EVOLUTION OF THE INTERNATIONAL REGULATION OF FOREIGN DIRECT INVESTMENT IN THE DEVELOPING COUNTRIES: THE IMPORTANCE OF THE ICSID MECHANISMS AND BITS

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ABSTRACT

The rule of law, in the context of economic development, is important not only as a means but as an end in itself. To ignore the role of law and the rule of law in discussing the development of the country's economy - is impossible, as well as the importance of FDI - for the development of the country. Developing countries need to ensure a speedy and reliable settlement of foreign direct investment disputes. Countries with emerging economies that have been able to find some investment but have failed to grow local investment should strive to maintain a more balance between offering safeguards and regulating trade in FDI while encouraging development. These states should continue to attract investment while enhancing local one. The purpose of this article is to explain the importance of international legal mechanisms for the protection of foreign direct investment in the country's development. In particular, assess the impact of the ICSID Convention and bilateral investment treaties on international legal regulations in developing countries.

INTRODUCTION

Current international investment law regime, *inter alia*, has been constructed considering the ideas of development for States.[1] By way of illustration, preambles of numerous international investment treaties,[2] including trade and investment promotion treaties[3] contain promises of stability and security; the idea is of great importance on the negotiations agenda as well.[4]

In a contemporary setting, the rule of law has become significant not only as a tool of development policy, but as an objective for development policy in its own right.[5] Pursuant to one appraisal, economic development is a fruit of interaction between law and the State's economy.[6] Support for and maintenance of the economic

[1] Jose A. Zarate, "The in Dubio Pro Development principle: A Right to Development in Trade and Investment Regimes," Denv. J. Int'l L. & Pol'y 43, (2015): 333.

[2] Felix O. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States," Rich. J. Global L. & Bus. 13, (2014): 217-261; David Williams and Simon Foote, "Recent Developments in the Approach to Identifying an "Investment" Pursuant to Article 25(1) of the ICSID Convention, Evolution, Investment Treaty Law and Arbitration", in Chester Brown and Kate Miles (eds.), "Evolution in Investment Treaty Law and Arbitration," Cambridge University Press, (2011): 47-48.

[3] See U.N. Conference on Trade and Development, International Investment Agreements: Flexibility for Development, Geneva, UNCTAD/ITE/IIT/18 (2000).

[4] Constantine Michalopoulos, "Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries" (2000) [working draft].

[5] David M. Trubek, and Alvaro Santos, "Introduction in the New Law and Economic Development: A Critical Appraisal, Cmbridge University Press," (2006): 1.

[6] To showcase the importance of the share legislative processes had in the economic growth and development of China see Donald Clarke, "The Role of Law in China's Economic Development, in China's Great Economic Transformation," SSRN Electronic Journal (2008): 1, accessed December

development process is the challenges for State's political and economic activities.[7] Further, globalization has made the development a challenge itself.[8]

Even though, several scholars question the role of law in the economic development, in particular with regard to international economics,[9] it is practically impossible to turn a blind eye to the function of law and rule of law throughout the discussions around the economic development of States.[10] The same is true for the importance of foreign direct investment in relation to the development of States.[11] Therefore, a legal consideration of the interplay between law and development in the process of economic development of States is pressing.

The aforementioned is demonstrated by the fact that the interplay between international law and development, in the context of global economics, has been emerged as a central subject of scientific studies throughout the past decades.[12] On the other hand, the improvement of the international investment environment through foreign direct investment protection has become one of the primary purposes of international investment law.[13]

After half a century of its establishment, World Bank Group institution, International Centre for Settlement of Investment Disputes (*hereinafter,* ICSID), is a synonym for the international investment law field.[14] As for the Convention on the Settlement of

15, 2019, doi: 10.2139/ssrn.878672; for the interaction between law and economic development in the African region see also Mashood Baderin, "Law and Development in Africa: Towards a New Approach," (2011): 2-45.

7 Tawia Ocran, "Law in Aid of Development: Issues in Legal Theory, Institution Building, and Economic Development in Africa," Ghana Publishing Corporation (1978); 17, Okpe, "Endangered Element of ICSID Arbitral Practice," 219.

8 Shahid Yusuf, "Globalization and the Challenge for Developing Countries," (World Bank Policy Research Working Paper No. 2618)(2001).

9 Robert Pritchard, (ed.). "The Contemporary Challenges of Economic Development, in Economic Development, Foreign Investment and the Law" (1996): 1-3; Krista Nadakavukaren Schefer, "Poverty and the International Legal System: Duties to the World's Poor" (2013); Marie-Claire C. Segger "Sustainable Development in World Investment Law", (2011); Julio Faundez, "Governance, Development and Globalization: A Tribute to Lawrence Tshuma" (2000); Paul De Waart, "International Law and Development", (1988).

10 Amanda Perry Kessaris,. (ed.), "Law in the Pursuit of Development: Principles Into Practice". (2010): i, xvii.

11 Genevieve Fox,. "A Future For International Investment? Modifying Bits To Drive Economic Development," 46 Geo. J. Int'l L., (2014): 229-259; Alec R. Johnson "Rethinking Bilateral Investment Treaties In Sub-Saharan Africa" Emory Law Journal, 59 Emory L.J. (2010): 919.

12 Vintila Denisia, "Foreign Direct Investment Theories: An Overview of the Main FDI Theories" 3 Eur. J. of Interdisc. Stud. (2010): 53-59.

13 For example, Multilateral Investment Guarantee Agency (MIGA) was established by World Bank, inter alia, for the attraction of private investments with the view to the development of developing countries' economies, see Ibrahim F.I. Shihata "MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency" (1988): 22, Okpe, "ICSID Arbitral Practice," 224.

14 Sergio Puig, "Emergence & Dynamism International Organizations: ICSID, Investor-State

Investment Disputes between States and Nationals of Other States[15] (*hereinafter*, the ICSID Convention), it has become the unparalleled mechanism for the promotion and protection of the host State's economy.[16] Moreover, pursuant to the appraisal of World Bank advisor and former Secretary-General,[17] ICSID "in addition to conflict resolution mechanism, is an organization with the aim of depoliticizing investment disputes."[18] In particular, "formalization of dispute resolution has encouraged stability and has replaced the law of the strongest."[19]

However, ICSID constituent treaties indicate three primary purposes of the institution.[20] First, the purpose of the Centre is the protection of foreign investment through the promotion of investment disputes resolution.[21] Second, the ICSID Convention should foster the inflows of investment[22] into developing countries.[23] Provision of guarantees for investors in the form of investor-State arbitration "would additionally promote and stimulate investment inflows into the territories of interest."[24] Accordingly, ICSID has been established out of the belief that investment protection fosters the movement of capital and, consequently, this process supports the economic development of the third world countries.[25]

Besides, the third purpose of ICSID is "to develop uniform vision" among investors and host States.[26] To some extent, this purpose combines the former purposes, as "the establishment of an organisation for dealing with the conflicts between States and foreign investors, might be one of the most important steps towards the creation of uniform visions and consequently it might foster private international capital

Arbitration & International Investment Law", 44 Geo. J. Int'l L. Winter, (2013): 531-607.

[15] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[16] David Caron, "ICSID in the Twenty-First Century: An Interview with Meg Kinnear", PROC., 105th Ann. Meeting of The Am. Soc'y of Int'l Law, (2011): 413.

[17] Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA", 1 ICSID Rev. Foreign Inv. L.J. (1986).

[18] Shihata, "Greater Depoliticization of Investment Disputes".

[19] Shihata, "Greater Depoliticization of Investment Disputes".

[20] Ibironke T. Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World," 8 San Diego Int'l L.J. (2007): 345-357.

[21] Odumosu, "Relevance of ICSID", 358.

[22] Odumosu, "Relevance of ICSID", 358.

[23] The term "Third World Countries" appeared during the Cold War to define less-developed countries not aligned with either developed capitalist countries or Communist bloc. Low-income countries mainly include African and Latin American countries; Middle-income Third-World Countries mainly include Asian countries with high indexes, see Pam Slater, "Environmental Law In Third World Countries: Can It Be Enforced By Other Countries?", 5 ILSA J Int'l & Comp L., (1999): 519.

[24] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 5 I.L.M. 524, (1965):12.

[25] Odumosu, "Relevance of ICSID", 359.

[26] Odumosu, "Relevance of ICSID", 359.

inflows into the States, which do have such a will."[27]

Together with the ICSID system, Bilateral Investment Treaties (*hereinafter,* BITs), important sources for international investment law,[28] not only consider the possibility of dispute resolution through international mechanisms, but acknowledge the principle of rule of law against the foreign investors.[29] The existing models of BITs highlight the protection of investors[30] and propose the type of treatment to the foreign investors, which cannot be provided by the host State's legislation.[31] In addition, the vast majority of contemporary BITs regulate the foreign investment in the States which have a developing economy.[32]

Therefore, the purpose of the present article is to define the importance of the international apparatus of foreign direct investment protection for the development of States. In particular, the potential influence of the ICSID Convention and BITs international legal regulation on the developing countries will be explored.[33]

1. DEFINITION OF THE ECONOMICALLY DEVELOPING COUNTRIES

In the course of the discussions around the economically developing countries, before anything else, the term should be defined. Especially, as it has been already noted, the purpose of the ICSID Convention was to promote economic, in general, and Third-World Countries, in particular, development. However, in the contemporary setting, classification as a Third-World Country is not a usual phenomenon and these States are recognized as parts of economically developing countries.[34] Further, several arbitral tribunals, in the decision-making process, have considered the general development of a State, i.e. together with the economic development, socio-political conditions were examined in the course of determination of the extent of

[27] ICSID Report, supra note 24, at 9; see also International Bank for Reconstruction and Development, Report of the Executive Directors on the ICSID Convention, 18 March 1965, Para 12.

[28] Wolfgang Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality"42 Yale J. Int'l L., (2017): 3.

[29] Leon, E. Trackman "The ICSID Under Siege", 45 Cornell Int'l L.J., (2012): 627; For the evolution of China's investment treaties see Alex Berger, "Investment Treaties and the Search for Market Access in China, Investment Treaty News", IISD, (2013), available at: https://www.iisd.org/itn/2013/06/26/investment-treaties-and-the-search-for-market-access-in-china/.

[30] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," 46 Harv. Int L.J. (2005): 74-76.

[31] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law," (2012): 13.

[32] Elizabeth Moul, "The International Centre for The Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime", 55 Santa Clara L. Rev., (2015): 885.

[33] For the impact of arbitral practice on the legislative process see Mark S. Manger and Clint Peinhardt "Learning and Diffusion in International Investment Agreements" (7th Annual Conference on the Political Econ. of Int'l Org. (2014), available at: http://www.uni-heidelberg.de/md/awi/peio/manger__peinhardt_26.08.2013.pdf.

[34] Salacuse and Sullivan, "Bilateral Investment Treaties,", 875-890.

the violation and the amount of compensation.[35]

Accordingly, the determination of the terms "development" and "economic development", as well as "developing" and "economically developing" would be proper. In particular, ascertainment of the potential of equating the terms with the developing countries is of core importance.

At the outset, it should be noted, that the essence of the term "development" has been changed over time.[36] For instance, in the 50s and 60s of the past century, development indicated economic growth only, which was measured by the calculation of Gross Domestic Product (GDP).[37] Throughout the 1950s, the world has been divided into two parts: poor and wealthy parts.[38] Later, in the course of determination, fair redistribution of the economic development fruits saw the daylight.[39] Exactly at this point, social, political and other aspects became interconnected to the idea of development.[40]

In addition, while the essence of development was undergoing changes, the term was employed for two meanings: development, as a unity of goals, and development, as a process leading to those goals.[41] When the term was employed as an equivalent to the goal, it was assumed that development entailed economic welfare, poverty eradication, improved healthcare, better education, etc.[42]

International law does not define uniformly the terms "development" and "developing countries". Even though many international organizations exist with the aim to promote development,[43] the criteria for the selection of States are diverse.

[35] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001; William Nagel v. The Czech Republic, SCC Case No. 049/2002 Award, 9 September 2003; Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award June 2012.

[36] Michael Cowen. and Robert Shenton "The Invention of Development, in Jonathan Crush" (ed.), (1995): 25.

[37] Hilmar Hilmarsson, "Managing Risks in Cross Border Energy Projects in Emerging Markets", Review of International Comparative Management Vol. 13, Issue 5, (2012): 717.

[38] Ricardo Contreras, "Pursuing the Good Life: The Meaning of Development as It Relates to the World Bank and the IMF," 9 Transnat'l L. & Contemp. Problems, Spring (1999): 93. The list of wealthiest States included the vast majority of Western European countries, Canada and the United States of America; the second category poor States, including Latin American, Asian and African States, representing 75 percent of the world population.

[39] Hilmarsson, "Managing Risks," 718.

[40] Hilmarsson, "Managing Risks," 718.

[41] Salacuse and Sullivan, "Bilateral Investment Treaties," 876.

[42] Salacuse and Sullivan, "Bilateral Investment Treaties," 876.

[43] For example, Food and Agriculture Organization of the United Nations (FAO), International Fund for Agricultural Development (IFAD), International Monetary Fund (IMF), The United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), International Bank for Reconstruction and Development, World Health Organization, etc.

For instance, developing countries comprise a majority of World Trade Organization (WTO), however, there is no WTO definition of "developing countries".[44] The status depends upon the assessment of the State itself, [45] i.e. members announce for themselves whether they are "developed" or "developing".[46] The number of "developing countries" also comprises "Least Developed Countries" (LDCs).[47] Therefore, with regard to the analysis of the WTO system, these categories are taken into consideration.

International Monetary Fund (IMF), on the other hand, differentiates between developing economy,[48] developed and developing countries.[49] Sometimes, the list of developing economies merges with the list of developing countries.[50] According to several authors, the IMF has just differentiated between developing countries and significantly developing countries.[51]

World Bank also employs its own method to classify countries as developing. However, as of 2016, the World Bank has changed its methods and refused to differentiate between developing and developed countries.[52] Consequently, the

[44] Peter Van den Bossche, "The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge University Press", (2006): 106.

[45] Peter Van den Bossche, "The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge University Press", (2006): 106.

[46] For the definition of the term see further information available at the web page of the World Trade Organization: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

[47] 47 countries are currently designated by the United Nations as "Least Developed Countries". The list of LDCs is reviewed every three year by the United Nations Economic and Social Council, in the light of recommendations by the Committee for Development Policy (CPD). The following criteria are used by CPD to determine LDC status: per capita income, human assets and economic vulnerability.
See:http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx.

[48] Emerging market economies [AU].

[49] The main criteria for the classification are: (1) per capita income level; (2) export diversification and (3) degree of integration into the global financial system.

[50] Lain Soulard, "The Role of Multilateral Financial Instituttions in Bringing Developing Companies to U.S. Markets", (1994) 17 Fordham Int'l L.J., gv. 37; Andy Chen, "Justifications and Limitations for Adopting Divergent Competition Policy and Law in Emerging Economies", 43 Denv. J. Int'l L. & Pol'y, (2015): 379.

[51] Daniel Benoliel, "The International Patent Propensity Divide," 15 North Carolina Journal of Law and Technology, (2013): 51.

[52] For the assessments regarding the World Bank decision, see Fantom Neil Fantom, (et al), "The 2016 edition of World Development Indicators is out: three features you won't want to miss, World Bank Data Blog" (2016), available at: http://blogs.worldbank.org/opendata/2016-edition-world-development-indicators-out-three-features-you-won-t-want-miss; Tim Fernholz, The World Bank is eliminating the term "developing country" from its data vocabulary, Quartz, (2016) available at: https://qz.com/685626/the-world-bank-is-eliminating-the-term-developing-country-from-its-data-vocabulary/; Matthew Lynn, Why the title of 'developing country' no longer exists, Telegraph, (2016), available at: http://www.telegraph.co.uk/business/2016/05/23/why-the-title-of-developing-country-no-longer-exists/ .

World Bank categorizes countries based on various characteristics, including geography and the average level of income.[53]

According to the World Bank Data Development Group, the reason for these changes, apart from the desire to collect analytically more accurate information, is the transformation of the term "development", consequent to the elaboration of the Sustainable Development Goals (SDGs)[54] by the United Nations.[55] In particular, the Millennium Development Goals (MDGs),[56] first and foremost, were elaborated for developing countries. There exist countries willing to help and countries willing to accept that support. Sustainable development goals, then again, conceives the development to be important for every State – it is universal.

In the course of discussions around the importance of foreign direct investment for the developing countries, the vast majority of authors follow the World Bank categorization.[57] This phenomenon might be explained by the fact that this organization has contributed greatly to the development of investment law. However, despite the categorization being changed in 2016,[58] the majority of States are mentioned as developing countries.[59]

Therefore, since there is no uniform approach to the term and the tribunals, in the course of investment dispute resolutions, employ the term "development" in its general sense, the analysis will make use of the terms "developing countries" and "developing economies", as elaborated by the World Bank and IMF.

2. THE EVOLUTION OF INTERNATIONAL LEGAL REGULATION OF FOREIGN INVESTMENT IN ECONOMICALLY DEVELOPING COUNTRIES

The evolution of international legal regulation of foreign investment in economically developing countries could be categorized into three stages.[60]

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[53] Based on income, the World Bank categorizes countries into the groups of Low, Lower-Middle, Upper-Middle and High income countries.

[54] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at: http://www.refworld.org/docid/57b6e3e44.html

[55] For the World Bank Data Development Group Members appraisal, see Umar Serajuddin and Tariq Khokhar, "Should we continue to use the term "developing world"?" (2016) available at: http://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world

[56] United Nations, The Millennium Development Goals Report 2013, 1 July 2013, ISBN 978-92-1-101284-2, available at: http://www.refworld.org/docid/51f8fff34.html

[57] Susan D. Franck, "Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes, Virginia Journal of International Law," (2014): 13.

[58] Countries are immediately reassigned on July 1 each year, based on the estimate of their GNI per capita for the previous calendar year. Income groupings remain fixed or the entire fiscal year (i.e. until July 1 of the following Year), even if GNI per capita are revised in the meantime.

[59] Wolfgang Alschner, "The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality," 42 The Yale Journal of International Law, (2017).

[60] Natalya Doronina and Natalya Semilutina, "Employment of Foreign Concepts of Law and Definitions on Market Economy Legislation," 13 Transnat'l L. & Contemp. Problems (2003): 508.

Throughout the 1960s, investment legislation creation came along with the aspirations of developing countries towards economic and political independence.[61] At this stage, States elaborated "differentiation" politics, restricted inflow of foreign investment through strict regulations and imposed high taxes in order to reduce foreign product import.[62]

According to several authors, the legislation regarding the investor-state relationship was characterized by antagonism. The non-existence of a powerful domestic economy led to becoming States more operational. Sometimes, States were the only ones, empowered to cooperate with the international organizations, which aimed at making investments.[63]

During the 1970s, when foreign investments became important for developing countries, investment legislation and its nature underwent changes. In particular, investment legislation has become more adapted to domestic and foreign private companies relationships.[64]

The legislation aimed at, *inter alia*, the adoption of the regime which would regulate foreign investments.[65] Sometimes, foreign investors were discriminated against.[66] The majority of investment legislation imposed restrictions upon the foreign investors, in order to maintain the capability of competition for the economically disadvantaged countries.[67]

In the mid-1970s, the nationalization of the foreign capital was at its high point.[68] The rationale behind this decision was to reduce the impact of foreign investments upon the economically developing countries and to control the economic ties to the outer world. The desire to create economically independent State has coerced numerous States to think of its own automobile and aircraft industries, mills, etc.[69] This period is deemed to be the first model of economically development countries' development.[70]

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[61] Doronina and Semilutina, "Foreign Concepts and Market Economy", 508.

[62] Doronina and Semilutina, "Foreign Concepts and Market Economy", 508.

[63] OECD, WTO and World Bank Group, Global Value Chains: Challenges, Opportunities, And Implications For Policy, Report prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014, at 22-19.

[64] Odumosu, supra note 20, at 376-384.

[65] Doronina and Semilutina, supra note 60, at 508.

[66] For instance, in the early 1970s, Common Andean Market Investment Code. (Agreement on Andean Sub-Regional Integration (26 May 1969, 8 I.L.M. 910) (1969)).

[67] Alexander Groh and Matthias Wich, "Emerging Economies' Attraction of Foreign Direct Investment," Emerging Markets Review 13 (2012): 210–229.

[68] United Nations, World Investment Report: Transnational Corporations and Integrated International Production, ST/CTC/156, 1993, at 17.

[69] David M. Trubekand Mark Galanter, "Scholars in Self-Estrangement: Reflections on Crisis in Law and Development Studies in the United States," Wis. L. Rev. (1974): 1062-1079.

70 Salacuse and Sullivan, "Bilateral Investment Treaties," 880.

During the 1980s, this model lost its relevance for several reasons. Firstly, it did not bring development. Secondly, the outer world has aspired to bring in changes in those countries, as a precondition for financial aid.[71] For example, the World Bank, the IMF, international commercial banks, and others imposed several principles, which are also known as "Washington Consensus". The principles required strict control over the budgetary shortages, currency exchanges, privatization of national properties, and openness to foreign trade-investment.[72] These things in sum amounted to the creation of the second model of development. It could be noted that foreign investment legislation was affected by international trade regulation.[73] In the contemporary setting, the economies of developing countries are characterized by the openness to the other parts of the world, in particular with regard to trade and investment. The ideas of closed economy and self-sufficiency have collapsed. This process demonstrated that more openness is needed and the Third-World countries have become more oriented to foreign relations.[74] These states consider the foreign investment as a capital increase, technological advancement or the possibility to integrate into the world market, and not as a threat to economic independence.[75] States enjoying their rights, guaranteeing and protecting the foreign investors might be underlined by several goals. For instance, having an impact upon private individuals through the monetary and trade policy; regulation of economic agents work through the fiscal, labour and other provisions; prevention of conflicts as a result of ideal economic system implementation, etc.[76] However, it is interesting to investigate, whether it is possible international investment guarantees to exist, which are non-derogable for States. If the answer is positive, what could be the importance of such a perspective for the developing countries.

3. IMPORTANCE OF THE ICSID CONVENTION FOR THE DEVELOPMENT AND THE ECONOMICALLY DEVELOPING COUNTRIES

The necessity of international guarantees and protection measures for foreign investors arose at the end of World War II. Internationally applicable programmes and concepts seemed to be essential, in particular for the economically developing countries.[77] The aspirations of colonies towards independence have made international development indispensable for the developing countries, including on the part of Great Britain, France, Belgium, and Portugal. Upon the request by the

[71] Salacuse and Sullivan, "Bilateral Investment Treaties," 880.

[72] The term "Washington Consensus" was adopted by the American economist, John Williams in 1989 and it comprises of 10 general directions.

[73] Among others, the doctrine, as enshrined in the General Agreement on Tariffs and Trade (GATT), regarding the necessity of competition among the developing countries, constructed the new generation of investment legislation. The prohibition of discrimination could be expanded onto investment relationships.

[74] Ibrahim Shihata, "The World Bank in a Changing World," (1995): 518-520.

[75] Salacuse and Sullivan, "Bilateral Investment Treaties," 885-886.

[76] Thomas J. Biersteker, "Reducing the role of the state in the economy: A conceptual exploration of IMF and World Bank prescriptions," International Studies Quarterly, 34(4) (1990): 477–492.

[77] Okpe, "ICSID Arbitral Practice," 225.

United Nations Secretary-General, 1952 Resolution prepared a survey,[78] and in 1954 Resolution was adopted, which called on States to invest capital in undeveloped countries.[79] Unanimously accepted Resolution recognized that "the flow of private investment has not been commensurate with the needs in those areas where rapid development is essential for economic progress."[80]

In the context of investment attraction and international development, the Resolution recommends to countries seeking to attract private foreign capital to "re-examine the domestic policies, legislation and administrative practices with a view to improving the investment climate...avoid discrimination against foreign investments, facilitate the import by investors of capital goods."[81]

According to one appraisal the Resolution has founded the interconnection between the development and foreign investments.[82] However, as it has been already noted, international customary law principles imposed numerous restrictions on foreign investors, including regarding the access to the court. This factor has facilitated diplomatic interventions and gunboat diplomacy.[83] The existence of the former was conditioned by the obligation to protect the foreign property with a view to international trade and investment development. However, this process was characterised not by legal, but by political connotations.[84] Further, the questions regarding the impartiality of the host State's judiciary in the course of foreign investment protection were irresistible.

Consequently, foreign protection investment emerged as a challenge in the context of international development. In other words, the non-existence of investment dispute resolution mechanisms, that would be acceptable for all, became the weakest point in the investment promotion and protection chain.[85] The problem was deemed to be of utmost importance for international organizations, including the World Bank. In the 1960s, the World Bank started to consider the problem of investment dispute resolution between investors and host States, as the issue impeded international development.[86] In several cases, the foreign investors and States approached the

[78] G.A. Res. 622 C (VII), para. 5, U.N. Doc. A/RES/622 (Dec. 21, 1952).

[79] G.A. Res. 824 (IX), U.N. Doc. A/RES/824 (Dec. 11, 1954).

[80] G.A. Res. 824 (IX), U.N. Doc. A/RES/824 (Dec. 11, 1954), para 5.

[81] G.A. Res. 824 (IX), U.N. Doc. A/RES/824 (Dec. 11, 1954), para 1 (a-c).

[82] Rosalyn Higgins, "Problems and Process: International Law and How We Use It," Oxford University Press (1994): 78-80.

[83] James Cable, "Gunboat Diplomacy, 1919–1991: Political Applications of Limited Naval Force," 3rd ed. New York: St. Martin's Press (1994).

[84] Potentially, the three-party conflict of the interests (foreign investor, host State and parent State) always existed. Mostly, investment disputes occur between investor and host State. The parent State might interfere in the dispute upon the request of the investor. In this scenario, the host State, while adjusting the dispute in accordance with the domestic legislation, could perceive the interference as a disregard to its sovereignty.

[85] Okpe, "ICSID Arbitral Practice," 231.

[86] Gautami S. Tondapu, "International Institutions and Dispute Settlement: The Case of ICSID,"

World Bank for the dispute resolution facilitation.[87]

Article 25 of the ICSID Convention establishes the jurisdiction of the Centre and notes that the jurisdiction extends to any legal dispute arising directly out of an investment. The report by the World Bank executive directors notes that "there was no attempt to define the term "investment". Since the consent of the parties and the mechanism were conferred the greatest significance, the States Parties determine by themselves the categories of the dispute upon which they confer jurisdiction to the Centre.[88]

The vague term has never been troublesome and in every concrete case, parties negotiate in the bilateral investment treaty the definition of the investment.[89] Accordingly, this approach is known as the two-tiered approach.[90]

Moreover, in the context of foreign investment protection evolution, it is important to note, that the material jurisdiction, as enshrined in Article 25 (1) of the ICSID Convention, merges with the question of whether the dispute concerns investment and not of whether the investment was made in accordance with the host State's legislation.

Thus, it was noted in the *Saba Fakes v. Turkey* that:
"the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be „legal or „illegal made in "good faith or not, it nonetheless remains an investment. The expressions „legal investment or „investment made in good faith are not pleonasms, and the expressions „illegal investment or „investment made in bad faith are not oxymorons."[91]

It remains true, that the development of the host State economy is a purpose of the Convention. However, it is not and cannot be the distinct criterion for the determination of investment.[92]

On the other hand, according to other approaches and several awards, the ICSID mechanism cannot be utilized for the foreign investment protection, if the investment has been made in a violation of the host State legislation or in bad faith, fraudulently, and corruptly. Thus, the convention protects only legal and *bona fide*

[22] Bond L. Rev. (2010): 81-83.

[87] For the extract from the speech of the World Bank president delivered at the annual meeting of the executive council, see ICSID, History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. II, Part 1, ICSID Publication, 1968.

[88] ICSID, Report of the Executive Directors on ICSID Convention, 2006.

[89] Dolzer and Schreuer, "International Investment Law," 60.

[90] Dolzer and Schreuer, "International Investment Law," 61-62.

[91] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010), para. 112.

[92] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010), para 111.

investments.[93]

It is interesting to note that international investment law and the ICSID tribunals are often criticized for putting investors in predominant positions; according to one assessment, this is the core principle of the whole system.[94] Despite the fact, that statistically investors and States lose the case on the same frequency, the costs and expenses are still significant for the economically developing countries, even if they just have to refute unreasoned claims.[95]

Despite the opinion that the status of developing country or membership in the international organization are associated with a better position in the ranking,[96] with regard to international investment relations the practice has gone in another way.

For instance, in 2007, Bolivia became the first developing country to refuse ICSID membership, when it went through the massive wave of nationalization.[97] In the same year, Ecuador restricted the area of potential disputes.[98] In particular, it announced that Ecuador would not agree to participate in the disputes concerning natural resources. In 2012, like Bolivia, Venezuela denounced the Convention. However, on the 10th anniversary of Bolivian decision, authors note that Bolivia is still actively participating in the ICSID disputes. The cases not only include the disputes arose before the decision communication[99] or registered after the 6-month period[100] but the disputes that arose after a while.[101]

Accordingly, the ICSID arbitration is never completely closed for investors and provides additional guarantees for foreign investors, restricts the easy escape for the developing countries. It is possible to conclude, that this is the reason why investment dispute resolution through arbitration has become more popular over

[93] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, para 114.

[94] Kathleen McArthur and Pablo Ormachea, "International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction," 28 The Review of Litigation (2009): 563.

[95] Yaraslau Kryvoi, "International Centre for Settlement of investment Dispute," Kluwer Law International, Vol. 37 (2010): 242.

[96] Axel Dreher "Membership has its privileges: The Effect of Membership in International Organizations on FDI," World Development Vol. 66, (2010): 346.

[97] Bolivia Submits a Notice under Article 71 of the ICSID Convention, 16 May 2007, News Release, available at : http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html

[98] Ecuador's Notification under Article 25(4) of the ICSID Convention, 5 December 2007, News Release, available at http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement9.htm

[99] Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2.

[100] E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia, ICSID Case No. ARB/07/28.

[101] In particular, the case war registered on 12th April, 2010, two years after the denunciation of convention by Bolivia. See Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8.

the years, in particular with regard to the economically developing countries.[102]

4. IMPORTANCE OF THE BILATERAL INVESTMENT TREATIES FOR THE DEVELOPING COUNTRIES

One of the forms for foreign investment protection – Bilateral Investment Treaties – was introduced in the 1950s for the first time and rapidly became an important element of international investment law.[103]

Pursuant to one appraisal, the reason for the Bilateral Investment Treaties application is "the amorphous character of customary international law, which made adequate protection of foreign investment impossible."[104] However, according to modern views, the core provisions of investment agreements, such as fair and equitable treatment, "have transformed into the rules of customary international law, binding upon all States, including those, that are not parties to Bilateral Investment Treaties."[105] This view is supported by several ICSID awards.

The fact that Bilateral Investment treaties were introduced by capital exporting States and not by the developing countries is indeed interesting. These States aspired to protect their companies and citizens from the rapidly changing circumstances on the foreign soil.[106]

In the 19th century, the US and the European States claimed that allies were rightful to enjoy minimal protection standards, in accordance with international law.[107] At the beginning of the 20th century, inter-State arbitration was introduced for investment guarantying ends, however, the disagreement over the protection degree emerged in the second part of the century.[108] Decolonization and socialism highlighted sovereign control over the natural resources,[109] which confronted the foreign property.

The developed countries responded to this through the conclusion of Bilateral Investment Treaties with the allying developing countries, and through the

[102] Adesina Bello "Arbitration: A panacea for investment disputes, Arabian Journal of Business and Management Review," Vol. 4, No.2 (2014): 14.
[103] Rudolf Dolzer and Margrete Stevens, "Bilateral Investment Treaties," Kluwer Law International (1995): 1-18.
[104] Rudolf Dolzer and André von Walter "Fair and Equitable Treatment: Lines of Jurisprudence on Customary Law," in Federico Ortino, Lahra Liberti, Audley Sheppard, Hugo Warner, "Investment Treaty Law," Vol. II (2007): 99.
[105] Stephen Schwebel, "A BIT about ICSID," ICSID Review,Vol. 23 (2008): 5.
[106] Dolzer and Schreuer, "International Investment Law," 310-12.
[107] Jonathan Gimblett and Thomas Johnson, "From Gunboats to BITs: The Evolution of Modern International Investment Law, in Yearbook on International Investment Law & Policy 2010-2011," (2011): 650.
[108] Gimblett and Johnson, "From Gunboats to BITs," 650.
[109] Muthucumaraswamy Sornarajah, "The International Law on Foreign Investment," Cambridge University Press (2010): 21-28.

elaboration of international arbitration mechanisms, that would lead to the international investment relations depoliticization. According to one approach, the culmination of this process was the creation of ICSID mechanisms by the World Bank.

Shortly, investment arbitration has emerged as a basis for investment law. Numerous scholars argue that investor-State arbitration has replaced international investment agreements. For instance, Thomas Wilde argues that investment arbitration has "fundamentally transformed the nature of Bilateral Investment Treaties."[110] Further, Joost Pauwelyn argues that international arbitration has "fundamentally changes foreign investment protection rules" and categorizes the generations of Bilateral Investment Treaties on the basis of the consent to investment arbitration. [111] Moreover, pursuant to another consideration, the investor-State arbitration promoted the creation of "new generation of investment treaties", which highlight the flexibility of the host States.[112]

For the developing countries, the Bilateral Investment treaties have two purposes: first, it stabilizes the investment environment and second, it complements the weak institutions of the host State. Without these, foreign investments could not be adequately protected.[113]

However, the extent of foreign investment increase inflow and the level of consequent development are controversial. Despite many analysis of the interlinkage between Bilateral Investment Treaties and foreign investments, there is no consensus over the effects of treaties on the increase of investment inflows. Some scholars argue that the reasons for this are the differences between the regions, States, and the essence of the treaties.[114]

Moreover, for some scholars, in the course of the discussion around the positive impacts of Bilateral Investment Treaties, the development promotion effect of foreign investments is controversial.[115] Theoretically, investment brings in finances, education, new technologies and diversification of the domestic market. Further, in particular, for the economically developing countries, investment delivers less dependence on international aid.[116]

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[110] Thomas Walde, "Interpreting Investment Treaties: Experiences and Examples, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer," (2009): 724-748.
[111] Joost Pauwelyn, "At the Edge of Chaos: Foreign Investment Law as a Complex Adaptive System, How it emerged and how it can be Reformed," 29 ICSID Rev. 372 (2014): 395-96.
[112] UNCTAD, (2012) World Investment Report: Towards a New Generation of Investment Policies.
[113] Alec R. Johnson, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa," 59 Emory L.J. 919 (2010): 925.
[114] Johnson, "Bilateral Investment Treaties in Sub-Saharan Africa," 925.
[115] Joshua Boone, "How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies," Global Bus. L. Rev. (2011): 187.
[116] Boone, "Adapt Bilateral Investment Treaties to Provide Benefits to Economies," 190-194.

However, in investor-State bilateral treaties, the non-existence of the stable obligations is an impediment for development in several directions. Or instance, since there exists no obligation to employ domestic laborers, foreign investors mostly recruit professional foreigners. [117] Accordingly, in this manner, foreign investment does not facilitate the employment and training of domestic workers.

Further, sometimes the treaties do not recognize the need for dissemination of new technologies and education in the host State. Consequently, the investors tend to create technologies in the parent States, send them in the host State and control them through the foreign hands, without sharing it to the host State.

CONCLUSION

Even though, in the course of the discussion, provisional conclusions were applied, in drawing things to a close, it could be noted, that if "the risk, material and immaterial, owing to incomplete protection of invested capital as a result of existing legislation or political will" remains in place, the introduction of investment protection measures will facilitate private investors. This view is supported by the purpose of the creation of arbitration mechanisms by the World Bank. In addition, the view that only arbitration mechanisms are capable of international investment law principles development is controversial.

Moreover, the majority of the ICSID members are represented by the developing countries and, even though, at the beginning of its existence, the mechanisms were less utilized, throughout the last 20 years, the number of cases has dramatically increased. The vast majority of investor-State disputes of the last two years were adjudicated by the ICSID arbitration.

The developing countries should guarantee a fast and adequate resolution of foreign investment disputes. This includes the fulfillment of the obligations, as enshrined in the Bilateral Investment Treaties. This process creates an effective and equal opportunity for investors to enjoy the associated rights. Moreover, for the facilitation purposes, it is important to restrict the grounds for filing a request.
Modern Bilateral Investment Treaties, for instance, include the prerequisites which should be obeyed by parties before approaching the international arbitration. These include the resolution of the dispute through consultations and negotiation, written notification regarding the party's intent to request arbitration, etc.

The economically developing countries, which managed to attract investments, but are not able to increase domestic investments, should try to seek a balance between provision of guarantees for investment protection and the regulation of trade. These States should continue to attract investments, despite an unstable investment environment, and should strengthen domestic investments. Compatible investment environment creates employment, develops working conditions, and facilitates the use of domestic laborers and other resources, which, on the other hand, is important

[117] Boone, "Adapt Bilateral Investment Treaties to Provide Benefits to Economies," 191-192.

for sustainable economic development.[118]

Accordingly, it is important Bilateral Investment Treaties to promote special treatment for domestic investments and to impose the corresponding obligations on the investor.[119]

To sum up, international arbitration practice has an important impact on the evolution of foreign investment international legal regulation. Namely, the tribunals tend to define a vague notion, which is sometimes considered to be *de facto* law-making.[120] Even though there exists no formal rule for the binding power of the awards over other cases, the assessments of tribunals and parties have created customary investment law.[121] Of course, States, including the economically developing countries, do not respond to every decision of arbitration mechanisms, participation in the disputes and discussions nevertheless promote to the critical assessment of legislation.

[118] Alec Johnson, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa," 59 Emory L.J., 925.

[119] E.g., Finland-Tanzania Bilateral Investment Treaty of 2004 contains the following provision: "in a form of non-discrimination clause, Tanzania has the capacity to facilitate national investors in order to promote small and medium-sized businesses, stimulate domestic economy, save not to harm the investors of the second party."

[120] Simon Schropp, "Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis," Cambridge University Press (2009): 96-97.

[121] Florian Grisel, "The Sources of Foreign Investment Law," (2014): 223-33.