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„Interpretation of foreign investments under ICSID convention and Libyan law“

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1 Chapter One: Introduction

In the last three decades, bilateral investment treaties (BITs) have become the primary instrument for the protection of foreign investment. Such treaties include provisions to grant protection from a wide range of conceivable risks faced by foreign investors, and creates rights for individuals against host states. In addition, such treaties include arbitration as a dispute resolution mechanism.[1] The International Centre for Settlement of Investment Disputes (ICSID) has established a unique system with the aim of offering protection to foreign investors by providing institutional arbitration and special enforcement mechanisms. ICSID was established to offer investors the opportunity to proceed with arbitration claims against a host state in order to enforce their rights under a specific bilateral investment treaty; the arbitration procedure does not require participation by the state.[2] The term "investment" is crucial to the determination of ICSID's jurisdiction and the scope of application of a BIT. ICSID's tribunals failed to agree on an approach for determining the definition of "investment" included in the treaties.[3] As BITs contain binding rights of the host state towards the investor, who operates in the host state and is subject to its domestic laws, conflicts may arise between the state's obligations under bilateral investment treaties entered into by the state and domestic law. This thesis investigates ICSID awards in relation to the arbitration of BIT disputes to reach a comprehensive understanding of the concept of "investment" under the ICSID Convention, and to determine to what extent the BITs' definition of "investment", and domestic laws' concept of the term, form part of the elements used by ICSID tribunals to determine the scope of the application of BITs under the ICSID Convention. This will highlight the relation between the obligations under BITs which are interpreted by ICSID tribunals, and the obligations under domestic law as interpreted by local courts, and the conflict between these two types of obligations. This thesis will constitute a unique contribution to research in the field of bilateral investment treaties. A number of researchers have discussed the interpretation of article 25 of the ICSID Convention, while

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[1]Mohamed A.M. Ismail, *International Investment Arbitration Lessons from Developments in the MENA Region* (Routledge 2016). 93.
[2] Alex Garabowski, *The Definition of Investment Under ICSID Convention a Defense of SALINI*, (2014) 15, 1. Chicago Journal of International Law 289.
[3] Tony Cole and Anuy Kumar Vaksha, Power Conferring Treaties, (2011) 24 *Leiden Journal of International Law*. 2.

others have explored the scope of application of BITs as considered by the ICSID tribunals. However, there has been no comprehensive examination of the conflict between treaty obligations and Libyan domestic law obligations, or of the relationship between the Libyan bilateral investment treaty concept and the domestic investment law concept, and its impact on the state's obligations.

The structure of this thesis is as follows:

Chapter Two begins with the establishment of the ICSID Convention and its stated goal. It then examines the significance of ICSID and the enforcement system of the ICSID Convention, before highlighting the principles and requirements applied by the ICSID tribunals to determine ICSID's jurisdiction, and the conditions must be met for an activity to qualify as "investment".

Chapter Three highlights the factors which led to the need for bilateral investment treaties, and explains the main provisions included in most bilateral investment treaties that protect foreign investment, and which establish the private rights of investors toward the state. It then explores the achievements of BITs with the aim of establishing whether such treaties are truly suited to the promotion of economic development and the protection of foreign investment.

Chapter Four begins by providing some background to Libya to provide a better understanding of the cultural aspects of the country which influence the economic sector. It then examines the different types of state investment contracts in effect in Libya, before discussing the conflict between state treaty obligations and local law obligations which result from the different interpretations of the concept of "investment" in BITs within ICSID and Libyan legislation, and the impact of this conflict on Libyan development and stability.

2 Chapter Two: Jurisdiction and enforcement of the International Centre for Settlement of Investment Disputes

This chapter highlights the principles and the requirements applied by the ICSID tribunals to decide ICSID's jurisdiction, and the conditions that must be met before the tribunals can determine what qualifies as an investment under article 25 of the ICSID Convention. It then explores the enforcement mechanism of an ICSID award, which is the main goal of the investor. First, however, we begin with the establishment of ICSID and its institutional framework.

2.1 Establishment of the Centre

In 1965, the executive directors of the World Bank approved the founding document of the International Centre for Settlement of Investment Disputes in Washington, DC. On 14 October 1966, the Convention entered into force and was ratified by 20 countries, establishing the Centre. Over the years more countries signed on, and by January 2010 the Centre served 144 member states.[4] The purpose of the Centre, as set out in article 1 of the Convention, is to solve investment disputes between contracting states and investors who are nationals of other member states: "the purpose of the centre shall be to provide facilities for conciliation and arbitration of investment dispute between contracting states and national of other contracting states in accordance with the provisions of this convention."[5] ICSID functions as a mechanism to encourage international investment, with a unique system designed specifically to solve disputes between states and foreign investors with the aim of bolstering economic development.[6] The arbitral process under the ICSID Convention differs from other types of arbitration that settle investment disputes in that it is administered by an international institution on the basis of an international convention, not by a private institution or through ad hoc arbitration based on the parties' consent.[7]

In terms of the institution itself, ICSID comprises two parts, the first of which is the Administrative Council, which governs the organization and features a representative of each member state[8]. The Administrative Council is chaired by the president of the World Bank Group, who holds no vote. The Council members vote on annual reports, regulations, budgets

[4] Lucy Reed, Jan Paulsson, Nigel Blackaby. *Guides to ICSID Arbitration*, (2nd edition Wolters Kluwer Law & Business, 2011). 2-3.

[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 1.

[6] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 238

[7] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 299.

[8] Alex Garabowski, The Definition of Investment Under ICSID Convention: A Defense of SALINI, (2014) 15, 1 *Chicago Journal of International Law*, 292.

and the appointment of the Secretary General and their Deputy, but have no influence over the individual cases brought before the tribunal.[9]

The second component of the ICSID institution is the Secretariat, which comprises 70 staff members from various professions and different countries, governed by the Secretary General and functioning as the support body for the settlement of international investment disputes. Its role is to administer all of the arbitrations brought before the Centre,[10] and the Secretary General has the authority to refuse any application that is clearly not within ICSID's jurisdiction.[11]

2.2 ICSID's jurisdiction

In order for a dispute to fall within the scope of ICSID's jurisdiction, certain requirements set out in article 25 of the ICSID Convention must be satisfied. The principal prerequisite for ICSID to have jurisdiction over a dispute is that both parties must be contracting states to the ICSID Convention. If only one of the disputing parties is a contracting state, the Centre has jurisdiction under additional facility rules. The parties to the dispute should be state and foreign investors who are nationals of another state[12]. Some tribunals permit investors to submit disputes on the basis of the nationality they held at the time at which the parties to the dispute gave their consent, regardless of whether the investor's nationality subsequently changed, while other tribunals require the investor to still hold the same nationality when submitting the dispute. The contractor state which is the other party to the dispute could be either a state or a government entity.[13] The only exception made by the Convention is for local companies controlled by foreign management, which may be considered as foreign investors if all the parties agree[14]. Usually companies hold the nationality of the state in which

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[9] World Bank, 'ICSID Administrative Council'<https://icsid.worldbank.org/en/pages/about/Administrative-council.aspx> accessed August 13, 2017.

[10] World Bank, 'ICSID Secretariat' <https://icsid.woridbank.org/en/pages/about/secretariat.aspx> accessed August 13, 2017.

[11] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 238.

[12] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 315.

[13] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 318.

[14] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 25.

they operate, but a distinction must be made between the local subsidiary and the foreign shareholders. A local company controlled by foreign management can be considered a foreign investor based on agreement between the parties; if they consent, the dispute will be covered by the treaty's protections. For instance, the tribunal in *Aguas del Tunari S.A. v. Republic of Bolivia* held that the majority of shareholders were in fact authorized to control the company even if they did not do so directly, and that such control was sufficient to grant the Centre jurisdiction, because clarifying the actual control of the company was not a simple matter. In another case, the tribunal accepted a claim from a foreign company established in the host state and owned by home state nationals because, according to the underlying treaty, the investor merely needed to be a legal person established in another contracting state, without any specific conditions regarding ownership.[15]

When the parties to a dispute are contracting states they must still agree to settle the dispute by arbitration under ICSID rules. The consent of the parties is the principal issue,[16] and such consent can be included in a contract between the parties, in international treaties, or in domestic legislation; it could also be given either before or after the dispute has arisen. The Convention makes it clear that consent, once given, cannot be withdrawn; states who have given their consent cannot subsequently claim sovereign immunity or give diplomatic protection[17]. Tribunals in many cases view consent to arbitration as existing when either of the parties is a member to the ICSID Convention. In the tribunals' view, once the parties become members of ICSID, their previous consents become effective on ICSID jurisdiction and cannot be withdrawn[18]. The tribunal applies international law to the interpretation of the consent as it is a treaty provision even when consent is given in terms of domestic law:[19] "the question of whether the parties have effectively expressed their consent to ICSID jurisdiction

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[15] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 338.

[16] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 25.

[17] Peyman Ghaffari, Jurisdiction Requirement Under Article 25 of ICSID Convention: Literature Review, (2011) 603 *The Journal of World Investment and Trade*, 605,606.

[18] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 324.

[19] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 254-263.

is not to be answered by reference to national law. It is governed by international law as set out in article 25 (1) of the ICSID Convention"; see *CSOB v. Slovakia*.[20] The problem with consent provided in domestic law is that, while the tribunal can verify the scope of the consent, it cannot ascertain the existence of the consent itself. For instance, in *SPP v. EGYPT*, Egyptian investment law provided consent to the conduct of an arbitration agreement. The tribunal viewed that as consent, without considering the language of the law itself.[21] Consent to settle disputes by arbitration under the ICSID Convention eliminates other remedies unless the parties consent to arbitration only after the investors have exhausted all local remedies, and investors have to complain of the condition of local remedies along with the provision of their consent to arbitration:[22] "investor is not compelled to pursue remedies in the respondent state's domestic courts or tribunals before instituting ICSID proceedings. This waiver is implicit in the second sentence of article 26, which nevertheless allows a contracting state to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent." See *Generation Ukraine v. Ukraine*.[23]

2.2.1 The subjective requirement of ICSID jurisdiction

This relates to the nature of the dispute itself, as the dispute must be seen to arise directly out of investment, and must be on a matter of law or fact. In other words, the dispute must be the result of a breach of legal rights or obligations. Commercial and political disputes are therefore outside of ICSID's jurisdiction. Tribunals interpret the nature of legal disputes very broadly; the tribunal in *AGIP v. Congo* considered a dispute related to the amount that should be paid as compensation to the claimant to be a legal dispute. In addition, tribunals have in many cases found that any economic or security measures taken by the government of the host state in violation of the investor's rights are within ICSID's jurisdiction[24]. The legal dispute has to arise directly out of the investment, and any general obligations are not within

[20] *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, (ICSID Case No. ARB/97/4) Decision on Jurisdiction (24 May 1999) para 14.
[21] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 325.
[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 26.
[23] *Generation Ukraine v. Ukraine*, (ICSID Case No. ARB/00/9) Award (16 September 2003) para 13.4.
[24] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974-2002*, (Oxford University Press 2013). 317.

ICSID's jurisdiction. In *Amco Asia v. Indonesia* the tribunal ruled that "the obligation not to engage in tax fraud is clearly a general obligation of the law in Indonesia. It was not specially contracted for in the investment agreement and dose not arise directly out of the investment. For these reasons, the tribunal finds the claim of Tax fraud beyond its competence ratione materiae".[25] The dispute and the investment must be directly linked but the underlying investment does not have to be direct foreign investment: "jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction"[26].

While the legal dispute must be directly connected to the investment, there is no need for that investment to be direct foreign investment. Investments are usually surrounded by different kinds of contracts, all of which are necessary to the investment and have a direct influence on it. However, whether these contracts are within the scope of ICSID's jurisdiction must be decided case by case[27]. Tribunals find that many transactions such as international trade or financial transactions, or the sale of goods or services or supply contracts, constitute investment under particular circumstances. For instance, in *Fedax v. Venezuela* the tribunal ruled that loans can qualified as investment under the Convention. (Since promissory notes are evidence of a loan and a rather typical financial and credit investment, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this.)[28] Similarly, the tribunal in *CSOB v. Slovak Republic* ruled that the fact that a transaction by itself does not qualify as an investment under the Convention does not prevent the tribunal from considering that transaction to be an investment under the Convention in certain specific situations: a "dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, considered in isolation, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall

[25] *Amco Asia et al v. Indonesia*, (ICSID Case No. ARB/81/1) Resubmitted Case Decision on Jurisdiction (10 May 1988). Para 122,135.
[26] *Fedax v. Venezuela*, (ICSID Case No. ARB/96/3) Decision on Jurisdiction (11 June 1997) para 24.
[27] *Siemens v. Argentina*, (ICSID Case No. ARB/02/8) Decision on Jurisdiction, (3 August 2004) para 150.
[28] *Fedax v. Venezuela*, (ICSID Case No. ARB/96/3) Decision on Jurisdiction (11 June 1997) para 29.

operation that qualifies as an investment."[29] However, because the scope of the term "investment" is not clarified under the ICSID Convention, the tribunals are left to interpret the term for themselves. Since most tribunals have found the scope of "investment" under the Convention to differ from the scope of the term in the BITs, those tribunals have found it necessary to interpret the term in line with the objectives of ICSID and establish certain criteria in light of which to examine whether a specific transaction ought to be considered an investment or commercial transaction[30].

The tribunal has the power to decide ancillary claims related to the dispute, and any additional claims that are within the jurisdiction of the Convention[31], on its own competence[32].

2.2.2 The Additional Facility Rules

In 1978, the World Bank adopted the Additional Facility Rules in order to extend the scope of ICSID's jurisdiction to cover disputes between states and foreign investors when only one of the parties is a member state of the ICSID Convention. The access to additional facility proceedings requires approval from the ICSID Secretary General, who will approve the request only if the dispute arises from a transaction that is clearly different from an ordinary commercial transaction. The Centre can therefore administer arbitration and conciliation proceedings in investment disputes and non-investment disputes where one of the disputing parties is a contracting state and the dispute is not an ordinary commercial dispute. Although many Convention rules apply to additional facility proceedings, the enforcement and recognition advantages of ordinary ICSID awards do not extend to additional facility arbitration awards, meaning that such awards are subject to the local law of the state where enforcement is sought.[33] As such, the award will not be enforced according to the rules of the Convention.

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[29] *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, (ICSID Case No. ARB/97/4) Decision on Jurisdiction (24 May 1999). para 72.

[30] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003-2007*, (Oxford University Press 2009). 341.

[31] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 46.

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art. 41.

[33] J. William Rowley QC, *Arbitration World Jurisdiction Comparison*, (The European Lawyer 2004). 59.

2.3 Concept of "investment" under ICSID Convention

The concept of "investment" is a cornerstone of the jurisdiction of the ICSID Convention, even though the Convention does not provide a definition for or explanation of the term, leaving it to the parties and tribunals to determine what qualifies as investment under the Convention.[34] The ICSID Convention is unique not only due to its features but also on the basis of the restrictions it imposes on the types of disputes that it will accept.[35] The Convention's jurisdiction is limited to investment disputes only; it will not accept any other commercial disputes. The definition of the term "investment" is challenging as many economic activities that have financial value could quality as investment under the Convention, while others won't be considered as investment under any circumstances, such as ordinary contracts of the supply or sale of goods.[36] The ability to determine what constitutes an investment has serious repercussions, not only in terms of determining the scope of the ICSID Convention's jurisdiction, but also because investment provides the foundation for the protection offered by investment treaties, which authorize investors to bring their claims before international bodies such as ICSID. Now that international business extends into a number of sectors which did not previously enjoy the protection of bilateral or multilateral investment treaties, more and more foreign-controlled companies are involved in activities that could be considered similar to traditional investment, such as legal services, sovereign debt and reshipment inspection, to name but a few. Can the term "investment" be extended to cover all of these activities? There are no one-size-fits-all solutions.[37]As "investment" is undefined in the Convention, and as its definition is a fundamental element in the determination of ICSID's jurisdiction, the tribunals have had to interpret the term for themselves.[38] During the drafting of the ICSID Convention, participants couldn't agree on a definition of the term "investment". Some wished to extend the term's scope to cover a wide

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[34] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 65.
[35] J. William Rowley QC, *Arbitration World Jurisdiction Comparison*, (The European Lawyer 2004). 57.
[36] Ivar Alvik, *Contracting with Sovereignty State Contracts and International Arbitration*, (Hart Publishing 2011). 127-128.
[37] Mavluda Sattorova, Defining Investment Under the ICSID Convention and BITs of Ordinary Meaning: Telos and Beyond, (2012) 2 *Asian Journal of International Law*. 267-268.
[38] Tony Cole and Anuy Kumar Vaksha, Power Conferring Treaties, (2011) 24 *Leiden Journal of International Law*. 313.

range of economic activities, while others wished to narrow its application by including a range of criteria an economic activity had to comply with in order to qualify as an investment. In the end, the Convention settled for the inclusion of a minimum requirement in article 25, leaving the parties free to decide what activities would constitute investments.[39] Tribunals have to apply articles 31 and 32 of The Vienna Convention on the Law of Treaties and interpret the term “investment” according to the Convention’s object and purpose as outlined in the preamble. In addition to the ordinary meaning of the term, tribunals can rely on the preparation document and the primary drafting of the Convention.[40] The Vienna Convention considers both preambles and annexes as central to the interpretation of treaties[41]. The goal of the Convention is to promote economic development by settling disputes that may arise between investors and host states linked to investments which play a role in the host state’s economic development. The ordinary meaning of the term “investment” was, at the time of the drafting of the ICSID Convention, broad enough to include both tangible and intangible properties. The only written material explaining the idea behind the Convention, aside from the preamble, is a report by the executive directors of the World Bank, written after the ratification of the Convention, and regarded as relevant context to the ICSID Convention. Neither of these sources specifies a particular definition. The preamble provides great flexibility, while the report mentions that the decision as to what constitutes investment is left to the parties to agree among themselves. Whether consent is included in contract, treaty or legislation, the definition of the term “investment” as it relates to that written consent must be considered. The Vienna Convention also underlines the importance of preparatory works and subsequent practice as indicators of the parties’ intentions, yet none of these serve to clarify the precise meaning of the term, as the parties rejected any proposal to limit the application of the term during the drafting negotiations, and as BITs (which can in this context be considered subsequent practice) usually don’t include any clear definition of the

[39] Julian Davis Morrenson. The meaning of investment: ICSID’s TRAVAYX and the Domain of International Investment Law, (2010), 51,1 *Harvard International Law Journal*. 260-259.
[40] Jeremy Marc Exelbert, Consistently Inconsistent: What is a Qualifying Investment Under Article 25 of ICSID Convention and Why Debate Must End, (2016-17), 85,1243 *Fordham Law*. 17.
[41] Alex Garabowski, The Definition of Investment Under ICSID Convention: A Defense of SALINI, (2014) 15, 1 *Chicago Journal of International Law*, 294.

term either.[42] With a rise in the number of cases came an increase in the frequency with which parties challenged the jurisdiction of ICSID, and the tribunals dealt with this issue[43] on a case-by-case basis. While they were under no obligation to follow the tribunals' earlier decisions, those decisions became benchmarks used to establish what constitutes investment. The decisions made by tribunals over the years to determine what qualifies as investment reflect their understanding of ICSID provisions and the proper interpretation of those provisions.[44] There are a number of fundamental issues related to the interpretation of the term, irrespective of whether the BITs' definitions are considered sufficient for determining ICSID's jurisdiction[45]. Such issues include arguments about the term's objective meaning and subjective meanings; even among tribunals who take an objective approach, differences in method could be found. Some are more restrictive and others more flexible in their verification of the facts.[46] Since ICSID is an international Centre and there is no precept governing its conduct, each tribunal is in fact free to interpret the term according to its specific point of view. As a result, there is no certainty as to the scope of ICSID's jurisdiction.[47]

2.3.1 The subjective approach

The ICSID Convention left the door open to countries to obtain membership. When states accept the ICSID settlement system, they have the right to decide which types of economic activities they wish to submit to the Centre. Contracts and BITs reflect the parties' choices in relation to the disputes they agree to submit to ICSID. Where disputes arise from certain types of transactions considered as investment, such choices constitute the scope of the parties' consent and are what actually give ICSID the right to settle the dispute. This means

[42] Michail Dekastros, Portfolio Investment Reconceptualising: The Notion of Investment Under ICSID Convention, (2013), 14, *The Journal of World Investment and Trade*. 300-303.
[43] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 65.
[44] Jeremy Marc Exelbert, Consistently Inconsistent: What is a Qualifying Investment Under Article 25 of ICSID Convention and Why Debate Must End, (2016-17), 85,1243 *Fordham Law*. 1250.
[45] Jean Ho, The Meaning of Investment in ICSID Arbitration, (2010), 22, 4 *Arbitration International*. 634-635.
[46] Michail Dekastros, Portfolio Investment Reconceptualising: The Notion of Investment Under ICSID Convention, (2013), 14, *The Journal of World Investment and Trade*. 291-292.
[47] Jeremy Marc Exelbert, Consistently Inconsistent: What is a Qualifying Investment Under Article 25 of ICSID Convention and Why Debate Must End, (2016-17), 85,1243 *Fordham Law*. 1251.

that the parties' definition of investment should be used, particularly as the Convention itself left the term undefined with the express purpose of allowing parties to freely choose which transactions they wished to settle through ICSID. However, the real problem arises when BITs give the term an extended definition that allows commercial transactions to fall under ICSID's jurisdiction, given the stated scope of ICSID's jurisdiction being limited to investment transactions only according to the provisions of the Convention. In addition, when BITs define the term "investment" in a particular way, ICSID's tribunals will be unable to use this definition to determine what constitutes investment within the scope of the ICSID Convention.[48] Some tribunals consider the BIT's definition relevant to the question of what qualifies as an investment under ICSID, but believe that the parties' understanding of what constitutes investment should be main element determining the Convention's jurisdiction. Others consider the BIT's definition to justify the parties' consent, and therefore ignore any influence it may have over the scope of ICSID's jurisdiction, rather than seeing it as a prerequisite to the verification of ICSID's jurisdiction.[49] In *Malaysian Historical Salvors v. Malaysia*, the marine salvage contract constituted an investment according to the BIT between the United Kingdom and Malaysia. However, in the award, the arbitrator decided that the contract was outside of ICSID's jurisdiction as it did not constitute a significant contribution to the economic development of Malaysia. The arbitrator's application of the restrictive objective approach meant denying the definition of investment contained in the BIT. The ad hoc committee annulled the award and held that "this was not consonant with the intentions of the parties to the ICSID Convention, who had deliberately left undefined investment in the ICSID Convention in order for parties to furnish the content of that term in BITs and multilateral investment treaties … the tribunal had committed a gross error and had manifestly exceeded its power".[50] The ad hoc committee followed the subjective approach, which gives greater weight to what contracting states who are parties to BITs have determined to qualify as investment. In *Biwater Gauff v. Tanzania* the tribunal held that: "if

[48] Jean Ho, The Meaning of Investment in ICSID Arbitration, (2010), 22, 4 *Arbitration International*. 644.
[49] Peyman Ghaffari, Jurisdiction Requirement Under Article 25 of ICSID Convention: Literature Review, (2011) 603 *The Journal of World Investment and Trade*. 614.
[50] *Malaysian Historical Salvors v. Malaysia*, (ICSID Case No. ARB/05/10) Annulment (16 April 2009). para 125,129.

very substantial number of BITs across the world express the definition of investment more broadly than the Salini test, and if this constitutes any type of international consensus it is difficult to see why the ICSID Convention ought to be read more narrowly."[51] Tribunals who follow this approach cover a wide range of economic activities, provided these activities remain within the scope of investment according to the parties. The idea underlying this approach is that of state sovereignty; if every state has jurisdiction over disputes within its territory and by its own free will elects to give up part of its own sovereignty to an international body, this part must relate to the specific activities addressed by the state in its BITs. In that context, the definition accepted by the parties is of paramount importance.[52] Even when tribunals apply objective criteria to the activities covered by treaties, the scope of the term "investment" will extend to cover additional activities that were not originally subject to international protection. In the first definition, the tangible properties which the investor owns and utilizes to operate his investment in the host state are the only assets directly invested in the host state and are therefore the only property subject to protection. However, sometimes this direct investment combines with indirect investments such as leases, mortgages, loans or shares in companies. Tribunals generally accept that shares in foreign companies constitute an investment; many treaties explicitly mention shares as investments and consider them as subject to the protection of treaties. Furthermore, some treaties consider the money invested in stock markets or bonds as investment[53]: in *Link-Trading v. Moldova* the tribunal held that "the fact that an investment consists of debt financing does not appear to affect its characterization as an investment under the BIT". In *Tokios Tokeles v. Ukraine*, the tribunal held that "money spent to modify, maintain or improve an investment is also an investment, the BITs don't distinguish between investments made by the investor or acquired from a predecessor". ICSID tribunals cover all types of shareholders, provided the treaties in question do not require a specific share percentage. For instance, in *Lanco v. Argentina*, the tribunal held that, because the treaty contained no

[51] *Biwater Gauff v. Tanzania*, (ICSID Case No. ARB/05/22) Award (24 July 2008). Para 314.
[52] Mavluda Sattorova, Defining Investment Under the ICSID Convention and BITs of Ordinary Meaning: Telos and Beyond, (2012) 2 *Asian Journal of International Law*. 270.
[53] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 8-12.

indication that the investor in the capital stock must have control over the administration of the company or a majority share, the fact that the claimant held an equity share of 18.3 per cent in the capital stock of the Grantee allowed for the conclusion that this was an investment. Tribunals often extend the term “investment” to cover indirect ownership of shares, even when the BIT does not mention indirect ownership. In *Siemens v. Argentina* the tribunal held that the treaty does not require there to be no interposed companies between the investment and the ultimate owner of the company. In *Berschader v. Russia*, the tribunal restricted itself to the BITs which mention indirect investment owned through intermediary companies in third countries, and held that the indirect investment would be covered only if it were owned through an intermediary company in a third state.[54] Another type of property covered by BITs with the term “foreign investment” is intellectual property. As investors invest technology and know-how in the host state, which increase economic development, these types of property must also be protected. BITs also include investors’ contractual rights within the meaning of “investment”; any breach of contractual obligations are therefore protected by the treaty. This protection is different from that provided under the umbrella clause: by including contractual rights within the definition of investment, the treaty will cover any contractual rights that were covered by the local laws of the host state.[55] ICSID tribunals have interpreted this broadly to cover concession agreements and consider any violation of rights arising from contracts which have economic value between the investor and host state to be within the jurisdiction of ICSID because such contracts are protected by the treaty, which considers them to be investments. In *Azurix v. Argentina* the tribunal held that a concession agreement qualifies as an investment, noting that it falls within the same category as any right conferred by law or contract. Tribunals have found many types of contracts to be covered by BITs, including contracts governing the construction of highways, management of hotels, widening and deepening of portions of canals, and the provision of pre-shipment customs inspection services. In addition, licenses or operating permits are also considered investments

[54] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 137-141.

[55] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 14.

according to BITs' definition of the term "investment".[56] Investors require permission in order to operate in the host state. In the normal course of business, administrative institutions are responsible for providing the licenses and permits necessary for enabling the investor to operate in the host state. These licenses or permits, once issued by the host state, become protected rights of the investor. BITs have included such administrative measures in the definition of investment because, if the host state were allowed to withdraw these administrative measures, harm would come to the investment, which function without the necessary government approvals. In order to protect the investment, all the required licenses must also be protected.[57] Tribunals in general extend the term "investment" to cover a wide range of economic activities in line with the definition found in BITs (i.e., any kind of investment). They do not need to examine whether the activities fit within a specific category listed in the BIT, simply because no such list exists. In fact, the term covers all manner of economic activities which fall outside of the jurisdictional scope of the ICSID Convention[58].

2.3.2 The objective approach

The objective approach requires tribunals to interpret the term "investment" by applying article 31 of the Vienna Convention and verifying the term according to the purpose and the objective of the treaty as set out in its preamble. Nevertheless, it is no easy matter to discern a comprehensive definition or specific characteristic of the term "investment" from a treaty's objectives; tribunals end up with a range of different criteria that constitute investment under the ICSID Convention by applying the objective approach. The first time a tribunal set a prerequisite for qualifying as an investment under the ICSID Convention was in *Fedax v. Venezuela*, when the tribunal held that "the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, substantial commitment and significance for the host state's development … it follows that given the particular facts of the case the transaction meets the basic features of

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[56] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, (Oxford University Press 2010). 143-147.
[57] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 15.
[58] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 145.

an investment."[59] As the tribunal rejected Venezuela's argument, it also set out elements which played an important role in forming the current definition.[60] The approach of applying objective criteria to determine what qualifies as an investment under the ICSID Convention is clearly explained in *Salini v. Morocco*. The case featured a dispute between two Italian companies and the Moroccan government. The companies had jointly signed a contract for the construction of a highway. Due to a delay of four months in the completion of the project, the government refused to pay them, and the companies submitted a claim under the ICSID Convention. The tribunal applied four criteria to determine whether the transaction qualified as an investment for the purpose of an ICSID arbitration: a certain duration, a contribution of money or assets, a risk, and contribution to the host state's development. The tribunal added the fourth criterion to the first three, which had their precedents in earlier decisions, after reviewing the preamble of the ICSID Convention.[61] This became known as the Salini test and has since been applied by tribunals following the objective approach, on the assumption that article 25 has objective meaning. Many tribunals use the Salini test in its original form, while others modify it. However it is used, the Salini test remains the foundation for analyzing the objective meaning of article 25 of the ICSID Convention[62]. In *Joy Mining Machinery v. Egypt* the tribunal adopted the Salini criteria and held that, for the purposes of determining ICSID's jurisdiction, the transaction must satisfy the objective criteria of duration, regularity of profit and return, risk, commitment and contribution to the host state's development, even if the parties agree otherwise[63]. In *Saba Fakes v. Turkey*, the tribunal decide not to apply the fourth condition of the Salini test, rather relying on a textual interpretation of the term "investment". The first three conditions were considered necessary and sufficient to address the question of investment under the ICSID Convention: "the present tribunal considers that the criteria of a contribution, certain duration, an element of

[59] *Fedax v. Venezuela*, (ICSID Case No. ARB/96/3) Decision on Jurisdiction (11 June 1997) para 43.
[60] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 66-67.
[61] *Salini v. Morocco*, (ICSID Case No. ARB/00/4) Decision on Jurisdiction (23 July 2001) para 25-56.
[62] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003-2007*, (Oxford University Press 2009). 341.
[63] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003-2007*, (Oxford University Press 2009). 101.

risk, are both necessary and sufficient to define an investment with the framework of ICSID Convention … the tribunal is not convinced, on the other hand, that contribution to the host state's economic development constitutes a criterion of an investment within the framework of ICSID Convention."[64] The tribunal in *Victor Pey Casado v. Chile* concluded that the contribution to the host state's economy which comprises the fourth element of the Salini test is the intended outcome of an investment and not a prerequisite for a program to qualify as an investment: "it is true that the preamble to the ICSID Convention mentions contribution to the economic development of the host state. However, this reference is presented as a consequence and not as condition of the investment."[65]

In *Lesi SPA v. Algeria*, the tribunal held that the conditions of the Salini test are difficult to meet, and that the fourth element is sufficiently covered by the other three conditions.[66]

The tribunal in *Phoenix Action Ltd v. Czech Republic* applied the Salini test and found the four elements to be insufficient; it argued that there was a need to add a fifth element – that a transaction must be bona fide – in order to avoid protecting illegal transactions: "the contribution of an international investment to the development of the host state is impossible to ascertain. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host state. Which is indeed normally inherent in the mere concept of investment as shaped by elements of contribution, duration, risk and should therefore in principle be presumed."[67]

The tribunal in *Quiborax v. Bolivia* saw economic development as a goal of investment, but not as characteristic of it: "yet, though such contribution may well be the consequence of successful investment it does not appear as a requirement. If investment fails, it may end up having made no contribution to host state development. This does not mean that it is not an investment."[68] All of the tribunals in the abovementioned cases followed the objective approach, verifying the term "investment" in a restrictive way. They are usually criticized

[64] *Quiborax S.A v. Bolivia*, (ICSID Case No. ARB/06/2) Decision on Jurisdiction (27 September 2012) para 224.
[65] *Victor Pey Casado v. Chile*, (ICSID Case No. ARB/98/2) Award (8 May 2008) para 232.
[66] *Phoenix Action ltd v. Czech Republic*, (ICSID Case No. ARB/06/5) Award (15 April 2009) para 84.
[67] *Phoenix Action ltd v. Czech Republic*, (ICSID Case No. ARB/06/5) Award (15 April 2009) para 85.
[68] *Quiborax S.A v. Bolivia*, (ICSID Case No. ARB/06/2) Decision on Jurisdiction (27 September 2012) para 220.

for limiting the scope of the term to protect only those economic activities which reach their goals and promote the economic development of the host state. Transactions that fail to reach their goals will not fall within the scope of the treaty's protection because they will not be considered investments. Some tribunals found that it was unnecessary to satisfy all elements of the Salini test, while others were more flexible in relying on the BITs definition and the objective test when examining whether the underlying transaction could be considered an investment under the ICSID Convention[69].

2.4 Recognition and enforcement under ICSID Convention

Because consent to international arbitration is the foundation of the entire arbitration procedure, the parties to an arbitration can be expected to voluntarily comply with the arbitral award. However, problems can arise when the losing party refuses to comply. Thus, it is necessary to have mechanism to enforce international arbitration awards.[70] The ICSID Convention provides a unique system for the recognition and enforcement of the final awards of arbitrations conducted under its rules. Its mechanism is superior to that provided by the New York Convention,[71] which includes two grounds upon which states could refuse to enforce arbitral awards: states can refuse to enforce awards if local laws and regulations would not have allowed the dispute in question to be settled by arbitration, in which case the local courts will be unable to enforce the award, or if enforcement of the award would run counter to the public policy of the state where enforcement is sought (or, as it is known in some countries, state immunity or state sovereignty). Under the New York Convention, the award has no supremacy; it is subject to the review of the local courts in order to be binding and, as a result of that requirement, the award must comply with the legal order and public policy of the state in which enforcement of the award is sought.[72] Under the ICSID Convention, the award becomes binding immediately. It requires no further local decision in order to be recognized or enforced. All member states are obligated to comply with the final

[69] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 134-135.

[70] Vasily Shubin, The Enforcement of ICSID Arbitration Award Practice and Problem, (2012),11 *Korea University Law Review*. 25.

[71] J. William Rowley QC, *Arbitration World Jurisdiction Comparison*, (The European Lawyer 2004). 75.

[72] Dennis Campbell, *The Arbitration Process, The Comparative Law – Yearbook of International Business*, (Kluwer Law International 2002). 267-268.

award, even if the state in which enforcement is sought is not itself a party to the dispute, as if it is a final judgment of its own courts. All member states have to designate to the Secretary General a competent court or other relevant authority for the purpose of the enforcement, which body will be issued with a copy of the award. The award is not subject to review by the local courts and is considered as a final judgment in the state, thus the award is protected from the application of state immunity in the same way as a final judgment of the courts of that state would be. The ICSID award is subject to the same rules as any final judgment in the state in which enforcement sought. Moreover, the final award is not subject to any challenge or appeal; it is only subject to annulment by the Centre itself. The ICSID Convention provides a limited number of grounds upon which an award may be annulled,[73]including when a tribunal has been improperly constituted or has manifestly exceeded its power, if there has been corruption on the part of the tribunal, if a basic rule or procedure has been ignored, or if an award has failed to state the reasons upon which it is based.[74] In such circumstances, an ad hoc committee consisting of three persons who do not share the nationality of either party to the dispute or any member of the original tribunal, and who were not part of the original tribunal, will decide the annulment. The ad hoc committee operates as an ICSID tribunal and has the same competencies.[75]

The ICSID Convention is an important instrument for the protection of foreign investment as it provides a comprehensive system by means of which to settle investment disputes and enforce the resultant arbitral awards. The existence of an investment is the main element that determines the jurisdiction of ICSID. There are two primary approaches to the interpretation of the term “investment”. The first relies on the parties’ definition, without any limitations, while the other operates on the assumption that article 25 of the Convention has an objective meaning, and defines certain criteria that determines what qualifies as an investment under the ICSID Convention. Nonetheless, there is no certainty on the interpretation of the term. Even though the tribunals may apply the objective approach, a wide range of economic activities may still be covered by ICSID’s jurisdiction. ICSID tribunals did not take into

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[73] J. William Rowley QC, *Arbitration World Jurisdiction Comparison*, (The European Lawyer 2004). 75.
[74] ICSID, *ICSID Convention regulations and rules*, (International Centre for Settlement of Investment Dispute 2003). 26.
[75] J. William Rowley QC, *Arbitration World Jurisdiction Comparison*, (The European Lawyer 2004). 75.

account the intention of parties to BITs to apply treaty provisions to certain types of economic activities or rely on any other standard that may affect the scope of the treaty provisions.

3 Chapter Three: The importance of bilateral investment treaties

The other instrument critical to the protection of foreign investment is the bilateral investment treaty (BIT). BITs are the tools which establish investment rights; states obligate themselves to protect foreign investment through the provisions included in the treaties. This chapter will highlight the factors which led to the need for BITs, explain the main provisions included in most bilateral investment treaties that protect foreign investment, and explore the main achievements of BITs.

3.1 Factors leading to emergence of treaties

Bilateral treaties are now the most important legal instrument governing international investment. In the last decades before World War II, foreign investment disputes were governed by national law. Occasionally, investors would enjoy diplomatic protection. Yet bilateral treaties did exist to govern trade relations: so-called treaties of friendship, commerce and navigation (FCNs) included the standards of treatment and property protections which form the core of modern BITs. The United States signed many FCNs. Such treaties provided protections to traders, ensured their free movement, contained most favored nation clauses, and set out the rights of traders in trials.[76]After World War II, the international economy underwent fundamental changes which had far-reaching effects on the international investment system. The United States, the most powerful economy in the world, adopted a free trade regime. It believed that liberal economic policies would help to build a successful and powerful economy as well as promote peace. At the Bretton Woods Conference, the United States and Great Britain agreed to swap the gold standard of exchange for the US dollar. States who wished to monitor the free movement of capital found that the dollar standard fit their needs. Pegging their currencies to the dollar, which was, in turn, pegged to the price of gold, would ensure the stability of exchange rates, as well as macroeconomic stability. The socialist countries of China and the Union of Soviet Socialist Republics nationalized all assets, pitting themselves against the economically liberal Western Europe

[76] M. Sornarajah, *The International Law on Foreign Investment*, (2nd Edition, Cambridge University Press 2004). 209-210.

and North America. Together, these formed the two pillars which would influence the whole world. The rest of the world's countries, run by independent governments, took over commercial channels, nationalized key sectors of their respective domestic economies and expropriated foreign-owned properties. At the time, the world was divided on the basis of the economic status of countries. The United States and Western Europe, comprising the world's most developed nations, were known as "first-world" countries. Centrally planned economies and one-party states, including socialist China and the communist Eastern bloc, made up the "second world", with unaligned, independent and undeveloped economies constituting the "third world".[77] The rapid and far-reaching changes in the international political and economic environment rendered the need to protect foreign investors urgent. First world countries frequently invest in developing countries, which are rich in natural resources and have jurisdiction over the local economy via regulatory systems which control the local establishment and operation of foreign businesses. Such nations require foreign investment in order to develop their local economies. In turn, developed countries need to ensure the security of the investments made by their own nationals, particularly in light of many developing countries' expropriation of foreign investors' properties and failure to uphold appropriate standards of treatment. As multilateral agreements are not suited to the protection of investment, BITs were introduced to offer a solution to such problems. Through BITs, an agreement can be reached between the interested parties, i.e. the home state of the investor and the host state.[78] The Germany–Pakistan BIT in 1959 was the first bilateral treaty, and was followed by a large number of others[79]. In the first three decades of their existence, BITs were primarily entered into between the capital-exporting countries of the North and the capital-importing countries of the South. Now, BITs are also commonly entered into between developed and developing countries.[80] BITs bridge the gap between the relative positions of

[77] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 38-43.
[78] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 183-186.
[79] Mohamed A.M. Ismail, *International Investment Arbitration Lessons from Developments in the MENA Region* (Routledge 2016). 93.
[80] Jeswald W. Salacuse, *The Three Laws of International Investment, National, Contractual and Framework for Foreign Capital*, (Oxford University Press 2013). 342-343.

developing and developed states by making explicit the intent to protect and promote foreign investment. They establish obligations owed by the state to investors who are nationals of another contracting state within their territory, and are entered into with the aim of attracting foreign investors. From the perspective of foreign investors, BITs create a friendly investment environment as their provisions are intended to reduce the risks inherent in investment in developing countries.[81] BITs tend to contain similar core substantive provisions. Because western countries have their own models which are sent to developing states as basic templates upon which to commence negotiations, the core provisions usually remain unchanged.

3.2 The core provisions of BITs

It is essential to highlight the role of customary international law and the minimum standard of treatment to better understand the standards incorporated into BITs.

3.2.1 Customary international law

In the 19th century, the United States called for foreigners to be treated according to an international standard of treatment. The intent was to impose a fundamental standard of justice valued and respected by all countries, which would constitute the minimum standard of treatment for foreigners. Even where the national standard was lower than this standard, it would be the host state's duty to ensure the international standard of treatment, and the home state's duty to provide its national with diplomatic protection. This approach was supported by US and European counties.[82] In contrast, Latin American countries rejected the international standard, arguing that a foreigner who chooses to live in a county other than their home country submits to treatment according to the host country's laws. These countries adopted the Calvo Doctrine, which is based on the principle of sovereignty. Thus, independent countries exercise their sovereignty within their own borders, and enforce their own laws and regulations upon nationals and foreigners. Other states have no recognized right to interfere, whether by diplomatic or other means. Thus, the treatment of foreign investors over the last two centuries has taken the form of either customary international law,

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[81] Jeswald W. Salacuse, *The Three Laws of International Investment, National, Contractual and Framework for Foreign Capital*, (Oxford University Press 2013). 109-110.

[82] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 124-128.

which includes the minimum standard of treatment and diplomatic protection, or national treatment with domestic court protection.[83]

3.2.2 The international minimum standard

While there is no specific definition of the minimum standard, it is possible to discern some principles on which the minimum standard rests. The Hull formula for prompt, adequate and effective compensation for expropriation operates in line with the international standard which protects the property of foreigners. In 1910, US Secretary of State Elihu Root explained the minimum standard in a statement: “there is [a] standard of justice, very simple, very fundamental and of such general acceptance by all civilized countries as from part of international law of the world.”[84] The NAFTA Commission’s interpretation of the minimum standard states that it is the same as the standard of fairness and equity.[85] Because the minimum standard has a general meaning of treatment according to the level of international law principles, ICSID tribunals have also pointed out, when assessing the minimum standard provision, that the protections provided by the standards incorporated in BITs must not be lower than those provided by the minimum standard of international law.[86]

3.2.3 Standards of treatment

These standards are the principles governing the treatment of investors. The host state guarantees that foreign investors will be treated in accordance with these standards. In many treaties, such standards appear in a single article setting out standards of treatment, but each standard has its own features and scope of application, irrespective of whether or not it is linked to customary international law (although there have been various interpretive approaches).[87] This chapter examines the standards and the tribunals’ interpretation thereof.

3.2.3.1 Fair and equitable treatment standard

The standard of fair and equitable treatment (FET) should be understood as a general concept, and is there to be relied on when other standards fail. The state might be deficient in its

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[83] Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press 2010). 46-48.
[84] Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press 2010). 48 and 58.
[85] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 128.
[86] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 226-227.
[87] Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press 2010). 206.

treatment of an investor even when that investor is being treated as a national of the state in question. The relation between the host state and the foreign investor should, in all cases, be fair and equitable, regardless of how the standard is set out in the treaty. Whether the standard appears alone or in conjunction with other standards or customary international law, the standard of fair and equitable treatment ensures that a high level of treatment is upheld (i.e., the investor's treatment must be no less than fair and equitable). Because it is flexible standard that can be linked with any other standard, some BITs append FET as a standard in addition to requiring treatment that is no less beneficial than that which would be received by a national of the state, most favored nation (MFN) treatment, or non-discrimination. The host state may fulfil the requirement for national treatment, MFN treatment or non-discrimination, but fail to meet the fair and equitable treatment requirement. When BITs linked FET with customary law, we must clarify the minimum standard of treatment provided for in international customary law, and explain the relationship between FET and the international minimum standard.[88] The FET standard is general and its elements are undefined, yet claimants often rely on it and in jurisprudence arbitral tribunals seek to explain when the standard has been violated.[89] Tribunals have had to answer the question of whether fair and equitable treatment is part of the minimum standard in customary international law. In the early 20th century, international commissions had ruled that the treatment required under the minimum standard of customary international law should be based on outrage, bad faith, willful neglect of duty or insufficiency of governmental action. NAFTA's Free Trade Commission issued a binding explanation that fair and equitable treatment under article 1105 of NAFTA was equal to the minimum standard in customary international law. However, some tribunals were not convinced by this historical interpretation and instead sought to interpret the FET standard in isolation from customary international law, deciding on a case-by-case bases whether a specific action had breached the FET standard.[90] ICSID tribunals have applied FET in various situations, in some cases ruling that the FET standard constitutes

[88] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 190-194.
[89] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 204.
[90] Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003-2007*, (Oxford University Press 2009). 354-357.

a legitimate expectation of the investor.[91] An investor will make a decision to invest in the host state according to the host state's obligations, whether those be included in a contract, or set out in domestic legislation or binding decisions. The investor's expectations generated by such government assurances should be protected by the treaty, because any violation by the host state of such expectations would be unfair, and would run contrary to the stated intent of the treaty, which is to protect the investment. However, this view should not prevent the state from exercising its sovereignty in terms of regulating and administering the state (i.e., this obligation does not entail a further obligation to freeze legislation).[92] Transparency is also essential within the legal framework; since the investor is affected by this framework, it must be clear and unambiguous.[93] Many tribunals have ruled that the state violated the fair and equitable standard because it failed to disclose the framework or rules affecting the investment to the investor. For instance, in *Siemens v. Argentina* the claimant signed a contract for a six-year term, extendable twice for three years. In 1998, the new government delayed the contract due to technical problems before terminating the contract. Because the government prevented the investor from accessing the administrative documents related to the contract, the tribunal held that Argentina breached the fair and equitable standard.[94] Access to justice and due process are elements of fair and equitable treatment as per the minimum standard upheld in international customary law. When investors are subject to unjust processes in the judicial system or unfair administrative procedures, such actions are considered violations of the FET standard.[95] Tribunals have found that, unlike the minimum standard in international customary law, a FET violation need not be based on bad faith. Whatever the state's intentions may have been, if its actions violate its obligations, those actions will be considered a breach of the FET standard; what really matters is the action

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[91] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 133.

[92]OECD, *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives*, (OECD Publishing 2005). 120-123.

[93] OECD, *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives*, (OECD Publishing 2005). 118-119.

[94] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 402-404.

[95] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 357-358.

itself, not the state's motive.[96] Tribunals have also found acts of harassment and coercion by the state towards the investor to be violations of the FET standard. The flexibility of the FET standard extends its scope; tribunals could apply the standard to the breach of almost any another standard.

3.2.3.2 Full protection and security

BITs commonly require full protection and security for both the foreign investment and the investor. Host states are obligated to take all necessary measures to protect investors and their investments and ensure their security, but the host state is not considered liable if it has not authored, fostered, encouraged or contributed to the action, and if it has acted responsibly to protect the investment. Tribunals agree that the obligation imposed by the standard is therefore not absolute; instead, the host state is merely required to take reasonable action, and not obligated to successfully protect the investment. Nevertheless, tribunals have different interpretations regard the scope of protection. Some tribunals apply the standard only to physical protection according to customary international law, viewing the state as responsible for protecting the investment from violence. The state's duty is therefore to provide physical security. Others apply the standard more broadly to every situation that the investment may require protection from. This view results from the development of the concept of investment. Investments are no longer limited in their nature, and can now comprise any kind of asset, whether tangible and intangible. The obligation set out in the BIT applies to all types of foreign investment, provided the BIT itself does not limit the scope of the protection.[97] In *Maffezini v. Spain*, the tribunal considered the transfer of money from the investor's bank account without permission to be a breach of the full protection and security standard.[98] In *Biwater v. Tanzania*, the tribunal held that "full protection and security implies more than physical security and that a limitation to physical security would be artificial. Rather, the term implies a secure physical, commercial and legal environment".[99] However,

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[96] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 156-158.
[97] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 356-357.
[98] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 248.
[99] *Biwater Gauff v Tanzania*, (ICSID Case No. ARB/05/22) Award (24 July 2008). Para 792.

it is difficult to prove that the host state failed to do its duty to protect a foreign investment. Equally, it is not a simple matter to link investment harm and loss with the state's neglect.[100] In light of these considerations, tribunals who apply the standard to non-physical harm usually do not rely solely on the full protection and security standard to establish the state's responsibility.[101]

3.2.3.3 Non-discrimination

This standard appears in almost every treaty to ensure that foreign investments and investors are not treated differently, arbitrarily or unreasonably. The aim of this standard is to protect investments from any measures that might be taken by host states to weaken them. The prohibition applies to unreasonable discriminatory measures only; other legitimate actions are not considered to violate the standard. The question of whether an action has to be both discriminatory and unreasonable in order to violate the standard, or whether the existence of either of these criteria in isolation is sufficient, has been answered by tribunals in accordance with the manner in which the standard is worded in the BIT in question. Tribunals require the action to be both unreasonable (or arbitrary) and discriminatory if the BIT itself links these two criteria. If, however, the BIT specifies that actions must not be unreasonable "or" discriminatory, tribunals have not found it necessary for an action to be both unreasonable and discriminatory in order to violate the standard. For instance, in *Azurix v. Argentina*, the tribunal concluded that the standard would be breached by arbitrary measures even when those measures were not discriminatory, because the underlying BIT used "or" to link the two adjectives. In *Sempra Energy v. Argentina*, the tribunal concluded that the emergency measures were illegal but not unreasonable: "they were not … arbitrary in that they responded to what the government believed and understood to be the best response to the unfolding crisis". Some tribunals do not find it necessary to address the differences between the criteria of unreasonableness and discrimination. For instance, in *Eastern Sugar v. Czech Republic*, the tribunal held that the government's decision in favor of new enterprise was an

[100] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 249.
[101] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 255.

unreasonable or discriminatory measure. [102] The standard does not provide any indication of the benchmark to be used in order to determine whether an investment is being treated in a discriminatory fashion. Tribunals tend to compare the investment with other investments in the same sector or other sectors. If the treatment of those other investments is comparable, the treatment in this case will be considered reasonable. Different treatment of investments, where the circumstances otherwise prevailing are similar, will be considered to be unreasonable. Some tribunals also examine the motivation of the treatment. If the motive is considered reasonable, they may find that there has been no violation of the standard. In other cases tribunals examine discrimination on the basis of nationality and compare the treatment of the investment with the treatment received by investments of other nationalities, but this element is usually not considered in isolation. Some tribunals, however, hold that the intention of the host state is irrelevant to the question of whether treatment is discriminatory; instead, the impact of the action is the core element under consideration, regardless of whether the state intended to discriminate against the investment.[103] In *Sempra Energy v. Argentina* the tribunal held that there had been "no capricious, irrational or absurd differentiation in the treatment of the claimant in relation to enterprises in other sectors of the economy".[104]

3.2.3.4 National treatment

This standard aims to guarantee to foreign investment treatment not less favorable than that granted to national investment.[105] This standard was established to counter the tendency of host states to provide foreign investors with a minimum international standard of treatment lower than that enjoyed by national investors. Nowadays, foreign investment and investors often enjoy more favorable treatment than do nationals, yet most BITs still specify the

[102] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 219-225.
[103] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 219-225.
[104] *Sempra Energy International v. Argentine Republic*, (ICSID Case No. ARB/02/16) Award of the Tribunal (28 September 2007). Para 319.
[105] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Kluwer Academic Publishers USA 1995). 63.

national treatment standard,[106] because national treatment has its advantages. Countries tend to reserve a significant range of benefits and economic sectors for their own nationals. By including this standard, foreign investors are able to benefit from local legislation while enjoying international protection.[107] According to the terms of the treaty, an investment will enjoy the same treatment as a national investment not only after its establishment but also during the process of the establishment and before entry into the country, in order to ensure the competitive position of foreign investors. However, host states usually exempt certain sectors or regulations from the scope of application of the national standard. This exemption must be included in the treaty in order for investors' exclusion from such sectors or regulations to avoid being regarded as discriminatory. Tribunals apply the standard to instances in which host states treat foreign investments differently from national investments in the same situation or circumstances. In order to violate the national standard, the government's action must not only express a clear differentiation of treatment, but also discriminatory intent. Alternatively, it must be shown that the impact of the action disadvantaged the foreign investment when compared to national investments in the same situation. Tribunals agree that the different treatment has to be unreasonable in order to violate the national standard. If the government's action was based on a legitimate reason, it would not be found to violate the standard. However, tribunals have differing interpretations of the term "in the same situation". Some require the competitor to be an enterprise in the same sector, while others merely require the two organizations in question to be engaged in the same operation or business activity, irrespective of whether they operate in the same sector[108].

3.2.3.5 Most favored nation treatment

The most favored nation (MFN) treatment standard aims to provide the foreign investment with the best treatment that the host state has committed to provide to a third party in any

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[106] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 204.
[107] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 202.
[108] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 377-384.

extant or future treaties.[109] Most tribunals agree that the scope of the MFN standard is limited to a specific treaty's subject matter, and does not cover any other obligations in treaties dealing with a different subject, or to contracts between private foreign investment and host states.[110] In some BITs, MFN standards are set out in conjunction with a specific scope of application. In such cases, the standard is limited to the stated scope and cannot be extended. Some provisions require MFN treatment to apply to the control, operation, enjoyment and disposal of the investment, limiting the scope of the standard. The standard is considered to be violated if the host state fails to provide the foreign investment with the treatment granted to investments entered into under other investment treaties. There is no need to prove that the host state did in fact treat a third party more favorably; the claimant merely needs to demonstrate that the other obligations or provisions which the claimant relies on do in fact exist in a treaty, and are more favorable. Tribunals have in many cases sought to answer the question of the scope of the MFN provision. For instance, in *Maffezini v. Spain*, the tribunal held that the MFN standard covered only the subject matter of the basic treaty which included the MFN provision. As the standard in the underlying treaty covered all the matters covered by the treaty, and dispute settlement formed part of the protection of investments which was the subject matter of the treaty, the MFN was considered to apply to the dispute settlement provisions. The tribunal also opined that the MFN should not influence the fundamental conditions of the parties' acceptance of the agreement. Finally, the tribunal found that the remedies are not public policy of the fundamental conditions of the agreement. This view highlights the question of the parties' actual intentions and raises the question of whether the application of the MFN standard to dispute settlement provisions was in fact the original intent of the parties. The tribunals in the following cases interpreted the MFN standard by addressing the parties' intent. In *Plama v. Bulgaria* the tribunal held that the BIT provided for MFN treatment in general, and considered this insufficient to establish that the parties intended to apply the MFN standard to dispute settlement provisions. The tribunal ruled that the consent to arbitration must be clear and unmistakable, and that the word "treatment" was

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[109] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 204.
[110] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Kluwer Academic Publishers USA 1995). 66.

not sufficiently clear to prove the parties' consent to arbitration.[111] In most cases, tribunals have to answer the question of whether the standard applies to dispute settlement provisions. There is no definitive answer to this question. Cases in which tribunals apply the MFN standard to dispute settlement provisions tend to deal with procedural issues within the dispute settlement provisions. A large number of the cases in which tribunals chose not to apply the MFN standard to the settlement of disputes dealt with the extent of the arbitration clauses in the basic treaty.[112] In general, tribunals apply the standard to the substantive provisions. In *MTD Equity v. Chile*, the tribunal held that the MFN standard should be interpreted to provide the investment with the best possible protection, and only exempt what had been explicitly excluded. In *Tecmed v. Mexico*, the tribunal had to determine the application of the standard to the scope of the BIT's provisions, and held that the central contractual issues were to be negotiated by the parties, and could not be dealt with by the application of the MFN standard. In *Société Générale v. Dominican Republic*, the tribunal held that the standard could not apply to the definition of the term "investment" as the transaction must in the first place be an investment in order to benefit from the MFN standard.[113]

3.2.4 Transfer of money

Most BITs contain provisions to ensure the free transfer of capital and profits. This obligation could cause harm to the host state's economy because the repeated transfer of money in and out of the state can adversely affect the stability of the financial market. The state must remain in control of monetary policy and foreign exchange reserves. From a foreign investment point of view, the right to free transfer is equal to the right to invest, making the free transfer of capital and profits an essential provision in foreign investment protection treaties. The right to transfer is not, however, absolute. Treaties set out the particulars in relation to the transfer of money, delineating various categories, exchange rates, and local regulations and

[111] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 357-366.
[112] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law,* (2nd Edition Oxford University Press 2012). 273.
[113] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 371-372.

procedures.[114] There have been a few cases in which the claimant invoked the transfer provision, and the tribunal found that the provision had not been violated. For instance, in *Metalpar v. Argentina*, the tribunal held that the requirement to obtain prior approval for certain transfers from the central bank, which was included in the Argentine decree, could not be considered a violation of the transfer provision. In *Casualty v. Argentina*, the tribunal addressed the scope of the provision according to the types listed in the treaty, and concluded that the transfer that was the subject of the claim could not be granted as a free transfer because it was outside the scope of application of the provision on which the claimant relied.[115]

3.2.5 Expropriation

The expropriation of foreign investments by the host state is accepted internationally as a reflection of the state's exercise of sovereignty over its own territory. For this reason, all BITs include provisions aimed at protecting foreign investment from expropriation.[116] The modern interpretation of the term "expropriation" differs from its historical use. In the past, the scope of the term covered the action of acquiring the title to, and depriving investors of the control and use of, their property. Nowadays, the scope of the term has been extended to cover both direct and indirect appropriation of investments. In addition, the payment of compensation no longer affects the legality of the act of expropriation; unlawful expropriation does not become lawful merely by being combined with payment. Lawful expropriation creates a right to compensation, whereas unlawful expropriation creates a right to compensation and the payment of damages.[117] Legal expropriation is required in certain circumstances and these are set out in most BITs as well as being included in customary international law. The expropriation must be undertaken for a public purpose, non-discriminatory, carried out according to the due process of law, and accompanied by adequate

[114] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 212-214.
[115] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 332-333.
[116] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 271.
[117] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 363-364.

compensation.[118] The condition specifying the acceptable purpose for which expropriation may be effected is aimed at avoiding the expropriation of property for private purposes. The public interest is considered a legitimate reason for the taking of properties, thus the action must benefit the public even if it also benefits private interests. In addition, the action must be directed at a legitimate goal, and may not be taken for the purposes of revenge or other personal motivations.[119] The requirement for non-discrimination is aimed at eradicating bias or the inconsistent treatment of properties based upon their owners' nationality[120] or any other reason not related to the legitimate goal of the action. The expropriation must comply with local laws and regulations, and exhibit a lack of denial of justice. The state is required to ensure that the investor is allowed access to local remedies, and receives prompt, adequate and effective compensation at the time of the expropriation. The payment of compensation must made without delay, and be in accordance with the property's market value. In order to ensure the effectiveness of compensation, BITs usually include a provision stipulating that the payment must be made in freely convertible currency or be freely transferable. All of the compensation requirements are aimed at ensuring that the investor does not suffer any losses due to delays or the provision of non-transferable currency.[121] Direct expropriation occurs when the state takes the title to the investment. This simple form of expropriation was that which applied in *Santa Elenta v. Costa Rica*, in which the state issued an official order to expropriate the land owned by the claimant and register it in the name of the state. The tribunal had to determine the value of the land. Alternatively, indirect expropriation occurs when the state deprives the investor of the use of the benefits of the investment, even when the investor still controls the investment and retains the title to it. Such expropriation results from regulatory actions which affect the value of the investment. BITs usually refer to

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[118] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 99-100.
[119] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 272.
[120] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 409.
[121] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 274-277.

indirect expropriation as measures which have equivalent effect.[122] The tribunals establish the impact of the measure on the value and benefit of the investment and whether the investor can be considered as having lost part of the investment, even if the overall investment continues to exist.[123] If the impact of the measure was significant and continued for a notable period of time, the action is considered to be indirect expropriation. Several tribunals have highlighted the fact that the core determinant of indirect expropriation is the impact of the action rather than the intention to expropriate. Meanwhile, other tribunals take account of the purpose of the measures and situation, and the conditions related to the measures.[124] Changes to the legal system of the host state which are contrary to the investor's legitimate expectations and affect the value of the investment can in some cases be viewed as indirect expropriation. Tribunals take account of the reasonable expectations of investors when determining whether there has been indirect expropriation of an investment.[125] Other elements that determine whether indirect expropriation has occurred include the taking of an essential part of the investment, for example the licenses or the permit to operate. Such instruments are fundamental components of the investment and, if the state were to cancel them, the investment may lose its value.[126] In addition, tribunals give much weight to the duration of the measures taken by the host state. Although there is no specific amount of time required for an action to qualify as indirect expropriation, tribunals have held that temporary interference does not constitute indirect expropriation, as the measures have to be permanent.[127] The contracts concluded between the host state and the foreign investor which surround and protect the investment, such as the tax agreement or customs regulations, are all considered part of the investment and protected from expropriation. Tribunals have found

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[122] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 289.
[123] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 107.
[124] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 291-292.
[125] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 115-117.
[126] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 402-403.
[127] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 209.

that simple breaches of contract or defects in the performance of contracts cannot be considered as expropriation. The defining characteristic that determines whether an event qualifies as an indirect expropriation is the act of the government. General regulations enacted by public authorities are not usually considered to constitute indirect expropriation. Some tribunals have concluded that, if the public regulations adopted by the state do not discriminate against the foreign investor, they do not constitute indirect taking. Other tribunals have held that regulations that affect the investment do qualify as indirect expropriation, for which the state must compensate the investor.[128] Measures which affect the investment may consist of a single action or comprise a series of actions with the same object conducted over a period of time, which is known as creeping expropriation. In *Siemens v. Argentina*, the tribunal held that "by definition, creeping expropriation refers to a process of steps that eventually have the effect of an expropriation. If the process stops before it reaches that point then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect by itself but may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break".[129]

3.2.6 Umbrella clause

BITs usually include provisions to guarantee that each party will comply with any obligations they have under contracts entered into in relation to the investment with nationals or companies of the other party. This provision is intended to cover any commitments or contractual obligations between investors and the contracting states that result from the treaty's provisions. This provision is called the umbrella clause because it gathers together all of the commitments that fall under the BIT's coverage.[130] The scope of the guarantee is determined in part by the language of the clause. Some treaties refer to contractual obligations

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[128] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 126-129.
[129] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 126.
[130] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 257.

arising in relation to the investment between the state and the investor, thereby excluding any other obligations from the scope of the provision, while umbrella provisions in other treaties refer to any obligations, thereby widening the scope of the provision to cover any contract or general commitment.[131] The violation of this provision consists in the host state's refusal to observe its contractual obligations. Although such refusal could be interpreted as an indirect expropriation, a simple breach of contract is not considered to be an expropriation, yet may breach the commitment provision. The import of this provision is to protect and ensure the enforceability of the conduct of agreements between foreign investors and the host state, with the aim of granting several rights to the investor which are required in order to ensure the optimal functioning of the investment, such as concession agreements, tax exemptions, or clauses ensuring the stability of legislation in respect of the investment.[132] Tribunals adopt various approaches to the application of the provision. Some follow the reasoning applied in the first case to address the meaning of the provision: in *SGS v. Pakistan*, the tribunal found that the ordinary meaning of the clause is too broad and should not be considered without clear evidence that the parties intended to give that broad meaning to the clause. In contrast, the tribunal in *SGS v. Philippines* found that the provision should be interpreted according to the ordinary meaning without any restrictive requirement.[133] Most tribunals follow this ordinary meaning approach. In *Eureko v. Poland*, the tribunal held that "the language of the provision, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, should be given its ordinary meaning" according to this approach, every obligation, regardless of whether it arises by way of a contract or unilaterally by way of regulation or law, is within the scope of application of the provision.[134] In some cases, tribunals have found the obligations of government entities to be exempt from the provision, requiring that the obligations must be given by the state. In *Noble Venture v. Romania*, the tribunal found the

[131] M. Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, Cambridge University Press 2010). 215-216.
[132] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 257-260.
[133] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 169-174.
[134] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 267.

obligation included in the contract between the foreign investor and the state entity, which was a delegate of the state, to be covered by the provision.[135] In *Azurix v. Argentina*, the tribunal deemed "the observance of obligations provision inapplicable because Argentina had not entered into any contract with the claimant. Rather the contract was between an Azurix subsidiary and the province of Buenos Aires." The majority of tribunals give the ordinary meaning to the term "state".[136]

3.2.7 Fork in the road provision

BITs include a provision to hold the parties to their choice of remedy to settle disputes. This provision is intended to prevent investors from bringing their case before both the domestic courts and international arbitration.[137] Investors must choose an avenue for the settlement of a particular dispute and, once a choice has been made, the decision is final. The investor must decide between three remedies: the domestic courts, international or ad hoc arbitration, or the remedy that exists in the treaty. In order for a fork in road provision to apply, the dispute, causes of action and parties must be the same as those brought before the local court. Therefore, not every claim submitted to a local court by an investor means that a choice has been made that prevents the investor from seeking international arbitration. In a few cases, tribunals have found the basic dispute to be the same as that submitted to a local court. In these cases, the tribunals distinguished between contractual claims and treaty claims, thus, even when the investor had submitted a claim to a local court based on breach of contract, the investor was not prevented from submitting an arbitration claim based on breach of the treaty.[138] In Genin v. Estonia, the tribunal held that "the US litigation did not relate to the major issue at stake here… and should not be considered resort to an alternative forum under article VI (2)(a) of the BIT such as to preclude submission of the present investment dispute to arbitration".[139]

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[135] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 269-270.
[136] *Azurix Corp. v. Argentine Republic*, (ICSID Case No. ARB/01/12) Award (14 July 2006). Para 408.
[137] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 267.
[138] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 485-486.
[139] *Alex Genin and others v. Republic of Estonia*, (ICSID Case No. ARB/99/2) Award of (25 June, 2001). Para 334.

3.2.8 Amicable settlement provision

BITs usually include a provision to require an amicable settlement to disputes through negotiation. Although the parties may agree to this provision, if either party does not have a genuine intention to settle the dispute through negotiation, the other party cannot enforce this provision. In *Salini v. Morocco,* the tribunal held "that the attempt to consult should include the existence of the grounds for the complaint and the desire to negotiate a resolution but need not be complete or detailed".[140] In other BITs, the parties may agree on a period within which to settle the dispute in an amicable way through negotiation or conciliation before commencing arbitration proceedings. This period is of benefit to the host state in terms of allowing the state to evaluate the situation and prepare for the arbitration, but may harm the investor, who may lose evidence or witnesses. Long waiting times may result in the investor evaluating the situation and accepting any proposed settlement in order to minimize losses. Host states are aware of the importance of this waiting period and thus in many BITs it is listed as a condition to the state's consent to arbitration. The waiting period has been interpreted differently by various ICSID tribunals. Some have viewed it as procedural in nature as it meant to provide the parties with time in which to settle the dispute amicably, but have denied that it affects jurisdiction, while others consider it a precondition to jurisdiction, requiring that the claimant wait until the expiration of the stated period before submitting a claim. In *Bayindir v. Pakistan*, the tribunal held that "a failure to comply with a notice requirement intended to give the parties an opportunity to settle the dispute did not deprive the tribunal of jurisdiction".[141] In contrast, in *Burlington Resources v. Ecuador,* the tribunal found the six-month period to be one of the state's rights, and held that "by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the treaty effectively accords host states the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host state an opportunity to redress the problem before

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[140] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 492.
[141] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 493.

the investor submits the dispute to arbitration. In this case claimant has deprived the host state of that opportunity. That suffices to defeat jurisdiction". [142]

3.2.9 Dispute resolution provision

BITs include investor–state dispute resolution provisions. These provisions form the core element of foreign investment protection, reflecting the parties' consent to arbitration and making explicit which type of disputes will be covered by such consent. The arbitration clause contained in most BITs shows the consent to be given in relation to all disputes arising between the parties or their citizens concerning an investment. In contrast, some BITs limit the scope of the consent, specifying the types of dispute that are covered by the provision. In practice, investor consent is given by way of acceptance of the provision and submission of the dispute to arbitration.[143] This provision is what allows an investor to submit an arbitration claim on the basis of treaty provisions even when there is no direct connection between the investor and the host state. The international law procedure progressed and now the states are not the only subject of international law.[144] Many dispute provisions are drafted such that disputes will be settled under ICSID rules and arbitral proceedings instituted by ICSID. The other common choice is arbitration by UNCITRAL under its rules. Arbitration under the ICSID Additional Facility is also commonly used. Some treaties include provisions for a conciliation or negotiation period before arbitration. Although this requirement does not affect the consent to arbitration, it could delay the initiation of arbitral proceedings. [145]

3.3 The practical outcome of bilateral investment treaties

3.3.1 The role of BITs

The role of bilateral investment treaties is reflected by the BITs' standards and provisions. These provisions aim to protect foreign investment by establishing a friendly legal environment that will attract foreign investment and promote economic development.

[142] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 270.
[143] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 257-262.
[144] Tony Cole and Anuy Kumar Vaksha, *Power Conferring Treaties*, (2011) 24 Leiden Journal of International Law. 4-5.
[145] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 233-234.

However, when developing countries perform these obligations and adopt the standards and obligations contained in BITs' regulations and policies, the result is liberalization of the host state's economy. Market liberalization, then, is the goal which BITs aim to achieve through their impact on the legal system of the host state.[146] BITs, in order to liberalize the investment environment, must ensure security, neutrality and ethical markets. The first pillar is investment security, which rests on the provisions governing full protection and security, fair and equitable treatment, expropriation, free transfer of capital and profit, compensation for war and civil disturbances, and stabilization. All of these provisions ensure the security of the investment. The second pillar is investment neutrality. This principle is reflected in some provisions, for example those governing the investor's right to access and non-discrimination. Yet BITs have not achieved investment neutrality; the provisions are limited and do not guarantee absolute rights of access to host state markets, or non-discriminatory treatment. The third pillar is market facilitation. The only provision that may serve to help achieve market facilitation is the transparency provision. The marketplaces of developing countries suffer from two major challenges: a lack of transparency and a lack of anticompetitive legislation. Even though globalization promotes competition and reduces the incidence of monopoly, it is not sufficiently powerful to eliminate anticompetitive behaviors. However, BITs have helped to liberalize the investment systems in developing countries to some degree.[147] The other task of BITs is to bolster the rule of law, encourage good governance, and facilitate clear and strong regulatory systems and legal and institutional frameworks. All of these elements encourage foreign investment. In conclusion, the BITs' provisions help developing countries improve the rule of law in order to attract foreign investment.[148]

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[146] Jeswald W. Salacuse and Nicholas P. Sullivan, Do BITS Really Work? Evaluation of Bilateral Investment Treaties and Their Grand Bargain, (2005), 46 *Harvard Investment Journal*. 76.

[147] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 108-112.

[148] Robert Pritchard, *Economic Development, Foreign Investment and The Law*, (Kluwer Law International 1996). 103-104, See also Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press 2010). 114.

3.3.2 BITs' achievements

Developed countries initially suggested the implementation of BITs to protect their investments in developing countries by surrounding those investments with legal protections and standards aimed at liberalizing the investment system. BITs have succeeded in protecting foreign investment.[149] Promoting foreign investment is the other stated object of BITs, but there is no clear answer to the question of whether BITs do in fact increase the flow of foreign investment to developing countries. Several studies have reached conflicting conclusions. In theory, foreign investment will promote economic development by bringing foreign capital into the host state, supplying the local market with new technology, proficient management and job opportunities, increasing the skill and qualification levels of the local labor force, and increasing local production and national income, in conjunction with a range of other benefits. In reality, foreign investment does not bring these benefits, or promote economic development, perhaps because the provisions of BITs do not obligate foreign investors to promote the host state's economic development or ensure that the foreign investment will bring any of the theoretical benefits which are supposed to accompany it.[150] Nevertheless, BITs may play a fundamental role in developing countries by strengthening the importance of respecting legal obligations and commitments, and developing the legal framework to ensure the performance of obligations, as these elements may influence investment decisions.[151]

The use of BITs as a tool to ensure the protection of foreign investment and encourage foreigners to invest in developing countries has significantly expanded in the last three decades. Nevertheless, there is no legal obligation contained in BITs to ensure the promotion of foreign investment or the contribution of foreign investment to the economies of developing countries. BITs have successfully achieved the objective of protecting foreign investment, as they have extended the protection of international arbitration to investors against treaty and contract breaches by the host state. BITs have succeeded in creating private

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[149] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History. Policy, and Interpretation*, (Oxford University Press 2010). 115.
[150] Genevieve Fox, A Future for International Investment? Modifying BITs to Drive Economic Development, (2014), 46, 1 *Georgetown Journal of International Law*. 229.
[151] Jason Webb Yackee, Bilateral Investment Treaties: Credible Commitment and The Rule of International Law. Do BITs Promote Foreign Direct Investment, (2008),12, 42, 4 *Law and Society Review*. 813.

rights for investors and ensuring a wide range of investor rights, even where such rights were not explicitly created in the treaty enacted between the investor's home state and the host state, but not much has been achieved in relation to investment liberalization or the development of the host states' economies.

4 Chapter Four: Differences in the interpretation of investment – the case of Libya

The term "investment" as included in bilateral investment treaties is the cornerstone of the protection afforded by such treaties, including determining the jurisdiction of ICSID to settle a particular dispute. As discussed in Chapter Two, ICSID has its own perspective on what constitutes investment. ICSID's interpretation of the term tends to differ from what the parties to a treaty intend most of the time. This gives rise to the question of what happens if the concept is different from the domestic law perspective? This chapter will discuss the conflict between ICSID's interpretation of investment and the concept as understood in Libyan legislation. The chapter begins by offering a background summary of Libya before outlining the various types of state investor contracts found in Libya.

4.1 Libya's background

Libya is located on the north African coast, with 1,800 kilometers of coastline bordering the Mediterranean Sea. The country, with a population of 6,500,000, was an Italian colony between 1911 and 1934. Between 1945 and 1951 the western and eastern parts of the country were administered by Britain, with the southern part under French control. On December 24, 1951 Libya was declared independent by the UN.[152] On September 1, 1969 Colonel Qaddafi took over the country. After less than four months in power, Gaddafi had annulled the Libyan constitution, declaring a revolution. This declaration deactivated all legislative and executive power.[153] In March 1977 a new political system was adopted and the country was renamed the Socialist Arab Libyan Jamahiriya. Qaddafi published his political philosophy in a short tract entitled *The Green Book*, echoing many central themes of socialist ideology.[154]

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[152] Adrian Pelt, *Libyan Independence and the United Nations a Case of Planned Decolonization,* (Kalam Research and Media 2016). 9, 33, 843.
[153] Encyclopedia of Libyan Legislation, *Constitutional Declaration of Libya (11 December 1969)*, (Ministry of Justice and United Nations Development Program 2010),
[154] Encyclopedia of Libyan Legislation, *Public Authority Declaration of Libya (2 March 1977)*, (Ministry of Justice and United Nations Development Program 2010).

For several decades Libya was isolated from the international community and suffered under economic sanctions imposed by the UN. After two decades of isolation, Qaddafi's regime was readmitted to the international community and the country began moving towards economic improvement. The government sought to promote economic development through privatization and international investment and cooperation. It enacted various regulations, establishing a framework for Libyan economic diversity, and organized the country's economic activities to encourage foreign investment. The changes were approved by the legislative authority in 2010.[155] In early 2011 the political climate in Libya was affected by calls for change in the bordering countries of Tunis and Egypt. The rise of the Arab Spring culminated in the February 17th revolution which toppled Qaddafi's regime. [156]

4.2 The nature of government contracts in Libya

4.2.1 Legal framework for foreign investment in Libya

The primary law governing civil transactions covers general contractual rights and obligations and has a specific perspective regarding contracts and evidence.[157] The commercial law covers commercial and business activities. According to its provisions, transactions must meet certain criteria in order to be considered as commercial activities, including a requirement for the transaction to be carried out by a commercial entity listed in the code.[158] An administrative law governs the actions and contracts of Libyan public authorities.[159] In 1997, the government issued the first law regulating foreign investment, aimed at attracting foreign investors. At the time the government changed its view along with making changes to its economic strategies and policies. The provisions of this law were deemed to advance the investment environment by opening some economic sectors to private

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[155] Lamine Ghanmi, *Libya aims to privatise half of economy in decade* (Reuters, 31 March 2010) <http://www.reuters.com/article/ozatp-libya-privatisation-20100331-idAFJOE62U0EF20100331> accessed 23 September 2017.

[156] Encyclopædia Britannica, *Libya Revolt of 2011* <https://www.britannica.com/event/Libya-Revolt-of-2011> accessed 22 September 2017.

[157] Encyclopedia of Libyan Legislation, *Libyan Civil Code 1954*, (Ministry of Justice and United Nations Development Program 2010), art 87.

[158] Encyclopedia of Libyan Legislation, *Libyan Commercial Law 2010-23*, (Ministry of Justice and United Nations Development Program 2010), arts 1-5.

[159] Encyclopedia of Libyan Legislation, *Libyan Administrative Law 1971-88*, (Ministry of Justice and United Nations Development Program 2010), arts 1-4.

and foreign investors[160]. According to the new law, foreign investors were permitted to own 100 per cent of an enterprise established and licensed under the law, which applied to both local capital and foreign investors. This was the first time that private enterprises were allowed to engage in certain types of business, and marked a significant turning point for the country. The law conferred a range of benefits. For instance, investment projects were exempt from income tax for an initial term of five years. The exemption could be extended for a further three years if the profits were reinvested. The exemption covered customs duties for the goods and equipment imported to meet project needs, and excise tax imposed on exported goods created by the project. Investors were also allowed to own or lease the property required for the project's operation[161]. Keep in mind that the government had removed the right to private property in 1978, in addition to prohibiting private business ownership. Each family was allowed to own one home for the sole purpose of its residency, with any other property becoming public property. The government redistributed properties to others who did not own homes, or rented them to foreign workers. Home owners were not allowed to rent their properties out; renting was illegal in Libya.[162] The law's provisions implied that renting was permitted for investment projects when it gave investors the right to rent properties. In addition, investors were allowed to employ foreign workers if the local labor market could not satisfy their needs.[163] Investors were allowed to open bank accounts and could transfer money to other countries and currencies.[164] The investment permits in a number of sectors, including tourism, health, services, industry and agriculture, were subject to government monopoly. The law authorized the Minister of Economy and Trade to permit investment in other sectors, except for the oil and gas, telecommunications, and financial

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[160] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), arts 2-5.
[161] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), arts 10, 15.
[162] Encyclopedia of Libyan Legislation, *Libyan Real Estate Property Law 1978-4*, (Ministry of Justice and United Nations Development Program 2010), arts 1-6.
[163] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), arts 12, 15.
[164] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), art 16.

sectors, which the government retained a monopoly over.[165] The law provided protection from expropriation and access to arbitration if there was an arbitration agreement in effect in the contract or treaty.[166] However, the application assessment and licensing processes were subject to lengthy and obscure procedures; there were no well-defined requirements for obtaining the approval of the Board.[167] In 2010 the government issued another law to regulate investment. It is the primary legislative framework governing foreign investment, and remains in force. The law allows foreign investment to operate in a number of specified sectors.[168] Foreign investors are allowed to own 100 per cent of a company established according to the commercial law as an investment transaction or joint venture with national entities.[169] The law specifies certain conditions and criteria that must be met in order for the transaction to qualify as an investment rather than a commercial enterprise.[170] The law confers on investments a number of advantages with the aim of encouraging both local and foreign investment. It exempts the investment from income tax and the goods required for the investment's operation from customs duties. The investment is also exempt from import tax for five years from the date of approval of the project, and exempt from stamp tax. In addition, profits are exempt from corporate tax if they are reinvested in the project, and the export of goods created by the investment project is exempt from excise taxes and customs duties and fees.[171] Foreign investors are allowed to lease the property required to operate the project from public entities or private citizens[172]. The law states that the local courts have jurisdiction over any disputes unless the investor is a national of a state which has a bilateral

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[165] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), art 8.
[166] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), arts 23, 24.
[167] Encyclopedia of Libyan Legislation, *Libyan Investment Law 1997-5*, (Ministry of Justice and United Nations Development Program 2010), arts 5,6.
[168] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 4.
[169] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 2.
[170] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 7.
[171] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 10.
[172] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 17.

or multilateral agreement with Libya that provides the investor with access to an arbitration procedure[173]. The law offers protection from nationalization, expropriation and all actions that have similar effect except according to legal or court decrees, and grants the right to fair and equitable compensation in a non-discriminatory manner[174]. The license application for the project has to be approved by the Minister of Economy, and the application must be verified as compliant with Libya's national security, national sovereignty and economic interest.[175] The application process and the requirements for gaining approval are unclear. In fact, the functions of the Libyan regulatory system and the country's public institutions face numerous challenges in terms of transparency and clarity of mandate, complicating matters for foreign investors[176]. The purpose of this law is to encourage the investment of national and foreign capital to establish investment projects within the framework of the general

[173] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 23, (Settlement of Disputes: Any dispute arising between the foreign investor and the State shall be presented either by the investor or as a result of actions taken by the State against the competent courts of the State unless there is a bilateral agreement between the State and the State to which the investor belongs or multilateral agreements to which the State to which the investor belongs are parties Arbitration or special agreement between the investor and the State providing for the arbitration clause).

[174] Encyclopedia of Libyan *Legislation, Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010) , art 24, (Project Guarantees: The project may not be nationalized, expropriated or forcibly expropriated, seizure, or freezing of the project or subjected to proceedings having the same effect except by law or judgment and in return for fair compensation provided that such measures are taken in a non-discriminatory manner and compensation is calculated on the basis of market fair value of the project when taking the procedure and allows the transfer of the value of the compensation in convertible currencies in a period not exceeding one year from the date of issuance of the law or judgment and the exchange rates prevailing at the transfer).

[175] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9,* (Ministry of Justice and United Nations Development Program 2010), art 9.

[176] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 6.

policy of the state[177]. The law guarantees investors certain rights to allow them to operate their investments[178].

The law's stated objectives confirm that the law governs different kinds of economic activities, excluding commercial and economic activities aimed at serving the public interest, which are governed by the administrative law and regulations. The investment law was established to work side to side with the commercial law and the administration law, not to replace either of them. Thus, the government may conclude administrative contracts or investment contracts, both of which are financed by the public budget, but the aims and features of which differ from each other.

4.2.2 Administrative contracts

An administrative contract is a contract between an administrative public authority and a private person, aimed at the performance of a public service. Not all contracts conducted by an administrative authority will qualify as an administrative contract; the aim and the object of the administration is what differentiates administrative contracts from normal civil contracts. While, in ordinary contracts, each party is motivated by their own interest, which interest is served by engagement in the contract, in administrative contracts, the

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[177] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 3, (1- To rehabilitate and develop the Libyan technical elements and raise their efficiency and provide them with advanced skills and job opportunities.
2 - Work on the transfer of knowledge and technology and localization in the Libyan economy.
3 - Contributing to the establishment or development or customization of economic units service and production, which helps them to compete and enter the world markets.
4. Achieve spatial development.
5. Increase and diversify sources of income.
6. Energy conservation.
7. Exploitation of locally available raw materials).

[178] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 12, (The investor has the right to:
1- Opening accounts in favor of his project in local currency and foreign currencies at one of the banks operating in the State.
2 - borrowing from banks and local and foreign financing institutions in accordance with the legislation in force.
3. Re-export the foreign capital invested in the case of expiry of the project period, liquidation or sale of it in whole or in part.
4 - Re-transfer of foreign capital abroad in the same form as it was received after the expiration of a period of six months from the date of receipt if the weight of investment difficulties or circumstances beyond the will of the investor.
5 - Transfer of net annual profits distributed and returns achieved by the foreign capital invested in the project.
6. The use of foreign labor when the alternative is not available from the nationalists.
7. Granting residence for a period of five years renewable for the duration of the project and granting a multi-trip exit and return visa).

administrative authority has no private interest; instead, it aims to serve the general public interest.[179] The contract parties are not equal as the administrative authority acts in its capacity as a sovereign power. Therefore, the contract is subject to the administrative law and governed by special rules. The public authority's position as a party to the contract is therefore not the main element. If the public authority's actions are intended to serve a private interest rather than the public benefit, its contractual position becomes equivalent to that of a normal person, and the contract becomes an ordinary contract subject to commercial or civil law. Administrative contracts only subsume those contracts where one of the parties is a public authority and aims to serve the public benefit. In order to ensure the smooth operation of public services, the legislature provided administrative contracts with a specific feature to maintain the balance between public authorities, as guardians of the public interest, and private parties' individual interests. The administrative body has the power of a public authority to perform its duty of protecting the public interest. (Administrative contracts are distinguished from civil contracts by their special nature, grounded in the needs of the public utility, whereby the contract is designed to serve the public interest. Whereas the interests of the parties in civil contracts are parallel and equal, in administrative contracts, they are unequal, because the public interest has supremacy over individual interests. It is this idea that governs the obligations arising from administrative contracts. As a result, the administration has the authority to control and supervise the performance of the contract and retains the right to change the terms of the contract and to add new conditions which may seem to the administration to be more closely aligned with the public interest, without challenging the fundamental principle of contracts as governing the relationship between contracting parties. A precondition to such amendment is that the change must not result in the termination of the contract as a whole. The other party has the right to compensation if the financial budget of the contract is broken. The administration retains the authority to modify the contract if that is deemed to be in the public interest. The other party has the right to compensation.)[180] On other hand, the contractor has the right to be compensated for any

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[179] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 3.

[180] Libyan Supreme Administrative Court, Case no. k21-8, (6 March 1975).

damages or losses arising out of the contract. These rights are fundamental features of the contract established by law, regardless of whether or not they are included in the contract provisions, because the regulation provisions are considered part of any administrative contract.[181] The administration has the right to unilaterally modify the contractual scope of work at will. It could request further work or more supplies, as long as the extra work is of the same nature as the work that was originally agreed on between the parties to the contract. The administration also has the right to control and supervise the performance of the contractual obligations. Contractors must to be willing to accept the special nature of the administrative contract and operate under the administration's control. They must observe their obligations in a way that satisfies the administration, even when those obligations have been modified.[182] Failure to do so may result in a fixed penalty for every day on which the obligations were not observed.[183] Despite these rights, the administration has the right to withdraw from the contract and obligate the contractor to fund the performance of the contractual obligations, or terminate the contract, at will and in whatever manner it deems will achieve the public benefit, in cases where the contractor did not commence performance of its obligations, discontinued performance of its obligations, or engaged in unlawful behavior to win the contract.[184] None of these rights of the administration are absolute rights; they are all subject to the condition of public benefit. The administration must be motivated by the public interest when it exercises these rights, because the pillar on which the administration's power rests is the public benefit and interest[185]. The contractor has the right to be compensated for any breach or modification of the contract by the administration.[186] There are two principles in the administrative law which confer on the contractor the right to be compensated. The first is the rebalancing of the contract theory, which applies when a

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[181] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 4.
[182] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 90.
[183] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 100.
[184] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 103.
[185] Libyan Supreme Administrative Court, Case no. k23-13, (16 February 1978).
[186] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 90.

sudden economic event affects the contractor's interest by adding a financial burden to the contractor that was not anticipated or accepted by the contractor at the conclusion of the contract. The basis of this principle is that no individual should be made to suffer for the public benefit. The economic event must be unpredictable; if the contractor had been able to predict its occurrence in order to take account of its effect and did not do so, that would be the contractor's fault, and the rebalancing of the contract principle would not apply. However, if such an event could not have been predicted by the parties at the time of conclusion of the contract, and it is outside of the parties' control, then the contractor has the right to request rebalancing of the contract by requesting that the administration compensate it for the extra costs of fulfilling its obligations.[187] Of course, this principle only ameliorates the adverse effects of the event in cases where the event does not affect the entire contract by making the performance of the obligations thereunder impossible. In such cases, the contractor has the right to ask the court to terminate the contract.[188] The right to be compensated based on the principle of rebalancing the contract is only effective when the event increases the financial burden of fulfilling the contractual obligations. The administration compensates the contractor to ensure the smooth and continued operation of public services. It enables the contractor to keep fulfilling its obligations by removing the additional burden imposed by an unforeseen event.[189] When the burden is caused by the administration itself, the underlying principle used to compensate the contractor is the theory of "Act Of The Prince", which applies when an action taken by the government serves to impose a financial burden on the contractor in terms of the observation of its commitments. This principle cannot be used all the time, but applies only in specific circumstances when the government's action could not have been foreseen, and adversely affected the contractor's obligations. It is also based on the principle that no individual should suffer damages as a result of serving the public interest. The contractor's right to be compensated and the administration's power over the contract enshrined in the administrative law are not the only

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[187] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 105, see also Libyan Supreme Administrative Court, Case no. k29-5, (3 June 1984).
[188] Encyclopedia of Libyan Legislation, *Libyan Civil Code 1954*, (Ministry of Justice and United Nations Development Program 2010), art. 147, See also Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 106.
[189] Libyan Supreme Administrative Court, Case no. k25-23, (2 April 1980).

features of the administrative contract. [190]The law also establishes a unique administration court, with judges who specialize in the administrative law, to protect individuals from abuses of power by administrative authorities.[191]

4.3 Conflict between the concepts of investment in the ICSD Convention and Libyan law

Under Libyan law, when obligations or rights granted under international treaties conflict with obligations or rights granted under local legislation, the local courts will apply the principle of supremacy of international treaties[192]. These general rules also apply to investment treaties. However, the application of this principle to Libyan investment treaties is not straightforward when it comes to the interpretation of contracts entered into between an administrative public body and a foreign enterprise. From the local legislation's perspective, a contract concluded by an administrative public body which aims at serving the public benefit and is financed from the public budget is an administrative contract, particularly if it includes the special conditions specific to administrative contracts. The regulations relating to administrative contracts also contain a list of certain types of contractors, contracts with which are automatically deemed to be administrative contracts.[193] These contracts have certain features which are included in the administrative contract regulations governing those contracts conducted by public administrative bodies. The unusual rights of both parties and the aim of such contracts are what distinguishes administrative contracts from ordinary contracts.[194] Contractors entering into administrative contracts know that they will be subject to control by the administrative authority, including the authority's right to control and supervise the contract, the right to insist of observation of the contractor's obligations, the right to modify the contract, and the unilateral right to withdraw or terminate the contract at will. On the other hand, the contractor's interests are

[190] Libyan Supreme Administrative Court, Case no. k19-3, (21 February 1974), see also Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 88.
[191] Encyclopedia of Libyan Legislation, *Libyan Administrative Law 71-88*, (Ministry of Justice and United Nations Development Program 2010), art 4.
[192] Encyclopedia of Libyan Legislation, *Libyan Civil Code 1954*, (Ministry of Justice and United Nations Development Program 2010), art 23.
[193] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 2,3.
[194] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 3,4.

protected. Contractors have the right to compensation for any losses or damages arising from unforeseen economic events or acts by the government or administration. There is no risk inherent in entering into administrative contracts.[195] The nature of the administrative contract makes it subject to special dispute resolution procedures. It falls under the exclusive jurisdiction of the local administrative courts. The only exemption from this general jurisdiction is when the parties have agreed on international arbitration. Such agreement requires prior approval from the Executive Authority. Except for those featuring such an exemption, all administrative contracts fall within the local administrative courts' jurisdiction[196]. Bilateral investment treaties apply to those contracts conducted in accordance with the investment law, to enterprises registered as investment enterprises, and projects approved as investment projects in accordance with the investment law. The administration in general does not aim at achieving public benefit or ensuring the smooth functioning of a public benefit when conducting investment contracts.[197] Therefore, the obligations conferred by bilateral investment treaties apply to investment contracts only; BITs are not applicable to commercial contracts or administrative contracts, because the objective of a BIT is to protect investment.[198] According to ICSID, investment contracts are those contracts which fulfil certain criteria, including containing an element of risk, asset contribution, specific duration and a contribution to the economic development of the host state. Not all of these requirements are always deemed necessary.[199] ICSID tribunals would exclude from ICSID's jurisdiction those elements of the BIT explicitly excluded by the parties, because the parties are free to consent to whichever elements they wish. Therefore, if the BIT does not clearly exclude certain types of transaction from its scope of application, such transactions won't be

[195] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 88,90,105.
[196] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 83.
[197] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 3.
[198] Rudolf Dolzer and Christoph Scheuer, *Principles of International Investment Law*, (2nd Edition Oxford University Press 2012). 13.
[199] Roberto Castro De Figueiredo, The Investment Requirement of the ICSID Convention and The Role of Investment Treaties, (2015), 26, 453 *American Review of International Arbitration*. 3.

excluded if they meet the ICSID jurisdiction requirement.[200] The local law interpretation is irrelevant to the determination of what constitutes investment from ICSID's perspective. The tribunals do not consider domestic law requirements and what constitutes investment in the local law perspective. The only relevant element is what the parties had agreed to exclude from the scope of the BIT, as the arbitration agreement is the fundamental element of ICSID's jurisdiction[201]. As Libya has concluded many BITs in the last two decades, most of them contain a general definition as to what constitutes investment, without excluding administrative contracts, or modifying the local legislation to be compatible with the BIT's obligations and provisions.[202] The domestic context of interpretation is therefore different from the international context[203]. There will be many administrative contracts that are protected by BITs, as the treaties did not exempt administrative contracts. Most of the BITs concluded by Libya provide foreign contractors with the right to international arbitration. Foreign contractors can rely on the BITs to settle disputes through international arbitration because the BITs do not exclude other type of government contracts from their scope.[204] Of

[200] Rebecca Crootof, Change Without Consent: How Customary International Law Modifies Treaties, (2016), 41, 237-300, *The Yale Journal of International Law*. 239-240.
[201] ICSID, *ICSID Convention regulations and rules*, (International Centre for Settlement of Investment Dispute 2003), art 25.
[202] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 6,7,8, See also Administrative Regulation 2007-563, art 3.
[203] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art. 3. See Also Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art. 2
[204] Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (signed 18/06/2002, entered into force 01/01/2004) ('Libya–Austria BIT').
Agreement between the Republic of Belarus and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (signed 01/11/2000, entered into force 23/02/2002) (Libya–Belarus BIT').
Agreement between the Belgo-Luxemburg Economic Union, on the one hand, and the Great Socialist People's Libyan Arab Jamahiriya, on the other hand, on the Reciprocal Promotion and Protection of Investments (signed 15/02/2004, entered into force 08/12/2007) (Libya–Belgium BIT').
Agreement between the Federal Republic of Germany and the Socialist People's Libyan Arab Jamahiriya concerning the Encouragement and Reciprocal Protection of Investments (signed 15/10/2004, entered into force 14/07/2010) (Libya–Germany BIT').
Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (signed 26/05/2007, entered into force 23/03/2009) (Libya–India BIT').
Agreement between the Swiss Confederation and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (signed 08/12/2003, entered into force 28/04/2004) (Libya–Swiss BIT').

course, this is not what Libya consented to be covered by the investment treaties, because the treaties cover the economic activities which operate according to the investment law. In Libya, other economic activities which are governed by other regulations are excluded from the scope of treaties' application. They do not consider investment under local legislation.[205] The contactors in administrative contracts will gain rights granted by the treaty which are not conferred by the administrative contract regulations,[206] and the government will be obligated to comply with the treaties' obligations.[207]

In the difficult scenario Libya now faces as it suffers from political instability, armed rebellion, a budget deficit and a decline in national income, it requires funding in order to conduct successful projects to repair the economic and social stature of the country. After lengthy civil war and political unrest, any arbitration compensation would have a further adverse impact on its stability.[208] In fact, Libya has faced several investment arbitration claims relying on investment treaties in the few last years, including the arbitration claims submitted to ICSID by Strabag. These show that Libya is unable to fulfil its treaty obligations.[209]

We can conclude that the different interpretations of the term "investment" under the ICSID Convention and under local Libyan law has led to conflict between the obligations conferred by treaties and local law obligations. This conflict has influenced the manner in which the government has dealt with foreign contractors engaged in administrative contracts, as many of the obligations conferred by investment treaties are not granted by administrative

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Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the reciprocal promotion and protection of investments. (signed 25/11/2009, entered into force 22/04/2011) (Libya–Turkey BIT').

[205] Encyclopedia of Libyan Legislation, *Libyan Investment Law 2010-9*, (Ministry of Justice and United Nations Development Program 2010), art 30.

[206] Social Security – Fund Libya, *Libyan Administrative Regulation 2007-563*, 'decree list' <http://www.ssf.ly>, art 88, 90, 100, 103 and 105.

[207] Encyclopedia of Libyan Legislation, *Libyan Civil Code 1954*, (Ministry of Justice and United Nations Development Program 2010), art 23.

[208] World Bank, 'Libya's Economic Outlook – April 2017' <http://www.worldbank.org/en/country/libya/publication/economic-outlook-april-2017> accessed 22 September 2017.

[209] James Macdonald, Dyfan Owen, *The Effects on Arbitration of the Arab Spring* (Global Arbitration Review, 20 April 2016) <http://globalarbitrationreview.com/chapter/1036966/the-effects-on-arbitration-of-the-arab-spring> accessed 22 September 2017.

contracts. The government's actions would therefore be legitimate according to the administration law, yet would be considered to be in breach of the treaty provisions, which could then be subject to an international arbitration claim. This is likely to have an adverse impact on Libyan stability and development as the country suffers from a lack of liquidity and low national income. To avoid this conflict, Libya should modify its legislation and review its treaties to ensure that the obligations they confer are in compliance with its domestic laws.

5 Chapter Five: Conclusion

This paper's review of ICSID awards shows that most tribunals utilize the objective approach to determine what qualifies as an investment. Some consider the BIT's definition, but they do not take account of what qualifies as investment under domestic law to determine what the parties actually agreed to in the treaty, in spite of the explicit reference to local law in the treaty. ICSID tribunals have always given priority to the obligations conferred under treaties over local law obligations without pointing to the understanding of the concept of investment under local law. BITs create obligations of the host state towards foreign investors, and the host state's violation of the treaty provisions would provide grounds for the submission of an arbitration claim directly by the investor against the state. The subject matter of administrative contracts concluded with foreign investors is different from the subject matter of investment contracts, also concluded with foreign investors, in Libya. As a result, the understanding of the concept of investment from the Libyan perspective differs from the understanding of the concept from ICSID's perspective. Because BITs confer private rights created by the consent of the host state, which grants these rights in relation to certain types of activities, investment should be considered in accordance with the domestic law of the host state only. All other activities which are subject to other laws are not covered by the BITs' provisions, thus the tribunals should consider the other standards of law which may bind the parties to a government contract and may conflict with the state's treaty obligations. The parties to a BIT should disclose all laws that may affect the implementation of the treaty and exclude certain types of contracts, and must be clear about the relationship between the domestic investment law and the scope covered by its consent. In addition, the tribunal must be made aware of this statement. Libya ought to review and amend its legislation to comply with its treaty obligations, and should create a strong legal framework in order to promote its economic development.

This thesis is intended to highlight the issue of investment as an undefined term that is the subject of international treaty obligations, and the consequences of the differing interpretations of the term by each party to a BIT. This thesis is not intended to be a solution to the issue, but rather a starting point from which to seek to understand the problem, with the aim of beginning to seek solutions.

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Abstract

Im Laufe der vergangenen drei Jahrzehnte haben sich bilaterale Investitionsabkommen als erstrangiges Instrument zum Schutz von Auslandsinvestitionen etabliert. Diese Abkommen beinhalten Bestimmungen, welche Auslandsinvestitionen vor allen denkbaren Risiken schützen sollen, die Schaffung individueller Rechte gegen den Aufnahmemitgliedstaat und sehen ein Schiedsgericht als Schlichtungsmechanismus für Streitfälle vor. Das Internationale Zentrum zur Beilegung von Investitionsstreitigkeiten (ICSID) hat ein einzigartiges System eingeführt, welches ausländischen Investoren in Form von institutionellen Schiedsverfahren und speziellen Durchsetzungsmechanismen Schutz bietet. Der Begriff „Investition“ spielt eine entscheidende Rolle bei der Bestimmung der Gerichtsbarkeit des ICSID sowie des Anwendungsbereiches bilateraler Investitionsabkommen. Die Bedeutung bilateraler Investitionsabkommen leitet sich jedoch nicht von deren Status als internationales Recht ab, sondern davon, dass sie rechtsverbindliche Rechte des Aufnahmemitgliedstaates gegenüber dem Investor, welcher in dem Aufnahmemitgliedstaat arbeitet und zur selben Zeit innerstaatlichem Recht unterliegen könnte, beinhalten. In dieser wissenschaftlichen Arbeit werden die wesentlichen Bestimmungen beleuchtet, die in den meisten bilateralen Investitionsabkommen, welche den Schutz ausländischer Investitionen vor dem Aufnahmemitgliedstaat zum Ziel haben, enthalten sind. Außerdem wird darauf hingewiesen, dass bilaterale Investitionsabkommen keinerlei verbindliche Bestimmungen bezüglich weiterer wirtschaftlicher Entwicklungen innerhalb des Aufnahmemitgliedstaates enthalten, was das Erreichen des Ziels bilateraler Investitionsabkommen beeinträchtigt hat. In dieser Arbeit werden die Kernelemente untersucht, welche nach Auffassung des ICSID-Gerichts herangezogen werden, um festzustellen, was Investition innerhalb der Gerichtsbarkeit des ICSID ausmacht und was daher von dem Schutz bilateraler Investitionsabkommen abgedeckt wäre. Darüber hinaus werden die Hauptansätze des ICSID-Gerichts untersucht und es wird die Interpretation des Begriffs „Investition“ nach ICSID-Übereinkommen, in bilateralen Investitionsabkommen sowie in der libyschen Gesetzgebung und in libyschen bilateralen Investitionsabkommen näher erklärt. Im weiteren Verlauf werden die verschiedenen Interpretationen des Konzepts der „Investition“ nach lybischem Recht und ICSID-Übereinkommen untersucht, woraus sich ein Konflikt zwischen den Vertragsverpflichtungen

und den nationalen Verpflichtungen des Staates ergibt. Diese Arbeit schließt mit der Untersuchung der Kompatibilität der libyschen Gesetzgebung mit libyschen bilateralen Investitionsabkommen.

Abstract

In the last three decades, bilateral investment treaties (BITs) have become the primary instrument for the protection of foreign investment. Such treaties include provisions to protect foreign investments from almost every conceivable risk that they may face, in addition to creating individual rights against the host state, and including arbitration as a dispute resolution mechanism. The International Centre for Settlement of Investment Disputes (ICSID) has established a unique system which offers protection to foreign investors by providing institutional arbitration and special enforcement mechanisms. The term "investment" plays a fundamental role in determining ICSID's jurisdiction and the scope of application of BITs. However, the importance of BITs does not derive from their status as international law, but from the fact that they contain binding rights of the host state towards the investor, who operates in the host state and might be subject to domestic law at the same time. This thesis highlights the main provisions contained in the majority of BITs that are aimed at protecting foreign investments from the host state, and notes that BITs do not include any binding provisions to further economic development within the host state, which has affected BITs' achievement of this objective. This thesis explores the core elements considered by ICSID tribunals to determine what constitutes investment within ICSID's jurisdiction and therefore what would be covered by the BITs' protection. It also examines the main approaches adopted by ICSID tribunals, and explains the interpretation of the term "investment" under the ICSID Convention, in BITs, and in Libyan legislation and Libyan BITs. It goes on to explore the different interpretations of the concept of "investment" under Libyan law and the ICSID Convention, the consequence of which is conflict between the state's treaty obligations and domestic obligations. The thesis concludes by examining the compatibility of Libyan legislation with Libyan bilateral investment treaties.