Ebrahimi & Soltanzadeh, 2014).

4.1. Subject-Matter Jurisdiction

According to Article 25 of the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment. Thus, the essential requirements for subject-matter jurisdiction may be summarized as the existence of a dispute of a legal nature and the existence of an investment. As the first requirement, a legal dispute must exist between the parties, meaning that there must be disagreement regarding the existence or scope of a legal right or obligation, or the nature or extent of compensation for breach of a legal obligation (Wehland.H, 2017).

Occasionally, respondents argue that the tribunal lacks jurisdiction because the dispute is not legal but political or economic in nature. However, once claims are formulated in legal terms, tribunals consistently reject such objections and affirm their jurisdiction. In Suez v. Argentina, the tribunal held that the claimant had presented a legal dispute. The tribunal stated: a legal dispute, in the ordinary sense, is a disagreement concerning legal rights or obligations. In that case, the claimant clearly based its claim on legal rights allegedly granted under two bilateral investment treaties concluded by Argentina with France and Spain. Throughout its written submissions and oral pleadings, the claimant consistently formulated its claim in legal terms. Other tribunals have accepted similar explanations of legal disputes and regularly dismissed attempts to deny jurisdiction on the basis that the dispute was political or economic (Barati Darani, 2015).

The second essential condition for subject-matter jurisdiction is the existence of an investment. Although the ICSID Convention does not define "investment," it has long been argued, relying on the negotiating history, that the term must have an autonomous meaning. Therefore, when assessing jurisdiction, ICSID tribunals typically evaluate the existence of certain criteria considered inherent to the concept of investment. These criteria—commonly known as the "Salini test"—are described as follows:

commitment of resources to the host state's economy;

a certain duration of the commitment;

assumption of risk and expectation of profit;

contribution to the host state's economic development.

Some tribunals have rejected the fourth criterion (contribution to economic development), while others have attempted to add further criteria, particularly the requirement of good faith investment. Recent decisions increasingly emphasize that the Salini criteria must be applied flexibly and suggest that not all criteria need to be satisfied in every case (Wehland.H, 2017).

The dispute must be related to an investment. However, this rule does not require that the dispute relate exclusively to the investment itself. In Fedax v. Venezuela, the respondent argued that the disputed transaction—namely, promissory notes issued by the Republic of Venezuela—did not constitute a direct foreign investment and could not therefore be characterized as an investment under the Convention.

The tribunal rejected this argument, stating that jurisdiction may exist even for investments that are not direct, provided that the dispute arises directly from the relevant transaction (Ameri Barki, 2022).

Thus, subject-matter jurisdiction requires two conditions: first, the dispute must be legal in nature; second, it must be connected with an investment. It need not relate exclusively to the investment itself; rather, it must arise from an investment transaction.

4.2. Personal Jurisdiction

With respect to personal jurisdiction, Article 25(1) of the ICSID Convention requires that the Centre's jurisdiction extend to all legal disputes arising directly out of an investment between a Contracting State (or any constituent subdivision or agency designated by that State) and a national of another Contracting State, provided that the parties have given their written consent to submit the dispute to the Centre. Once given, such consent may not be withdrawn unilaterally. Personal jurisdiction, together with consent and subject-matter jurisdiction, constitutes one of the essential elements of ICSID jurisdiction. In effect, personal jurisdiction limits the Centre's authority based on the nature of the disputing parties. By enabling individuals to bring claims against states, the ICSID Convention elevates individuals to the status of subjects of international law. This is intended to provide an alternative to diplomatic protection and to depoliticize the investment environment, thereby contributing to the economic development of host states (Ameri Barki, 2022).

Article 25(2) defines the term "national of another Contracting State" as encompassing both natural and legal persons. Article 25(2) specifically excludes dual nationals who also possess the nationality of the respondent state (Wehland.H, 2017).

When the Convention refers to a "national of another Contracting State," it imposes two simultaneous requirements:

a negative requirement—that the private party must *not* possess the nationality of the respondent (host) state;

a positive requirement—that the private party must hold the nationality of a state that is a party to the Convention.

Nationals of a state cannot use international mechanisms to bring claims against their own government because there is no justification for replacing domestic dispute-resolution processes with international ones in disputes between a state and its own citizens. Moreover, states whose nationals may bring claims before an international body lose the right to exercise diplomatic protection and must comply with ICSID awards within their territories (Ameri Barki, 2022).

Regarding legal persons, Article 25(2) extends the Centre's jurisdiction to locally incorporated companies under foreign control, provided that there is a specific agreement to treat them as nationals of another Contracting State. It should be noted that Article 25(2) merely defines the outer boundaries of who may qualify as a "national of another Contracting State," leaving each Contracting State free to determine the nationality of its own legal and natural persons.

Another essential requirement, in the context of subject-matter jurisdiction, is the existence of an investment. Regarding personal jurisdiction and entities affiliated with a Contracting State, Article 25 identifies two cumulative conditions (Wehland.H, 2017).

A "national of another Contracting State" includes any natural person who, on the date of consent to submit the dispute to conciliation or arbitration—or on the date the request was registered under Article 28(3) or Article 36(3)—held the nationality of a Contracting State other than the state party to the dispute. This definition excludes any person who held the nationality of the respondent state on either of these dates. Additionally, it includes any legal person which, on the date of consent, held the nationality of a Contracting State other than the respondent state, and any legal person which, although possessing the nationality of the respondent state on that date, is controlled by foreign interests and has been treated by agreement of the parties as a national of another Contracting State for the purposes of the Convention.

5. Consent under the Agreement

In addition to the requirements of subject-matter jurisdiction and personal jurisdiction discussed above, Article 25 of the ICSID Convention makes the parties' consent to submit their dispute to the Centre mandatory. This consent is usually expressed through an agreement between the parties (Wehland.H, 2017). The first condition for the arbitral jurisdiction of ICSID is the conclusion of a written agreement between the parties, whether before or after the dispute arises. Apart from

the requirement that the agreement be in writing, no other formal condition is imposed. The parties may become bound and committed to ICSID arbitration through: a contract between a Contracting State and an investor who is a national of another Contracting State that contains an ICSID arbitration clause; or through a bilateral or multilateral investment treaty between states that provides for ICSID arbitration as the method for resolving disputes between a Contracting State and an investor of another Contracting State; or through the adoption of foreign investment promotion laws that foresee the settlement of disputes between the host state and foreign investors by referring them to ICSID arbitration. It must be emphasized that, once ICSID's jurisdiction has been accepted by the parties, unilateral withdrawal from such consent is not possible. Another important point inferred from the Preamble to the Convention is that mere ratification of the Convention does not in itself confer jurisdiction on ICSID tribunals. Thus, ratification of the Convention by a state does not, by itself, impose an obligation to refer disputes to ICSID. This has been expressly stressed in the Preamble in order to eliminate any divergent interpretations. Therefore, referring a dispute to ICSID arbitration requires that both the host state and the investor's home state be parties to the Convention and that they agree to ICSID's jurisdiction; however, resort to ICSID arbitration by a Contracting State is not obligatory and remains entirely voluntary (Mojtahedi, 2011).

6. The Position of the Additional Facility Rules in ICSID

Article 2 of the ICSID Additional Facility Rules limits their application to arbitration for the settlement of legal disputes which, within the meaning of Article 25 of the ICSID Convention, do not fall under the jurisdiction of the Centre, either because one of the states of nationality of the investor or the opposing party is not an ICSID Contracting State, or because the dispute does not arise directly out of an investment. In particular, where the jurisdictional requirements of Article 25 ICSID are met, this excludes the tribunal's jurisdiction under the ICSID Additional Facility Rules. Accordingly, Article 2 effectively creates a modified version of the jurisdictional requirements of Article 25 of the ICSID Convention. Furthermore, Article 4 of the ICSID Additional Facility Rules provides that any arbitration agreement referring a dispute to the ICSID Additional Facility requires the approval of the Secretary-General, who must verify that the underlying transaction has characteristics that distinguish it from an ordinary commercial transaction. Thus, the ICSID Secretary-General is not only entrusted with supervising the jurisdictional conditions under Article 2 of the Additional Facility Rules, but must also ensure that, even if the underlying transaction does not have the characteristics of an investment, it is nonetheless distinct from a routine commercial transaction. Article 4 of the Additional Facility Rules suggests that, without the Secretary-General's approval, any arbitration agreement referring to the Additional Facility Rules is invalid. In practice, this makes the Secretary-General's approval of the arbitration agreement an additional jurisdictional requirement for tribunals operating under the Additional Facility Rules (Wehland.H, 2017).

Regarding enforceability under Article 2, the Secretary-General must give consent only if the regulatory requirements have been satisfied and the transaction in question possesses characteristics that distinguish it from an ordinary commercial transaction. As to the enforceability of Article 2, the jurisdictional and administrative conditions set out in Article 12 of the Convention must be fulfilled, and the Secretary-General must consider the possibility that a conciliation commission or arbitral tribunal might be constituted to decide whether the dispute arises directly out of an investment. The Secretary-General's approval may therefore be conditioned on the consent of both parties bringing the claim, acknowledging ICSID's jurisdiction.

The Additional Facility becomes particularly important when only one party to the dispute is either a state party to the Convention or a national of a Contracting State. In principle, cases falling under the ICSID Additional Facility are those in which either the subject matter of the dispute does not relate directly to an investment, or one of the parties is not a Contracting State or a national of a Contracting State. The ICSID Additional Facility finds its practical relevance especially where, in the dispute at hand, neither the host state nor the foreign investor's home state is necessarily a Contracting State to the ICSID Convention. This is especially significant in the NAFTA framework, since among the NAFTA Parties only the United States has ratified the ICSID Convention, whereas Canada and Mexico are not ICSID Contracting States.

Article 1120 of NAFTA contemplates recourse to arbitration under the ICSID Additional Facility Rules and under the UNCITRAL Arbitration Rules as alternatives to arbitration under the ICSID Convention, which is considered the primary dispute-resolution mechanism. It is important to note that dispute settlement under the ICSID Additional Facility Rules allows parties to benefit from the same institutional guarantees that apply to disputes resolved under the ICSID Convention itself (Ameri Barki, 2022).

Article 12(1) of the ICSID Convention provides that the Centre's jurisdiction extends to all legal disputes arising directly out of an investment between Contracting States (or their constituent subdivisions or agencies designated by that State to the Centre) and nationals of another Contracting State, where the parties have given written consent to submit the dispute to the Centre. Under this provision, ICSID jurisdiction is limited both ratione materiae and ratione personae: subject-matter jurisdiction is confined to disputes arising directly out of an investment, and personal jurisdiction is limited to disputes where one party is a Contracting State and the other is an investor whose state of nationality is also a Contracting State.

Nevertheless, some investors and capital-exporting states have argued that the jurisdictional scope set out in Article 12 of the ICSID Convention is too narrow and restrictive. The requirement that both the host state and the investor's home state be Contracting States, and that the investor be a national of a Contracting State, causes many disputes to fall outside ICSID's jurisdiction. Moreover, the subject-matter requirement, given that in many cases it is contested whether the dispute "arises directly" out of an investment, further restricts ICSID's jurisdiction. This criticism of Article 12 led the ICSID Administrative Council, on 27 September 1978, to authorize the ICSID Secretary-General, upon request, to register and administer cases brought by parties falling outside ICSID's ordinary jurisdiction. Pursuant to this authorization, three types of proceedings were envisaged (Schreuer.C.H, 2001).

First, arbitration or conciliation between parties where one of them is not an ICSID Contracting State—namely, a dispute between a host state and an investor in which either the host state is not a Contracting State or the investor is a national of a non-Contracting State. Second, arbitration or conciliation between a host state and an investor where at least either the host state or the investor's home state is a Contracting State, but the dispute does not arise directly out of an investment (Golsong.H, 1986).

7. Conclusion

The principal concern of the foreign investor is a lack of confidence in the courts of the host state; the foreign investor is not assured of the impartiality of that state's judiciary. Foreign investment initially requires the creation of trust between the investor and the host state. Disputes arising from foreign investment constitute a specific category of disputes that calls for a specific form of arbitration. A foreign investor will invest in the host state only when it feels both secure about its investment and confident of profitability. The International Centre for Settlement of Investment Disputes has provided a forum for resolving investor–state disputes that has fostered such confidence. As a first condition for ICSID jurisdiction, there must be a legal dispute between the parties. Another essential condition, in terms of subject-matter jurisdiction, is the existence of an investment. Thus, ICSID jurisdiction requires two elements: first, that the dispute be legal in nature; second, that it be connected with an investment. It need not relate exclusively to the investment itself; it is sufficient that the dispute arise from an investment transaction. Party consent to submit a dispute to ICSID is mandatory. In addition to these two types of jurisdiction, the ICSID arbitration framework includes the Additional Facility Rules, which also play an effective role in ICSID arbitration and influence the scope of the Centre's jurisdiction. The Additional Facility becomes especially important when only one party to the dispute is a Contracting State or a national of a Contracting State, or when the dispute does not relate directly to an investment. Such cases fall under the ICSID Additional Facility and may still be resolved within the ICSID institutional framework. The ICSID Convention provides a satisfactory mechanism for the settlement of investment disputes, and its provision for reservations has contributed to the increase in its membership. The fact that the Convention has been signed by more than 150 states and ratified by a large majority of them confirms this claim. ICSID tribunals, supported by the Additional Facility Rules—which mark a new chapter in

the settlement of international investment disputes—have created a secure environment for foreign investors.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

Acknowledgments

We would like to express our gratitude to all individuals helped us to do the project.

Declaration of Interest

The authors report no conflict of interest.

Funding

According to the authors, this article has no financial support.

Ethical Considerations

In this research, ethical standards including obtaining informed consent, ensuring privacy and confidentiality were observed.

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