

# The Political Character of Investor-State Disputes

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## Abstract

International investments play an important role in the economic growth and development of all states, specifically the underdeveloped ones. That's why these states endeavor to attract foreign direct investments to their territories. However, the investment contracts which are concluded between these states and foreign direct investor initiate a lot of conflicts which, in turn, lead to disputes, here and after called the Investor-State Disputes. Although these disputes are economic in nature, as their subject matter is investment, they have a political nature. This research is concerned with the political attributes of the Investor-State Disputes. In this context, this research will, first, shed light on the nature of parties of these disputes; second, it will explain some of the clauses which are included in the investment contracts and curb, one way or another, the sovereignty of states and finally, the negative impact of these disputes on international relations.

**Keywords:** Diplomatic Protection-Incorporation of Law- International Subjects- Investor-State Disputes- Marginalization of Law- Stabilization clauses- State Sovereignty.

## 1. Introduction

No doubt that international investment, especially foreign direct investments, plays an important role in economic growth and economic development. That's why all states, developed and underdeveloped and even the least developed exert every effort to attract transnational enterprises (TNEs) and multinational corporations (MNCs) to launch their investments in their territories. Seeking new destinations, maximizing their market value, searching for economies of scale, location economies and learning effects and due to demographic reasons and home markets saturation, TNEs and MNCs were pushed and motivated to perform business operations outside their home states and search for new destinations, the host states, which welcome their investments and business operations. Even though the investment context is wrapped by the win-win situation as a lot of benefits and privileges accrue to both the host state and the foreign investors, disputes between them arise from time to time. Statistics show that Investor-State Disputes are increasing over time. Of course, causes behind this type of disputes differ and vary from a dispute to another; however, all Investor-State Disputes have negative political and economic impacts. Economic wise these disputes affect negatively the process of economic growth and economic development of the host states. Political wise, these disputes harm the political relations among the states involved in the investment relationship, the home state or the parent state of the foreign investors and the states hosting their investments. In other words, it could be said that Investor-State Disputes not only harms the global economy but international relations as well. That's why this research is concerned with exploring and clarifying the political nature of these disputes.

## 2. Research Methodology

Research methodology is a systematic way to show how the research is carried out. Essentially, the procedures by which researchers go about their work of describing, explaining and predicting phenomena are called research methodology. It is also defined as the study of methods by which knowledge is gained. Its aim is to give the work plan of research.<sup>1</sup> It includes the research method adopted in this research, research type and how information is collected and analyzed. This research mainly adopts the qualitative research method; however, it uses the quantitative research method in a very small scale when it sheds light on some statistics concerning the numbers and categorization of Investor-State Disputes per respondents, regions and the institutions designated to settle these disputes. This research is adopting the qualitative method because it tries to answer some major questions which represent the focus of the qualitative research method. The qualitative research seeks an answer or answers to questions. This research poses some major questions that seek answers, the first is: does the Investor-State Dispute have a political nature? Second, does the Investor-State Dispute have a special nature? Third, what are evidences that support the answers of the previously mentioned questions? As qualitative, this research systematically uses a predefined set of procedures to answer the question starting by giving definition for Investor-State dispute, its importance, statistics about the numbers of these disputes and the

<sup>1</sup> Rajasekar, S. et al, (2013), Research Methodology, p 1

factors behind giving this type of dispute its special nature. Moreover, this research collects evidence which support its hypotheses which shows as follows:

- Investor-State dispute has a political nature
- Investor-State disputes are increasing in numbers
- Investor-State dispute has a special nature
- The increasing number of Investor-State disputes negatively affects International relations.

Testing these hypotheses, the researcher tries to produce findings that were not determined in advance and produces findings that are applicable beyond the immediate boundaries of the study.

This research is an exploratory research; it explores the causes behind giving the Investor-State dispute the political character. Moreover, it explores the factors which donate this type of disputes a special nature as Investor-State dispute is always described as the dispute with a special nature.

Concerning data collection, the researcher depended on official reports made by international organizations and their affiliates, for example, reports made by the United Nations Conference on Trade and Development (UNCTAD). Also, the researcher went through previous and current studies which handle the issue even though they adopt different perspectives.

### **3. Definition and Importance of Investor-State Disputes**

Investor-State disputes arising under international investment agreements (IIAs) are not ordinary international legal disputes. Rather, they exhibit specific characteristics that distinguish them from other types of disputes and confer on them a special nature. The special nature of Investor-State disputes is likely to affect the way the parties to a dispute handle their conflict. It will also be important in the choice of techniques used for dispute resolution.<sup>1</sup>

#### **3.1 What is the Investor-State Dispute?**

Investor-State disputes can be defined as the kind of dispute which arises between the two parties of the investment contract, the country hosting the investment and the foreign investor (a national of another state) as a result of a violation made by one of the parties concerning the rights of the other party or breach of the obligations stipulated in the investment contract, for example, prematurely terminating the contract, or making any unilateral action by one of the parties, mainly the state such as expropriation, seizure, confiscation and nationalization, leading to serious damages to the other party. These actions require compensating the harmed party for the damages and loss it incurred on the investor due to those violations.

Investment contracts establish some sort of legal relationship between the contracting parties. Some believe that this relationship is characterized by the international character, since one of its elements is foreign. The legal relationship is defined as the one that exists between one subject and another, determined by a rule of law. This relationship consists of three elements. First, the reason of the relationship or the action establishing the relationship, which is the contract, second the parties of the relationship parties, the host states and the foreign investor, and finally the object of the relationship, the material thing on which the relationship is based, the investment project.<sup>2</sup>

#### **3.2 Importance**

Investment contracts put forth many legal problems and disputes that are highly sophisticated and complicated. If the contracts concluded between the state or one of its public bodies and its nationals under the domestic law put forth many disputes and require in many states to dedicate a law governing them, these problems would be doubled if the contracts are concluded between the state and foreign nationals on the level of international relations. These problems provoke direct and indirect contacts between the states hosting the investment, as states importing the foreign capital, and those states exporting it as the states of investors' nationality. What makes the situation more complicated is the right of the investor's home states to grant diplomatic protection to their citizens in case any damages occur to them or their properties. The difficulty and sharpness of the problems raised by investment contracts result from inequality in the legal positions of the parties to these contracts. These contracts are concluded between two unequal parties: the host country on the one hand, the state, and a national of another state on the other hand, the foreign investor. The state, as a subject

<sup>1</sup> Salacuse JW (2007). "Is there a better way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution". *Fordham International Law Journal*. Vol. 31, No. 1: 138–185.

<sup>2</sup> Riad, Fouad, Rashed, Samia, (1987) *Mediator in the Conflict of Laws and the Conflict of International Jurisdiction*, (Cairo, Arab Nahda House, ), p.7.

of public internal law, enjoys sovereign authorities not enjoyed by the private foreign subject contracting with it, generally considered as subject of private law.<sup>1</sup> Although the state enjoys exceptional advantages not available for the contracting foreign party, most of developing states are often considered in a much weaker economic position than the economic position enjoyed by the foreign parties, multinational companies, as the budgets of some of these multinationals may exceed the combined budgets of the states hosting their investments.<sup>2</sup> This disparity in the economic power of the contracting parties may lead to strictness by the contracting states in their attitudes toward these companies, lest the former become an easy prey to the great economic superiority of these gigantic corporations.<sup>3</sup>

#### 4. Literature Review

Compared to relevant studies, this study has a unique character. Although it might be similar to them in the fact that they both discuss the issue of international investments which are very important for all countries, especially the underdeveloped, this studies differs from these studies in different aspects. These differences will be shown after shedding some light on these studies. Concerning Investor-State disputes, some studies focused on the role of international agreements which are concluded to encourage and facilitate the investment relationships between the parties of these agreements. A prominent example of these studies is the study made by the UNCTAD about the impact of bilateral investment treaties from 1995 to 2006 on investment rule making. The main objective of this study is to identify trends in the normative developments of each of the elements typically addressed in BITs, as well as to trace and explain new issues that have started to be covered by recent agreements.<sup>4</sup> Other studies focused on the mechanisms used to settle the Investor -State disputes. An example of these studies is a study made by Roderick Abbott. Abbott argued that Investor-State Dispute Settlement (ISDS), a legal provision in Bilateral Investment Treaties (BITs) or other International Investment Agreements that gives investors a right to call for arbitration with a state, has recently become the center of controversy in a debate over the Transatlantic Trade and Investment Partnership (TTIP). He said that critics argue that such a provision is either illegitimate, unnecessary, and/or does not have any positive influence on flows of Foreign Direct Investment (FDI). More radical critics argue that ISDS is a provision that allows big companies to sue governments when they have made democratic choices with negative consequences for companies.<sup>5</sup> Another example of is a study made by BDI, The Voice of German Industry. This study argues that Foreign direct investment (FDI) is currently protected by more than 3000 International Investment Agreements (IIAs) worldwide. Most of these agreements feature an Investor-State Dispute Settlement (ISDS) mechanism to enforce investor rights. In recent years there has been an increase in the number of ISDS cases, accompanied by growing criticism of the way investor- state disputes are settled. Critics fear that ISDS gives investors the ability to challenge national laws, particularly in the environmental and social domains. These fears are fuelled by headline-grabbing cases. Others studies focused on the role of international organizations in the settlement of this type of disputes.<sup>6</sup> An example of this type is a study made by the OECD.<sup>7</sup> This study argues that Investor-State dispute settlement mechanisms (ISDS) are an important component of most International Investment Agreements (IIAs) and have significant influence on how disputes between States and investors are resolved. This statistical survey of a large sample of 1,660 bilateral investment treaties (BITs) identifies the main parameters of ISDS regulation in BITs; traces their emergence, frequency and dissemination over time; and highlights past and recent country-specific treaty practice.<sup>8</sup> The survey finds among other things that many countries define the procedural framework thinly compared to advanced domestic procedural frameworks, despite a broad trend toward greater regulation in treaties of parameters of ISDS. Many treaties offer foreign investors a range of procedural choices, such as a choice between arbitration procedures. The survey also highlights the diversity that characterizes the design of ISDS: over a thousand different combinations of rules regulating ISDS can be found in only 1,660 bilateral treaties –, with variation found both at editorial and substantial level. Differences in policy approaches between

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1 El Hadad, Hafiza, (1996), *The Contracts Concluded Between The State and Foreign Individuals, Their Identity and The Applicable Law.*, ( Dar El Nahda Al Arabiya, Cairo) . pp. 8-9.

2 Ibid. p. 12

3 Ibid p 13

4 UNCTAD, 2007 *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, p

5 Abbott, Roderick et al, (2014) *Demystifying Investor-state Dispute Settlement (ISDS)*, ECIPE OCCASIONAL PAPER • No. 5/2014, p 8.

6 *Facts and Figures International Investment Agreements and Investor-State Dispute Settlement*, (2014) BDI, The Voice of German Industry Background: *BDI-Document Nr. 0007*

7 Pohl, J., K. Mashigo and A. Nohen (2012), “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, OECD Working Papers on International Investment, 2012/02, OECD Publishing. <http://dx.doi.org/10.1787/5k8xb71nf628-en>

8 Ibid, p 3

countries are the source of some of this variance, but it appears that much of it may not reflect differences in policy.<sup>1</sup>

The previously mentioned studies show that these studies focus on either the bilateral agreements encouraging and initiating international investments and the mechanisms used for the settlement of Investor-State disputes. While the subject matter of these studies and the current study is the international investment, the later focuses on the disputes that arise due to the problems associated with international investments between foreign investors and the states hosting their investments. Besides, this study argues that Investor-State disputes have a political nature and tries to justify this argument. Finally, it tries to explain why some call these disputes the disputes with a special nature. So to identify the political nature of a dispute which is mainly economic give this study the uniqueness previously mentioned.

## 5. Statistics Concerning the Increasing Number of Investor-State Disputes

The number of known cases filed for arbitration between a private investor and a state has increased over the past two decades. In the first half of the 1990s, the number of cases was not significant but since then it has steadily increased, with acceleration in the first years of the last decade.<sup>2</sup> Before 2003, the accumulated number of cases was fewer than 100. There was a decline in the number of filed cases in the latter half of the 2000s. In the first three years of the 2010s, however, the number of cases has yet again gone up. In total there were 461 cases filed for ISDS arbitration between 2003 and 2013.<sup>3</sup> In 2012, the number of known treaty-based Investor-State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 58. This constitutes the highest number of known treaty-based disputes ever filed in one year.<sup>4</sup>

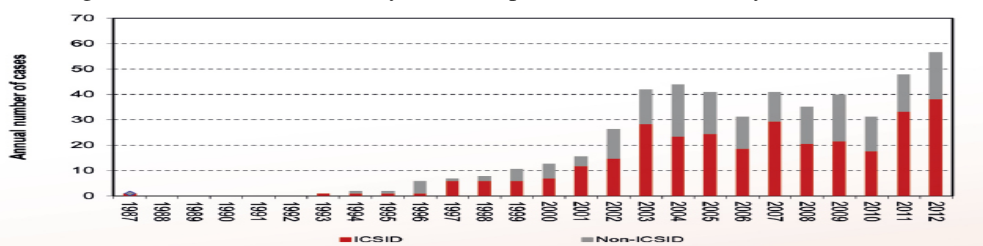


Figure1. Known ISDS cases

Source: UNCTAD

Of the 58 new disputes, 39 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which seven cases are under the ICSID Additional Facility rules), seven under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and another five under the Stockholm Chamber of Commerce (SCC). The International Chamber of Commerce (ICC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) received one new case each. One case was an ad hoc arbitration. For five cases, the applicable arbitration rules/venues are unknown. In 38 of the 58 new cases, respondents are developing or transition economies and in 15 cases they are developed states.<sup>5</sup> For five cases the respondent country is unknown. In 2012, Venezuela, for the second consecutive year, responded to the largest number of cases (9); followed by Pakistan (4); Algeria, Egypt and Hungary (3 each).<sup>6</sup> In 2012, Belgium, Equatorial Guinea, Republic of Korea and Laos faced their first ISDS claims. Of the 58 new cases, 37 were filed by investors from developed states. Out of these 37 cases, 27 were filed against developing states or economies in transition; the remaining ten cases were filed by investors from developed states against host developed states. 2012 witnessed an increase in the number of cases filed by investors from developing states (15, compared to nine in 2011). For six cases the investor's home country remains unknown.<sup>7</sup> 2012 saw at least eight new intra-EU investment disputes, i.e. claims by EU investors against EU Member States, which brought the overall number of such claims to 59. Of the eight new claims, two were brought pursuant to the Energy Charter Treaty (to which all Member States are party) and the other six pursuant to provisions of intra-EU bilateral investment treaties (BITs).<sup>3</sup> Hungary was the most popular respondent, having to cope with three new intra-EU claims. Investors have challenged a broad range of government measures, including those related to revocations of licenses (e.g., in mining, telecommunications, tourism), alleged breaches of investment contracts, alleged

<sup>1</sup> Ibid, p3

<sup>2</sup> Ibid, p 8

<sup>3</sup> Ibid, p 8

<sup>4</sup> UNCTAD Reports 2012-13. RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

<sup>5</sup> Ibid.

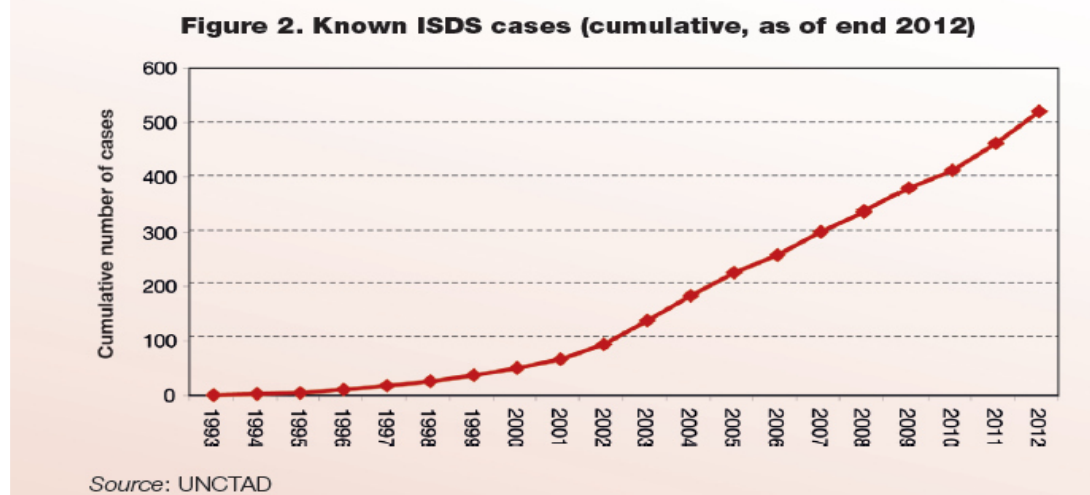
<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

irregularities in public tenders, changes to domestic regulatory frameworks (gas, nuclear energy, marketing of gold, currency regulations), withdrawal of previously granted subsidies (solar energy), direct expropriations of investments, tax measures and others.<sup>1</sup>

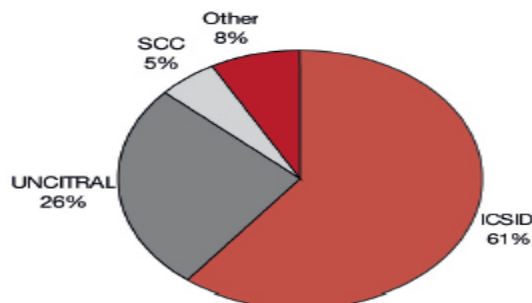
### 5.1 Total claims by end 2012

The total number of known treaty-based cases rose to 514 by the end of 2012 (figure 2). Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.

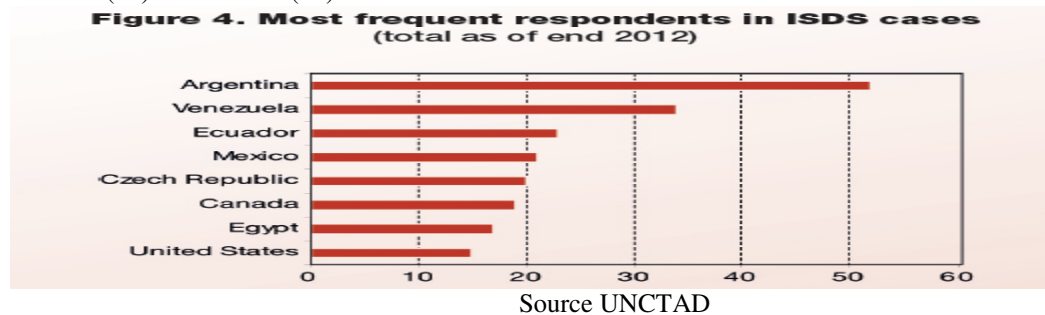


The majority of cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (314 cases) and the UNCITRAL Rules (131).<sup>5</sup> Other venues have been used only rarely, with 27 cases at the Stockholm Chamber of Commerce and eight with the International Chamber of Commerce (see figure 3).<sup>2</sup>

**Figure 3. Distribution of known cases among arbitral institutions/rules (total as of end 2012)**



In total, over the past years at least 95 governments have responded to one or more investment treaty arbitration: 61 developing states, 18 developed states and 16 states with economies in transition. Argentina continues to be the most frequent respondent (52 cases) followed by Venezuela (34), Ecuador (23) and Mexico (21).<sup>3</sup>



<sup>1</sup> Ibid.

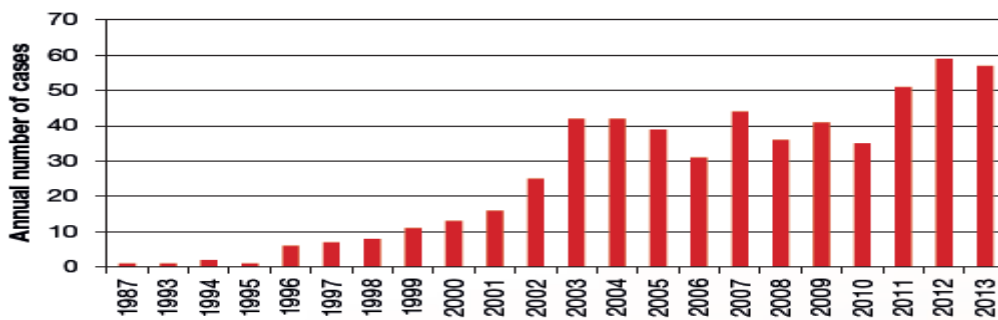
<sup>2</sup> Ibid.

<sup>3</sup> Ibid.



Investor-State arbitrations have been initiated most frequently by claimants from the United States (123 cases, or 24% of all known disputes), the Netherlands (50 cases), the United Kingdom (30) and Germany (27). The three investment instruments most frequently used as a basis for ISDS claims have been NAFTA (49 cases), the Energy Charter Treaty (29) and the Argentina-United States BIT (17).<sup>1</sup>

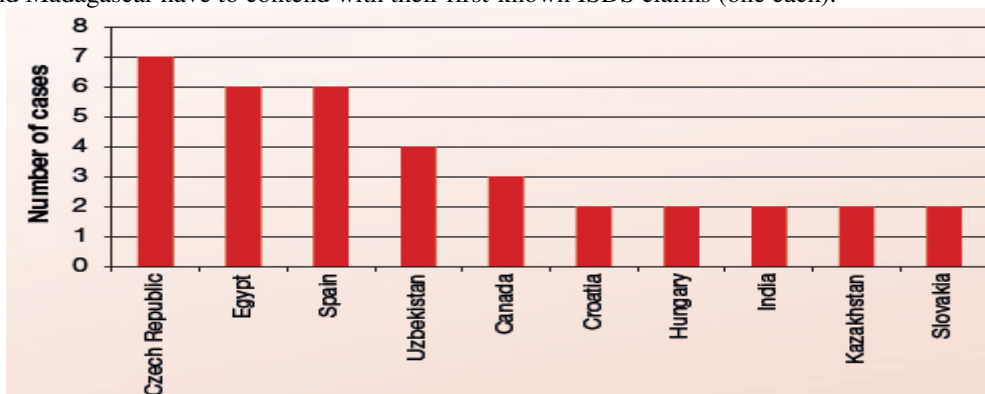
In 2013, investors initiated at least 57 known State –Investor dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs). This comes close to the previous year’s record high number of new claims.<sup>2</sup>



**Fig. 5 Known ISDS cases, annual (1987-2013)**  
 Source UNCTAD

#### 5.1.1 Respondent States

the year 2012 witnessed an unusually high number of cases against developed States (27); the remaining cases have developing (19) and transition (11) economies as respondents (figure 2). Last year’s most frequent respondent was the Czech Republic (7), followed by Egypt (6), Spain (6), Uzbekistan (4) and Canada (3). Venezuela, the previous year’s most frequent respondent, received only one claim in the review period. Cyprus, Greece and Madagascar have to contend with their first-known ISDS claims (one each).<sup>3</sup>



**Fig. 5 Respondent States**  
 Source: UNCTAD

#### 5.1.2 Regional distribution of respondent States:

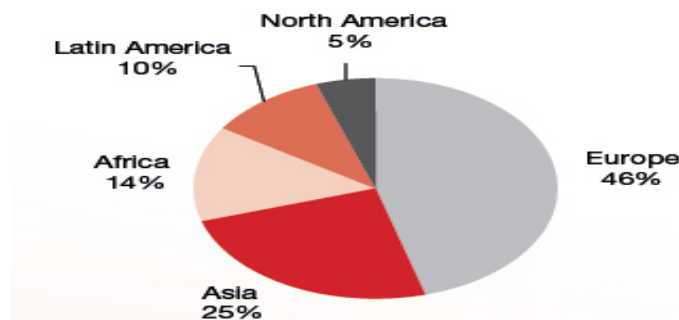
The greatest number of 2013 cases were brought against states in Europe (26 cases, of which two are against states not members of the European Union (EU) – Albania and Serbia), followed by Asia (14), Africa (8) and Latin America (6). Three cases were brought against a North American country (Canada) last year.<sup>4</sup>

<sup>1</sup> UNCTAD Recent Developments in Investor- State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment, 28-29 May 2013 ([www.unctad.org/dia](http://www.unctad.org/dia)).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.



**Fig. 6 Regional distribution of Respondent States**  
Source: UNCTAD

## 6. The Different Contexts of the Investor-State Disputes

Investor-State disputes and the legal instruments under which they arise are tremendously diverse and varied. There are three central continuums along which the basic parameters of most investment disputes can be charted: the socio-legal, the territorial, and the political. Figuring out where along these three continuums the various attributes of a particular dispute fall can help draw attention to the special considerations one might wish to take into account in resolving that dispute.<sup>1</sup>

### 6.1 The social-legal continuum (individual to communal)

The basis behind the social-legal continuum is to locate each particular Investor-State dispute within the social and legal context in which it arises. This continuum provides two basic types of information. First, how large is the claimant scope relative to the total number of actors who were in some way affected, whether positively or negatively, by the underlying governmental action which forms the basis of the dispute? Second, to what extent are all of the affected actors equal in their ability to safeguard their various rights through access to effective legal remedies?<sup>2</sup> If the government conducts giving rise to the claim affects no one but the claimants themselves (as was the case in Malaysian Historical Salvors),<sup>3</sup> then other actors are far less likely to concern themselves with how the dispute unfolds. By contrast, where a governmental measure impacts upon both claimants and non-claimants and there are notable discrepancies in the legal protections or remedies afforded to the two groups, the likelihood of not only broader attention but also social opposition to the arbitration rises. These considerations make it prudent to pay attention to fundamental social and legal dynamics from the outset of each Investor-State claim.<sup>4</sup>

### 6.2 The territorial continuum (local to transnational)

The territorial continuum provides another type of considerations. This continuum aims to explain the geographical side of the dispute – as defined by the dispute's actual and potential impact rather than by the respondent state's formal jurisdictional competence under traditional international law principles. There are two relevant questions. First, what is the spatial scope of the various positive and negative impacts of the governmental action that forms the basis of the complaint?, second, how broad is the reach of the major legal claims and defenses that are likely to be argued, in terms of their generality to actors outside the territorial borders of the respondent state?<sup>5</sup>

### 6.3 The political continuum (commonplace to contested)

The third continuum is the political continuum which assists point to different dispute resolution considerations for different types of Investor-State disputes. The overriding purpose of the mapping exercise along this continuum is to convey a sense of the degree to which the basic features of the dispute itself and the circumstances in which it arises are likely to be viewed as mundane, ordinary, or commonplace – as opposed to radical, surprising, or contested by constituencies who may have or perceive themselves as having an interest in the resolution of the dispute.<sup>6</sup> Moreover, how the emergence of such disputes initiate tension in the international arena as the conflict between the host state and the foreign investor doesn't only create problems in the domestic sphere but the international relations sphere as well.

<sup>1</sup> Maupin, Julie, A. (2014), *Differentiating among International Investment Disputes*, Oxford University Press, pp8-9.

<sup>2</sup> *Ibid*, pp.10-11.

<sup>3</sup> Malaysian Historical Salvors STN BHD v The Government of Malaysia ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007), paras 14-16 (describing the original arbitration proceedings in Malaysia).

<sup>4</sup> *Ibid*, p.11.

<sup>5</sup> *Ibid*, Maupin, p.10

<sup>6</sup> *Ibid*, p. 11

## 7. The Political Nature of Investor-State disputes

When the state steps into the field of international trade as a public subject of international law, the first subject of this law; it, first, aims at speeding up development on all tracks and second, increasing the foreign investments inflow as an important source of external funding. As a result, the economic development agreements among the states have increased and the size of international trade has been expanded, which prompted investors belonging to those states to come with their money in order to establish their investment projects in states which badly need such investments. The areas of investment are not limited to certain sectors; however, they include investment in sectors of petroleum, mining, construction, services, technology, and manufacturing. In general, investment contracts are almost characterized by special features which confer the political character on these disputes and distinguish them from traditional international trade contracts. These special features give some sort of privacy to the nature of disputes arising from these contracts. In the following section, the study highlights the most important features which color these disputes with the political and special nature. These features are the nature of the disputing parties, the special clauses which curb states' sovereignty and the negative impact on international relations.

### 7.1 The Nature of Disputing Parties:

An important characteristic which colors the Investor-State dispute with the political nature is that one of the disputants is a state and the other party is a national of another state (that is why some call the contracts from which such disputes arise "investment contracts" or "state contracts"). The state is the form of political organization of society. It holds the supreme power and enjoys the international legal personality. The state is absolutely the most important political entity, as it is the main subject of international law. States may engage in economic activities; these activities might end in disputes with other states. They may conclude contracts with individuals and companies based in their territories or in other states; they may own and operate enterprises such as state airlines which offer services to other states' citizens; they may employ other states' citizens in their embassies; their officials may commit wrongful acts against citizens of other states. The state as an international subject has sovereignty and enjoys special privileges which give it immunity both under private law and international public law. The rules of state immunity lay down the extent to which a state is protected from being sued in the courts of other states. A successful plea of immunity will prevent a state being made a party to proceedings in the courts of a foreign state and will protect its property from being seized to satisfy a judgment. Immunity can extend to legal proceedings against the state itself, its organs and enterprises and its agents. It is international law that determines the general rules of whether or not a state should be accorded immunity by the courts of another state, but it is national law that interprets and applies those rules.<sup>1</sup>

Identifying the other party (private foreign party) contracting with the state raises no difficulties. It is agreed that the contracting party with the state is a subject belonging to another state. This subject could be a natural person or a legal subject; it could also be mono-national, multinational, or stateless.

#### 7.1.1 The Natural Person

Before examining this issue, we should know the position of the individual on the international law map. The individual's legal position has undoubtedly raised many discussions and debates at the international level. Although this legal position is weak and limited, yet interest in the legal position of the individual has become very important at the international level. That is because the purpose of any legal system is represented mainly in serving its people who eventually consists of individuals. The internal law mainly cares for individuals as they form its existence. The international law, albeit cares for its subjects (states – international organizations), focuses also on individuals<sup>2</sup>. Scholars have clearly disagreed about the legal adjustment of the individual as a subject of international law. Distinction can be made here between several trends:

First: The individual does not enjoy any aspect of international personality:

Positivist School thinkers deny that the individual enjoys the international legal personality under any circumstances. The most important features of the international legal personality are represented in many aspects, such as concluding international treaties, bearing the consequences of international responsibility, and

<sup>1</sup> Joanne Foakes et al (2005), *State Immunity: The United Nations Convention and Its Effect*, Chatham House, p 2.

<sup>2</sup> Aboel wafa, Ahmed, (1996), *Mediator in Public International Law*, (Dar El Nahda Al Arabiya, Cairo), p512



the possibility of joining international organizations, among others that are not available for the natural person who may not perform any of them.<sup>1</sup>

Second: The individual indirectly enjoys international personality:

Some views believe that the individual has an indirect international personality, since the international law addresses him only through his state; and the application of international law to individuals may be achieved only by orders issued to them by their state<sup>2</sup>.

Third: The individual directly enjoys international personality:

Social school thinkers see the fact of the contemporary international community as it is composed of a group of individuals. Accordingly, there are no differences between the international community and the internal community, considering that each one of them is a community of individuals. The individual has the first personality in the international community. This trend is not concealed from the state as a true fact, but it rejects the idea of the state as a subject and accepts it as a concept seen as a framework or as a means of regulating public facilities required for the group. Enjoying a degree of international personality by the individual directly is an exception in the context of the current international law. It is not automatically entailed, but it must be determined through a traditional or conventional international legal basis. The main features of this situation, for example, are represented in holding the international criminal responsibility of the individual if the individual practices piracy on high seas and acts of terrorism, in establishing international criminal jurisdiction, and in individuals' direct resorting to international bodies, such as resorting to the international Centre for Investor-State disputes Resolution and direct resorting to the Court of Justice of the European Union and the issue of human rights.<sup>3</sup>

In spite of the weakness of the legal position of the individual under international law level, yet this does not mean that the individual does not enjoy a degree of protection assigned to him by that law abided to by all states. This is known as the minimum limit of the protection of foreigners' rights, and is sometimes called "Standard Natural De Civilization". This limit includes the following rights:

- 1- The foreigner's right in acknowledging his legal personality, which entails acknowledging his legal capacity for the conclusion of all the legal acts.
- 2- The foreigner's right in acknowledging his acquired rights; the state must acknowledge the rights acquired by foreigners on its territory according to its legislations or those acquired in the territories of other states if they do not contradict with the rules of the public law. The state may expropriate a foreigner's assets only for the public interest, and on condition that the compensation is prompt, effective and comprehensive. The Permanent Court of International Justice has confirmed this rule when it announced that any liquidation of foreigners' funds is a deviation from the general rules of treating foreigners and the need for respecting their acquired rights. This prohibited procedure may not be transformed into a legal one on the basis that the state applies it to nationals.
- 3- The foreigner's right in enjoying rights and freedoms inherent in the human personality, such as the freedom of belief, individual freedoms and the freedom of movement, provided that the practice of these freedoms does not violate the rules of public law and moralities in the state.
- 4- The foreigner's freedom of resorting to justice before the courts of the state.
- 5- The foreigner's right of enjoying the right of protection.

#### **7.1.1.2 The Juridical person (Moral Person)**

All transnational corporations and multinationals, for example Unilever, Procter and Gamble and Zara are juridical or moral persons. The recognition of the juridical person is no longer the subject of controversy in the modern legal thought. Besides the natural person to whom all modern systems give legal personality enabling

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1 Ibid., p. 514.

2 Ibid., p. 516.

3 Ibid. p.516.

him to enjoy rights and be committed to duties, there is the juridical person for whom these systems acknowledged the legal personality, like the natural person.<sup>1</sup> The juridical person is a group of subjects or funds dedicated for a specific purpose. If the nationality link is linking the natural person with a specific country and subject his case to its law, the juridical person should also have a state to which it belongs in order to become a subject to its law and to enjoy the diplomatic protection given by the states to their nationals. In other words, the juridical person should have a nationality of a certain country; this is an issue of a political nature. It must also be governed by law; this is an issue of a legal nature.<sup>2</sup> The necessity of the legal subject's subjugation to a law from which he takes his legal personality is the basis for the legal dependence. The legal dependence means the legal subjugation to the legislative authority of a particular country in order to know the law applicable to the system of the juridical person in terms of origin, activity and transience.<sup>3</sup>

## 7.2 Inclusion of Special Clauses which Curb States' Sovereignty in Investment Contracts

States, as previously mentioned, are sovereign. Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, outside its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law.<sup>4</sup> States have *De Facto* (actual) sovereignty and *De Jure* (legal) sovereignty. A *de jure* sovereign is the legal sovereign whereas a *de facto* sovereign is a sovereign which is actually obeyed. *De facto* sovereign "is the person or a body of persons who can make his or their will prevail whether with the law or against the law; he or they, is the *de facto* ruler, the person to whom obedience is actually paid". Thus, it is quite clear, that *de jure* is the legal sovereignty founded on law whereas *de facto* is the actual sovereignty. Moreover, metaphorically, states enjoy external sovereignty where it is assumed that states conduct their foreign affairs independently without subjugating to any exogenous or foreign pressures.

The object of Investor-State disputes is often related to the sovereignty of the state in terms of the existence of the investment project on its territory, and in terms of the law applicable to the dispute. So the question which arises here is how a sovereign state would be subject to law other than its law on its territory while it has the supreme authority in legislating and enacting of laws and regulations in all matters in relation to everything on its territory. Besides, majority of investment contracts contain special clauses which curb the sovereignty of states. Special clauses or the clauses with the special character in the investment contracts are very important. This has been reflected in the acknowledgement on the part of the judiciary of the parties' authority to include such clauses in the investment contracts concluded between the country hosting the investment and the foreign investor. These clauses have varied in terms of dealing with the law of the host country among four models: first, Freezing and stabilizing the law governing the contracts in terms of time; this freezing or stabilizing is known as the legislative stabilization (*Stabilization Clause*), second, no modification to the contract or amending it unilaterally, third, the attempt to incorporate the rules of law into the contract and converting its rules to mere contractual terms without any power except the one granted by the parties and fourth, marginalizing the role of law in the contract, where it is applied only as a backup; this is known as the reserve role of the contract law.<sup>5</sup> In the following paragraphs the research will explain briefly the nature of these special clauses and how they curb states' sovereignty.

### 7.2.1 Stabilization Clauses:<sup>6</sup>

In the *Texaco v. Libya* case, the tribunals held that stabilization clauses limit the host state's sovereignty as the host state in exercising its sovereignty committed to its waiving *Stabilization clauses* are provisions in investment contracts that accommodate the risk of regulatory changes for investors.<sup>7</sup> Given their high level of protection, stabilization clauses may cause tensions with conflicting states' regulation to protect human rights or

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1 Elnemre, Abou Lela, (2001) *Studies in Private International Law, Home in Private International Relations and the Position of Foreign Legal Subjects* (Cairo, Arab Nahda House.), p. 149.

2 Shawki, Badreldin, *Mediator in the Egyptian Private International Law, Nationality - Home – Foreigners' Position*, (Cairo, Police Academy, 2000), p. 214.

3 Alwakeel, Shams, *ibid.*, p. 434.

4 Steinberger, H. (1987), 'Sovereignty', in *Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law*, vol 10, p 414.

5 Salama, Ahmed, *International Contract Law*, (Cairo, Arab Nahda House, 2001), p. 305.

6 Fahmy, Mohammed Kamal, *Principles of Private International Law*, (Alexandria, University Culture Institution, 1980), pp. 310-311.

7 Gehne, Katja, Brillo, Romulo, (2014), *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, *The National Centers in Competence in Research*, p 11.

more generally to work towards sustainable development.<sup>1</sup> The debate on stabilization clauses closely relates to the more general call for coherence between investors' rights, legitimate public interest and states' human rights in international investment law.<sup>2</sup> Stabilization clauses are contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project".<sup>3</sup> It identifies three main types of modern stabilization practice. First, "freezing clauses" that exempt an investment from the application of new laws, "freezing" the law of the host state, either in its entirety or limited to certain regulatory fields (e.g. fiscal issues); second "equilibrium clauses" that cover the financial loss that relates to changes in law and third, "hybrid clauses" that are combinations of freezing and economic equilibrium clauses, providing in complementing each other "an additional layer of protection for stability of the contract".<sup>4</sup> Stabilization clause aims to freeze legislative rules in the host country in its relations with the foreign contracting party on the previous situation on the date of concluding the contract in order to protect the foreign party against legislative risks represented in the authority of the state in amending economics of the contract. This is through changing the applicable legislation, whether as the law governing the contract or as necessary application rules.<sup>5</sup> This is the attempt by the weaker party is to isolate the national law of the host country from the contract which it should govern; this is through freezing it in time, so that the contract is governed only by the law on its condition upon concluding that contract, with excluding all amendments that could occur to it in the future. This time freezing leads to including the contract without the law, in case of the occurrence of these legislative changes, liberating it from the rule of law applicable to it, and upon becoming free.<sup>6</sup>

### 7.2.2 Unilateral amendments of the Terms of Investment Contracts

Under these terms, the state undertakes not to amend the same contract at its sole desire using for that purpose the advantages conferred to it by its national law as an executive or administrative authority. It is as if the terms of no amendment to the contract represent some sort of immunity enjoyed by the foreign party contracting with the state against the power of the state as an administrative authority<sup>7</sup>. although the terms of legislative stability and no prejudice to the contract both aim at achieving protection for the foreign party contracting with the state, through the state's waiver of its practice of sovereignty and the advantages it enjoys as a public authority, yet the state's waiver of its power in amending the contract law is different in respect of each type of terms. As for the terms of legislative stability of the contract, the state undertakes not to apply any new legislation to the contract concluded with a foreign party; it grants the foreign party immunity against the power of the state as a legislative authority. As for the terms of no prejudice to the contract, the state undertakes not to amend the same contract or one of its terms based on its own and sole self-will.<sup>8</sup>

### 7.2.3 The incorporation of Law into Contract

Incorporation<sup>9</sup> is a system whereby the law chosen to govern the contract becomes just a contractual condition or rule having only the value and power of the conditions or terms of the contract; the parties can apply to it what they apply to the rest of the contractual terms, thus losing its value as a law or a rule. It is as if the law melts in the contract and becomes part of it. It does not seem as matter outside the contracting parties imposed on them by its strong effect, but becomes as made by individuals. The incorporation of law into the contract as such can only be done by the parties of the contract, particularly in the imposition whereby they expressly reveal their will in choosing the law of a certain country to rule the contract. It is not only done by the contracting parties, but authenticated by jurisdiction stating the possibility of physical incorporation of the rules of the law

<sup>1</sup> Cotula, Lorenzo (2008a), Regulatory Takings, Stabilization Clauses and Sustainable Development, OECD VII Global Forum on International Investment. Available at: <http://www.oecd.org/dataoecd/45/8/40311122.pdf>

<sup>2</sup> Ursula (2007), Regulatory Taking: Balancing the Interests of the Investor and the State, 8 Journal of World Investment and Trade, pp. 717-744

<sup>3</sup> Shemberg, Andrea (2008), Stabilization Clauses and Human Rights, IFC/SRSG Research Paper [http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications\\_LOE\\_Stabilization](http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_LOE_Stabilization), p. 4

<sup>4</sup> Maniruzzaman, A.F.M. (2008), The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends, in JWELB, Vol. 1. Nr. 2, pp.121-157, p. 127

<sup>5</sup> "State Contracts", UNCTAD Series on issues in international investments agreements, United Nations, New York and Geneva, 2004, p. 11

<sup>6</sup> Abo zeid, Serag Hussein, Arbitration in Oil Contracts, (Cairo, Arab Nahda House, 2000), p. 111.

<sup>7</sup> Elhadad, Hafeeza, *ibid.* p.326

<sup>8</sup> *ibid.*, p. 328

<sup>9</sup> ELhadad, Hafeeza, *ibid* examples on the basis of incorporation into concession contract concluded between Ecuador and the Texas Petroleum Company on 21/02/1964, in which Article 14 states that the parties must abide by the laws of petroleum and mining in force at the time signing the contract; those laws the articles of which are incorporated into the contract and undertake the rule of operations carried out between the parties in any area not expressly agreed by the parties.

applicable to the contract<sup>1</sup>. The idea of incorporating the law into the contract aims at stripping it of its power. With the incorporation of law into the contract, it issues no orders or binds a thing. Sine law, as defined, issues orders and binds, with incorporation, law does not become law, and with incorporation the law of the will becomes something related to contractors; it does not derive from its sovereignty the authority of abolition of obligation or the authority of amendment without satisfaction. The result of incorporation is that the domestic law under which the contract is concluded becomes powerless as it becomes in a weaker position than the contract which is concluded under it.<sup>2</sup> Therefore, to incorporate the law and convert it to a contractual term makes the law lose its legal identity. In addition, when this law loses its legal identity it means that the internal sovereignty of the state of this law on touch or suspended which never happens under international law.

#### **7.2.4 Marginalizing the role of law of contract:**

The idea of marginalizing the role of law in the contract is based on two facts. First, the inadequacy of the law due to the presence of objective rules for the international contracts; and the second is the principle of self-sufficiency. As for the first ground, it is well known that the presence of a well-organized group, establishing a network of relationships and links, in addition to the presence of a qualified authority practicing the organization process could lead to the creation of a set of regulatory rules governing the activity and relationships of that group. This is what is achieved in economic and business transactions dealing at the international level. The second ground, based on the principle of self-sufficiency, postulates that the spread of typical contracts and general conditions have reduced the role of law in the contract and made it a backup; it is resorted to only if the contract terms are unable to provide the desired solution; i.e. when self-sufficiency is not achieved for the terms of the international contract. There is no doubt that the parties' express statement in their contract that the law they choose is applied only as a backup when the contract and its provisions are unable to provide a solution to the dispute represents a dedication to the idea of the backup role of the applicable law<sup>3</sup>. However, the researcher wonders about the applicable law in this case if the national law is marginalized. The contract must be governed by a law that can be referred to in order to organize its affairs and settle its disputes. Rules, no matter how effective they are, will never replace the law governing the contract.<sup>4</sup>

#### **7.3 The Negative Impact of the Investor-State Dispute on International Relations:**

Economic disputes, especially Investor-State Disputes, are frequent sources of international conflicts. When debates arise about foreign investments, the traditional method for settlement is the exercise of diplomatic protection. Under this method a State espouses the claim of its national and pursues it in its own name. Diplomatic protection was developed as a consequence of the non-availability of international remedies to individuals and corporations under traditional international law.<sup>5</sup> The Draft Articles on Diplomatic Protection adopted a definition of diplomatic protection by virtue of enumeration of its elements which have to be fulfilled cumulatively. In this sense, "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".<sup>6</sup> Thus, if a State intends to exercise diplomatic protection in favor of an injured person, it is necessary to meet three basic requirements: These requirements are, first, responsibility of a State under international law for injury to an alien caused by State's wrongful act or omission, second, a tie between the person injured and the State exercising such protection (so called "nationality of claim), finally exhaustion of all local remedies.<sup>7</sup> It is worth noting that diplomatic protection and consular assistance are terms which are often used in a way that confuses both of these concepts. This is caused mainly due to the fact that the rules governing both concepts are derived from international custom and that the subjects involved in this assistance or protection are rarely differentiated in accordance to the functions they are actually

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1 Salama , Ahmed, *ibid.*, p. 348.

2 *Ibid.*, p. 328.

3 *Ibid.*, p. 363.

4 Salama, Ahmed, *ibid.*, p. 380. An example of that is the concession contract concluded between Sierra Leone and one of the Swiss companies manufacturing Aluminum in 1961. The parties have agreed that the contract is to be governed by laws in force in Sierra Leone. Accordingly, one of the contract terms stated that any dispute between any of the provisions and rules of the mining law and one of the provisions of this contract will be resolved by applying or giving effect to the provisions of this contract; i.e. the provisions of Sierra Leone law, when there is a dispute between the parties regarding the implementation of contractual obligations.

<sup>5</sup> Schreuer, Christoph, (2008), *Investment Protection and International Relations*, p 1

<sup>6</sup> Art. 1 of the Draft Articles on Diplomatic Protection

<sup>7</sup> Amerasinghe , C. F. (2008): *Diplomatic Protection*. Oxford: Oxford University Press, p. 25.

performing in certain situation.<sup>1</sup> Consular assistance is the right to "protection by the diplomatic or consular authorities", thus covering the wide range of consular activities exercised by consulates and consular departments of diplomatic missions. On the other hand, diplomatic protection is not limited solely to the actions of diplomatic authorities and, what has to be highlighted; consular authorities should be excluded from the possibility of exercise of diplomatic protection due to their non-political status determining its non-interventional operation in mutual inter-state relations.<sup>2</sup>

Although diplomatic protection provides the nationals of the concerned home state a type of shelter; however, it carries serious limitations for the investor relying on it. The investor must have exhausted the local remedies available in the host State. Even more importantly, the investor has no right to diplomatic protection but depends on the political discretion of his government. The government may refuse to take up the claim. It may discontinue diplomatic protection at any time. It may waive the national's claim or agree to a reduced settlement. As soon as the national State has taken up the claim, it becomes part of the foreign policy process with all the attendant political risks.<sup>3</sup>

Diplomatic protection on behalf of investors also carries important cons to the states concerned, the home state and the host state. It can seriously disrupt their international relations, at times leading as far as to the use of force. Frequently, investment disputes have led to protracted litigations between the host state and the state of the investor's nationality before international arbitral tribunals, the Permanent Court of International Justice and the International Court of Justice. Not surprisingly, developing states resent pressure from capital exporting countries whether it is exercised bilaterally or in multilateral for as such as international lending institutions. Not only has diplomatic protection in investment disputes by capital exporting states against developing states been a frequent source of irritation, but also between the developing states themselves.<sup>4</sup> Some examples of the cases which show the negative impact of the intervention of the home state using the principle of diplomatic protection against the host states in the international courts and tribunals are shown below to clarify how the arousal of such disputes harm international relations.

#### **Belgium V. Spain (The Barcelona Traction Case)<sup>5</sup>**

The claim, which was brought before the Court on 19 June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company incorporated in Canada. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State. The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in Canadian company with respect to measures taken against that company in Spain.<sup>6</sup>

#### **Republic of Guinea (Guinea) V. the Democratic Republic of the Congo (DRC): (Diallo Case)<sup>7</sup>**

On June 19, 2012, the International Court of Justice (ICJ) issued its third judgment in Diallo case brought by the Republic of Guinea (Guinea) against the Democratic Republic of the Congo (DRC), on behalf of its national, Ahmadou Sadio Diallo who had lived in the DRC since 1960s, founding two Societe privees a responsabilite limitee (private limited liability company) Africom-Zaire and Africontainers-Zaire (SPRLs) and then had been arrested and detained twice and eventually expelled. Guinea requested ICJ to adjudge and declare that the DRC is responsible for the injury caused by international wrongful act of the DRC, suffered by Mr. Diallo as an individual, as the sole associate and "by substitution" forth two company thereof.<sup>8</sup> The DRC denied any international wrong act and raised preliminary objections of the jurisdiction of the Court on the ground of non-exhaustion of local remedies and no nationality connection between the alleged rights violation companies and Guinea.<sup>9</sup> As the rights for which the Guinea sought to exercise diplomatic protection on behalf of Mr. Diallo,

<sup>1</sup> Panlovic, Peter, Protection of EU Citizens According to ART. 23 TFEU: Diplomatic Protection as Defined by International Law?, Journal of Interdisciplinary Research , p 1.

<sup>2</sup> Krepelka, F.(2010) Days of Law [CD-ROM]. Brno: Masaryk University, p. 2558.

<sup>3</sup> Schreuer, Christoph, *ibid*, p 1.

<sup>4</sup> *ibid*, p 1

<sup>5</sup> International Court of Justice Reports of Judgments , Advisory Opinions and Orders, Case Concerning THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (NEW APPLICATION : 1962) (BELGIUM v. SPAIN) SECOND PHASE JUDGMENT OF 5 FEBRUARY 1970

<sup>6</sup> *Ibid*.

<sup>7</sup> International Court of Justice Reports of Judgments , Advisory Opinions and Orders, Case Concerning Ahamadou Sadio Diallo (REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC OF THE CONGO) JUDGMENT OF 30 NOVEMBER 2010.

<sup>8</sup> *Ibid*.

<sup>9</sup> Diallo, Judgment 2007, Para.11



can be divided in to three categories: his individual personal rights, his direct rights as associe in Africom-Zaire and Africontainer-Zaire and the rights of those companies, by substitution.<sup>1</sup> The Court scrutinized the claims of the Guinea individually. After having rejected the preliminary objection raised by DRC and ruled that the DRC had violated two human rights treaties, the Court decided that DRC was under obligation to make appropriate reparation, in form of compensation, to the Guinea, in six months. DRC and Guinea failed to reach such compensation agreement and as ruled in Judgment 2010, the ICJ handed down the latest Compensation Judgment 2012.<sup>2</sup>

### **Liechtenstein v. Guatemala: (Nottebohm Case)<sup>3</sup>**

The Nottebohm case had been brought to the Court by an Application by the Principality of Liechtenstein against the Republic of Guatemala. Liechtenstein claimed restitution and compensation on the ground that the Government of Guatemala had acted towards Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala, for its part, contended that the claim was inadmissible on a number of grounds, one of which related to the nationality of Nottebohm, for whose protection Liechtenstein had seized the Court. Guatemala referred to the well-established principle that it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. Liechtenstein considered itself to be acting in conformity with this principle and contended that Nottebohm was, in fact, its national by virtue of the naturalization conferred upon him. In this connection the Court stated the essential facts of the case and pointed out that Nottebohm always retained his family and business connections with Germany and that there is nothing to indicate that his application for naturalization in Liechtenstein was motivated by any desire to dissociate himself from the Government of his country. In its Judgment the Court accepted this latter plea in bar and in consequence held Liechtenstein's claim to be inadmissible.<sup>4</sup>

From the cases shown above, it is apparent that Investor-State disputes provoke the intervention of states, the home state or the investor's parent state to protect its citizens against the violations of right committed by the host states. Although this intervention is an obligation of the home states towards its nationals to protect them anywhere, however, the exercise of this right usually causes tension and conflicts between the involved states which negatively impacts international relations. Although raising complaints in the International Court of Justice by the parent states on behalf of its citizen is a legitimate right; however, it is undesired in international relations. Starting the adjudication process by a state against the other create an unfriendly atmosphere between them and may harm other relations between them. Therefore, we can induce that when an investor- State dispute arise, we have to expect tension on the international relations process,

In addition to the previously mentioned attributes which confer the political character on the Investor-State disputes; one of the disputant is a political entity called the state which has the international personality and enjoys sovereignty, the insertion of special clauses which, one way or another, curbs the sovereignty of states hosting the foreign direct investments and the tension they initiate in the international relations arena, these disputes attracted the attention of the international community and international organizations. This is apparent in the step taken by the International Bank for Reconstruction and Development, nowadays called the World Bank, when it established the International Center for the Settlement of Investment Disputes (ICSID). ICSID is the world's leading institution devoted to international investment dispute settlement. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the

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<sup>1</sup> Diallo, Judgment of 2007, Para. 26-31.

<sup>2</sup> Wang, Peng (2014), Diplomatic Protection and International Investment Arbitration: Preliminary Observations of Diallo case, SRIICL Research Series, p 1-2.

<sup>3</sup> INTERNATIONAL COURT OF JUSTICE PLEADINGS, ORAL ARGUMENTS, DOCUMENTS NOTTEBOHM CASE (LIECHTENSTEIN v. GUATEMALA)VOLUME: Application.-Pleadings

<sup>4</sup> Ibid.

dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.<sup>1</sup>

ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process. More than 550 such cases have been administered by ICSID to date.<sup>2</sup>

## Conclusion

No doubt that foreign direct investment represents a necessity for all countries, especially the developing countries as they fill four major gaps in the later. These gaps are investment gap, trade gap, revenues gap and technology and management gap. Although there are reciprocal benefits that accrue to both the foreign direct investor and the host state, a lot of disputes arise between them. In this study, these disputes are called Investor-State disputes. Investor-State disputes have a political character and are characterized by a special nature arising from the subjectivity and privacy of investment contracts, or state contracts, which are often called economic development contracts, due to their relation most often to the aspects of development in the developing states. As for the part related to contribution to the development process, these contracts include long-term operations, carried out in the framework of a plan under the state priorities in economic development; thus, they include contracts affecting the primary sector (exploitation of primary resources) or the secondary sector (heavy industrial devices or the provision of services) which enjoy a high strategic significance to the host states and hence provoke a lot of disputes between the host state and the foreign investor.<sup>3</sup> Investor-State disputes have the political character because it arises between a political entity called the state which enjoys the international personality and a foreign party, natural or juridical, which is a national of another state. Thus, these disputes arise between two subjects which differ in their legal status and hence create a plenty of problems, for example the applicable law in case these disputes arise. Moreover, these disputes arise from investments contracts which include clauses with special nature, for example the stabilization clauses, sacredness of contracts, incorporation of the domestic law in the investment contracts and marginalization of the domestic laws. The inclusion of these clauses in the investment contracts curb or force states to abandon a part of their sovereignty to attract the foreign investor due to the scarcity of resources in these states. Besides, the Investor-State disputes create negative impacts on international relations. These disputes arise between a host state which hosts the foreign investments in its territory and a foreign national (the foreign investor) who is a national of another state. So when these disputes arise, they harm the bilateral relations between the states concerned because the home state of the foreign investor, sometimes, sticks to the right of diplomatic protection to secure its nationals from the violations of the host states and hence this would create a lot of troubles between it and the states hosting the investments. From what is previously mentioned, it is vivid that although Investor-State disputes are economic in nature; however, their political character is highly apparent.

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<sup>1</sup> <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx>

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, p.18.

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